

02/07_RUL Mike Campbell (PVT) Limited & William Michael Campbell v. Zimbabwe

In the Southern African Development Community (SADC) Tribunal Windhoek, Namibia

In the matter between:

Mike Campbell (PVT) Limited - First Applicant

And

William Michael Campbell Second - Applicant

Versus

The Republic of Zimbabwe - Respondent

Coram:

Hon. Justice Dr Mondlane - President

Hon. Justice Mtambo, SC - Member

Hon. Justice Dr Tshosa - Member

Applicants' Agents:

Adrian Phillip De Bourbon

Elize M. Angula

Respondent's Agents:

Fatima C. Maxwell

Nelson Mutsonzwa

Hon. Justice M.C.C. Mkandawire - Registrar

Mr Dennis Shivangulula - Court Clerk

Ruling

Hon. Justice Dr Luis Antonio Mondlane delivered the Ruling

On 11 October 2007 the applicants filed a case with the Tribunal challenging the acquisition of an agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe by the respondent. An application was simultaneously filed pursuant to Article 28 of the Protocol on Tribunal (hereinafter referred to as the Protocol) as read with Rule 61 sub-rules (2) - (5) of the Rules of Procedure (hereinafter referred to as the Rules) for an interim measure restraining the respondent from removing, or allowing the removal of, the applicants from the agricultural land mentioned above and mandating the respondent to take all necessary and reasonable steps to protect the occupation by the applicants of the said land until the dispute has been finally adjudicated. In essence, the applicants are asking the Tribunal to order that the *status quo* in the agricultural land be preserved until the final decision is made in relation to the case.

Before dealing with the application, there are preliminary issues that should be determined. Firstly, whether

the parties in the case are those that are envisaged by Article 15(1) of the Protocol. The article provides: *"The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States."*

This is indeed a dispute between a natural and a legal person and a State. We hold that Article 15(1) of the Protocol has been met and therefore that the matter is properly before the Tribunal.

Secondly, there is the issue relating to jurisdiction. Article 14 of the Protocol provides:

"The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to; (a) the interpretation and application of the Treaty."

The interpretation and application of the SADC Treaty and the Protocol is therefore one of the bases of jurisdiction. For purposes of this application, the relevant provision of the Treaty which requires interpretation and application is Article 4, which in the relevant part provides:

"SADC and Member States are required to act in accordance with the following principles - (c) human rights, democracy and the rule of law."

This means that SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the Treaty thus conferring jurisdiction on the Tribunal.

Thirdly, as indicated earlier, the application is brought pursuant to Article 28 of the Protocol. The Article provides:

"The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary."

This clause is complemented by Rule 61 (2) - (5). The Rule requires the application for an interim measure to be made by a party to a case during the course of the proceedings, stating the subject matter of the proceedings, the reasons for the application, the possible consequences if the application is not granted and the interim measure requested, and finally that the application for an interim measure shall take priority over all other cases. These provisions empower the Tribunal or the President of the Tribunal to make an appropriate interim order upon good cause being shown.

During the hearing the agents of the parties raised other preliminary issues. The applicants' agent raised the issue of the respondent's failure to file some documents within the timelines set by the Tribunal as required by Rule 36(2) of the Rules. These documents are the "Notice of Opposition" and an "Application for Condonation for Late Filing of Opposing Papers", which were filed on the morning of the date of the hearing, 11 December 2007, according to the official date stamp of the Registry. The agent argued that there is no basis for the documents in question to be considered by the Tribunal. He, however, submitted that in the interest of progress he could not insist on the point except that it should be placed on record that the respondent disregarded the Rules.

In reply, the respondent's agent denied that the respondent has disregarded the Rules concerning filing of papers. He said that failure to file the opposing papers on time was caused by administrative matters and consultations in the Republic of Zimbabwe. However, the agent argued that the respondent has substantially complied with the Rules and implored the Tribunal to use its inherent powers in terms of Rule 2(2) to condone the late filing of the opposing papers to ensure that the ends of justice are met. The agent further argued that, in any case, the applicants have not shown that they have suffered any prejudice due to the late filing of the opposing papers. It should be noted that the agent of the applicants indicated that he did not wish to insist on the matter and that in the interest of progress the hearing could proceed. It was also the position of the Tribunal that in the interest of justice the application should proceed and therefore the Tribunal accepted the application for condonation for late filing of opposing papers by the respondent.

As regards the present application, the applicants' agent submitted that the applicants wanted protection pending the final determination of the dispute between them and the respondent. He argued that the Tribunal was set up to protect the interests of SADC citizens, and that in terms of Article 21 of the Protocol, it has the powers not only to apply the Treaty and the protocols thereunder, but also to develop the

Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States. He further argued that for the Tribunal to be effective it should be seen to be protecting the rights and interests of the SADC citizens. According to the applicants' agent, the Tribunal should adopt the criteria that are used in other jurisdictions when deciding whether or not to grant an interim measure. He said the criteria are the following:

- a) a *prima facie* right that is sought to be protected;
- b) an anticipated or threatened interference with that right;
- c) an absence of any alternative remedy;
- d) the balance of convenience in favour of the applicant, or a discretionary decision in favour of the applicant that an interdict is the appropriate relief in the circumstances.

The applicants' agent therefore argued that the application meets these criteria and that the balance of convenience tilts in favour of the applicants because they stand to suffer prejudice if the interim relief is not granted. Moreover, the agent argued that the respondent would not be prejudiced by the granting of the relief sought. This point was conceded by the agent of the respondent during the hearing of the application. Regarding the application, it is observed that the respondent's agent did not oppose it. He only concentrated on the issue relating to exhaustion of local remedies. He submitted that in terms of Article 15(2) of the Protocol, the applicants have not exhausted local remedies. The text provides: "*No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.*"

According to the respondent, it was argued, the applicants have not complied with this provision. The agent submitted that the applicants have a matter pending before the Supreme Court of Zimbabwe in which the relief sought is similar to the one that they are seeking from the Tribunal. The respondent's agent said that the matter referred to is awaiting judgment by the Supreme Court. The applicants' agent does not disagree.

The respondent's agent therefore argued that the application cannot be brought before the Tribunal. The respondent's agent also argued that if the applicants wanted protection pending the decision of the Supreme Court, they should have approached the domestic courts but they have not done so. Regarding the latter point, the applicants' agent contended that Section 16B (3) (a) of the Constitution of Zimbabwe oust the jurisdiction of the courts in matters concerning land acquisition.

Referring to the issue of failure to exhaust local remedies by the applicants, we are of the view that the issue is not of relevance to the present application but that it may only be raised in the main case. It may not be raised in the present case in which the applicants are seeking an interim measure of protection pending the final determination of the matter. Thus the Tribunal need not consider the issue of whether or not the applicants have exhausted local remedies. In the circumstances, the contention relating to exhaustion of local remedies is unsuccessful.

We have observed above that the respondent did not oppose the present application. We have also alluded to the criteria advanced by the applicants' agent which should be applied in determining applications of this nature. We agree with the criteria. In the present application there is a *prima facie* right that is sought to be protected, which involves the right to peaceful occupation and use of the land; and there is anticipated or threatened interference with that right; and the applicants do not appear to have any alternative remedy thereby tilting the balance of convenience in their favour.

Accordingly, the Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (PvT) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.

The Tribunal makes no order as to costs.

Delivered in Open Court this _____ day of _____ 2007 at Windhoek in the Republic of Namibia.

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Hon. Justice Dr Luis Anthonio Mondlane
(President)

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Hon. Justice Isaac Jamu Mtambo, SC
(Member)

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Hon. Justice Dr Onkemetse Tshosa
(Member)