

**IN THE SOUTHERN AFRICAN DEVELOPMENT
COMMUNITY (SADC) TRIBUNAL
(HELD AT WINDHOEK)**

Case No: 07/2008

LUKE MUNYANDU TEMBANI

Applicant

and

GOVERNMENT OF ZIMBABWE

Respondent

**HEADS OF ARGUMENT FOR APPLICANT
(enrolled for hearing 23 April 2009)**

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GENERAL MATTERS

INTRODUCTION

1. This application is brought by one of the first indigenous commercial farmers in Zimbabwe, Luke Munyadu Tembani. Mr Tembani, now 70 years of age, and his entire family stand to be evicted from the land on which they have been residing, and he farming, for the last 26 years. The reason for the imminent eviction is the realisation of a debt by an organ of the Government of Zimbabwe (*“the respondent”*) without recourse to the courts. The value of the debt is less than half of the value of the farm from which they stand to be evicted.
2. To protect his family and himself from the devastating effect of such eviction, Mr Tembani relies in this application on protection granted in terms of international law. These legal standards are rendered justiciable by this Tribunal in terms of article 4(c) and article 6(1) of the SADC Treaty and Protocol, as we later show.
3. The application involves the validity of section 38 of the Agriculture Finance Corporation Act [Cap 18:02] of Zimbabwe (*“the AFA”*). The AFA sanctions extra-curial, unauthorised and unsupervised sales in execution of agricultural land. It furthermore excludes subsequent judicial remedies. It represents self-

help of a kind struck down under a number of constitutional dispensations, including at least one in SADC, and inimical to international law, as will be shown.

4. The specific human rights protected under the SADC Treaty and relied upon in this application are the right to protection of law; the right against arbitrary deprivation of property; the rights not arbitrarily to be evicted or subjected to interferences with family life; and rights incidental thereto.
5. The application is not defended by the respondent on the merits at all. The respondent has, however, raised a procedural objection in terms of rule 67. There is also an application for intervention by the Agricultural Bank of Zimbabwe Ltd. And because of a recent attempt to press ahead with the eviction before this application can be finally disposed of, Mr Tembani has also had to apply for interim relief pending the resolution of the substantive application.

FACTUAL BACKGROUND

6. The most pertinent of the facts giving rise to the substantive application are as follows.¹

¹ See applicant's affidavit at p 4-8 paras 4-38.

7. In 1983, after many years of experience as a commercial farm manager, Mr Tembani acquired a lease with an option to buy in respect of a commercial farm of 1265 hectares in Zimbabwe, called the Remainder of Minverwag (which, it may be noted, is Afrikaans for ‘little expected’) of Clare Estate Ranch, in Nyazura District (*“the property”*). He then exercised an option to buy the property and became the registered owner in 1985. Thus what could hardly be expected before Zimbabwe’s independence three years before was realised: he was a freehold farmer of a commercial farm.
8. Ever since he has been farming and residing with his family on the property. They are all to this day solely dependent upon it for their home and livelihood.
9. Mr Tembani, appropriately as a successful large-scale commercial farmer, has over the years invested considerable time and resources on developing the farm’s irrigation, improving his employees’ housing and founding a first primary school for 320 children living on the farm and in the surrounding area, a church hall, and numerous farming facilities.
10. To finance these and other farming ventures, he took loans from the parastatal bank, now named the Agricultural Bank of Zimbabwe (*“ABZ”*). In terms of the loan agreements, Mr Tembani’s farm has been pledged as security for his debts.
11. Since 1997, when the Zimbabwean economy started experiencing a steep

inflation curve, interest rates rose rapidly. To ensure his ability to honour his debts despite the economic difficulties, Mr Tembani successfully requested authorization from ABZ to subdivide the farm. This was to enable him to sell an uninhabited smaller portion of the farm if necessary. Approval for subdivision was also obtained from the relevant planning authorities.

12. Due to exorbitant interests rates coupled with the *in duplum* rule and other circumstances, it was particularly difficult for Mr Tembani to ascertain the balance of his loan account with ABZ. Apparently even the bank's own officials were at a loss to gauge the balance, because despite repeated requests, they could not satisfactorily verify the amount. Estimations ranged from Z\$4 million to Z\$15 million, and later from Z\$5 million to Z\$11 million.²

13. Mr Tembani disputed the evaluations, but never received a detailed account from ABZ. Despite the uncertainty over the balance of the loan account, and despite his steps to ensure funds to settle it, the ABZ invoked section 38(2) of the AFA. It purported to take the farm in realization of the debt, without any court process. On 29 November 2000 it sold the entire undivided property in execution for a mere Z\$6 million. But, to the knowledge of the officials of ABZ, this sum only equaled the market value of the smaller, uninhabited portion divided off. Henceforth Mr Tembani persistently protested against the sale in execution and its *sequelae*. He immediately appointed an independent sworn valuator, who estimated the property's forced sale value at Z\$15 million

² Since the inception of "Operation Sunrise" these amounts are reflected as Z\$4 000, Z\$15 000, Z\$5 000 and Z\$11 000 respectively.

at that time, and instituted legal proceedings.

14. This led to his initial success in the High Court. However, on appeal the Supreme Court – each member of which bar one, it was not disputed in the proceedings before the Tribunal in the *Campbell* matter, is the recipient of one or more ‘redistributed’ farms – on 19 November 2007 eventually upheld the execution sale. It held that Zimbabwe’s municipal (domestic) law authorises a summary and forced sale of property to meet any alleged debt and ousts the courts’ jurisdiction to hear a disputed debt. The Supreme Court specifically held that such sale was not in violation of any fundamental right protected by the Constitution of Zimbabwe or any other law.

15. During the protracted court process, Mr Tembani made numerous settlement proposals in vain efforts to avert losing everything. These would have secured the identical financial result of a sale in execution to both ABZ and the buyer (who has throughout been fully apprised of all relevant information regarding the true market value of the property, the subdivision, the forced sale and Mr Tembani’s objections), while not depriving Mr Tembani and his family of their home and livelihood. But these proposals were all rejected. Then, while the appeal to the Supreme Court was still pending, ABZ unilaterally transferred the farm despite Mr Tembani’s protest.

16. In spite of this, Mr Tembani and his family have remained in occupation of the farm and he has precariously to date continued farming activities (although on

a reduced scale).

17. However, eviction proceedings have now been instituted against him, his family and employees resident on the farm. These have been set down for hearing on 21 May 2009. A request to provide an undertaking not to proceed therewith pending the finalization of this substantive application has been rejected. Hence the urgent need for both interim protection from the Tribunal and a final determination by it, for registration (under Article 32 of the Protocol) in Zimbabwe.

JURISDICTION

18. Before dealing with the interlocutory applications, it is appropriate to consider this Tribunal's jurisdiction in the present matter. It is to be noted at the outset that the respondent has not, in what it has filed, challenged the Tribunal's jurisdiction. If it intended to challenge jurisdiction, it would of course have had to do so expressly and at the outset. This amounts to a concession of jurisdiction.³ So does the respondent's rule 67 application.⁴
19. In terms of article 14(a) of the Protocol this Tribunal has jurisdiction over all disputes duly referred to it which relate to the interpretation and application of

³ A party who fails to object to the forum's jurisdiction *in limine* is precluded from later raising an objection based on jurisdiction, even if that failure was due to inadvertence, see Pistorius *Pollack on Jurisdiction* 2nd ed (Wetton, Juta & Co Ltd 1993) 11; *Du Preez v Phillip-King* 1963 (1) SA 801 (W) at 806A.

⁴ Taking interlocutory measures constitutes a submission to jurisdiction in municipal law, see for example *Irving & Co v Dreyer* 1921 CPD 185 (requesting or agreeing to a postponement; requesting security); *Kopelowitz v Auerbach* (1907) 24 SC 567 (appointing an agent authorized to be sued).

the SADC Treaty. Article 15(1) provides that the Tribunal has jurisdiction over disputes between natural or legal persons and states. In exercising this jurisdiction, article 16 of the Treaty entrusts the Tribunal with the powers to ensure adherence to the Treaty, and to interpret its provisions and its subsidiary instruments. The Tribunal is further charged with adjudicating upon such disputes as may be referred to it.

20. Because the dispute relates to the interpretation and application of article 4 and 6(1) of the SADC Treaty and is between a legal person and a member state to the Treaty, the Tribunal is competent to hear the present application.
21. The applicant has already prosecuted the matter until final appeal before the Supreme Court in Zimbabwe. That court upheld the respondent's version before this Tribunal, namely that no domestic remedy exists in the municipal law.⁵ That conclusively establishes that the requirement of article 15(2) of the Protocol to exhaust local remedies has fully been complied with.⁶
22. The respondent has thus correctly not objected to the application on grounds of jurisdiction. Indeed, as noted above, it has accepted the Tribunal's jurisdiction over it by taking further steps in the proceedings in lodging the rule 67 objection. The respondent has therefore subjected itself to the

⁵ See para 1 of its Grounds of Objections.

⁶ With regard to the intervening party's suggestion that there may have been a failure on the part of the applicant to sufficiently raise human rights issues before the municipal courts, the following. Firstly, as already mentioned, the respondent's first point of objection sufficiently answers this: if municipal law regards a contractual abandonment of a human right against a state organ as conclusive, this breaches international law and per definition means that domestic remedies have been exhausted. Secondly, the intervening party quite correctly does not persist in its contention to that effect: it abides this Tribunal's ruling on jurisdiction.

Tribunal's jurisdiction. It was obliged to do so in the circumstances as signatory to the SADC Treaty.

PROCEDURAL MATTERS

PROCEDURAL OBJECTION

23. For convenience the parties are referred to as in the substantive application.
24. The respondent objects to the substantive application on two grounds. Firstly, the respondent alleges that the applicant has no cause of action. Secondly, it contends that no human rights protocol exists to be applied by this Tribunal. These contentions are dealt with in sequence. As will be seen, we submit that they are untenable and properly fall to be dismissed.

Applicant's cause of action

25. We submit that this ground of objection is ill-founded, cynical and constitutes an abuse of process.
26. Firstly, the respondent's contention that the substantive application contains

no cause of action is premised on (what is at best for it)⁷ a misreading of the judgment by the European Court of Human Rights in *James and Others v The United Kingdom*.⁸

27. In its grounds of objection in terms of rule 67 the respondent alleges that this judgment is authority for the proposition that an expropriation without recourse to courts do not violate the “human right to be heard”.⁹ The respondent has been unable to provide in its Grounds of Objection or Heads of Argument a specific reference to anything in that judgment which founds the assertion.

28. What the European Court of Human Rights did confirm in that matter was in fact the exact opposite, namely that “the lack of a remedy whereby [a] grievance could be brought before ‘a tribunal competent to determine all the aspects of the matter’”¹⁰ violated international human rights standards.¹¹

⁷ In fact, the correct reading of the judgment is so apparent that the respondent’s ill-founded reliance on this case should be deplored.

⁸ [1986] ECHR 2.

⁹ See para 1 of the Grounds of Objection.

¹⁰ The Court quoted its previous decision in *Sporrong and Lönnroth v Sweden* Series A no 52 p 31 para 87.

¹¹ *James and Others v The United Kingdom* [1986] ECHR 2 at para 81. The Court held:

“In the present case in contrast, in so far as the applicants may have considered that there was cause for alleging non-compliance with the leasehold reform legislation, they had unimpeded access to a tribunal competent to determine any such issues” (emphasis added).

At para 86 the Court reiterated:

“The requirements of Article 13 [of the European Convention, which entrenches the right to an effective remedy before a national authority upon breach of a right protected by that convention] will be satisfied if there exists domestic machinery whereby the individual can secure compliance with the relevant laws. Effective remedies in this sense were and remain available to the applicants. In particular, disputes over a tenant’s entitlement to acquire the freehold under the leasehold reform legislation and over related matters are within the jurisdiction of the County Court; and the purchase price payable is subject to determination, in default of agreement, by the local Leasehold Valuation Tribunal (or, formerly, the Lands Tribunal)” (references omitted).

Accordingly the objection is ill-founded.

29. It is also ironic that the Government of Zimbabwe is attempting before this Tribunal to defend the validity of the AFA. This piece of legislation has been adopted under a dispensation which (the respondent might have been expected to be the first to point out) neither reflected an enactment under a parliamentary democracy nor one regulated by the entrenched protection of human rights. Yet this Act is now being invoked to disown one of the first indigenous commercial farmers in Zimbabwe of his land.

30. Finally, the objection based on an alleged absence of a cause of action is on first principle incompetent. In terms of the rules, an objection under rule 67 may not be based on the merits of the substantive application. Rule 67(1) provides:

“A party to the proceedings may apply to the Tribunal on a preliminary objection or preliminary plea not going to the substance of the case. . .”
(emphasis added).

31. But the averment that the applicant “has no cause of action” and that the Act “is not a violation of the individual’s right to be heard” purports to respond to the ultimate issue raised by the substantive application. It therefore goes directly to the very heart of the substantive case.

In fact, the availability of recourse to both courts and tribunals (including an appeal against both) under the impugned legislation in that matter was pertinently discussed by the Court in paras 24-25 of its

32. Clearly thus the respondent's section 67 objection does not, insofar as it purports to be based on an alleged absence of a cause of action, comply with the rules of the Tribunal. It is an anticipation of the merits, and no true preliminary interlocutory issue at all.
33. For these reasons, it is submitted, the procedural objection is misconceived and frivolous, and falls to be dismissed, with costs (a matter to which we revert).

Protocol on human rights

34. The second ground on which the respondent bases its procedural objection in terms of rule 67 has less substance yet. The respondent alleges that this Tribunal cannot hear the substantive application because "there is no Protocol on Human Rights through which the Tribunal can define human rights issues."
35. This objection is understandably not pressed in the respondent's Heads of Argument. It is clearly unsupportable, in the light of the Protocol on the Tribunal, the clear approach of this Tribunal in *Campbell*, and the jurisprudence of similar regional bodies.

36. Firstly, article 21 of the Protocol, which, provides for the applicable law to be applied by this Tribunal, reads:

“The Tribunal shall:

- (a) apply the Treaty, this Protocol and other Protocols that from part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the Community pursuant to the Treaty or Protocols; and
- (b) develop its own 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.”

37. The article thus envisages that general principles of public international law and relevant international instruments be applied by the Tribunal.

38. Secondly, this Tribunal’s jurisprudence has indicated that article 21 of the Protocol incorporates a coherent and expansive body of human rights standard to be applied to resolve disputes before it.

39. In *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*¹² this Tribunal was competent to deal with complex issues as wide-ranging as expropriation, compensation, racial discrimination, access to court, jurisdiction, interpretation and costs.¹³ In doing so, it has proved the workability of the body of human rights integrated into SADC law through article 21. Thus the work of the Tribunal has effectively destroyed this basis

is tantamount to trifling with this Tribunal.

¹² (2/2007) [2008] SADCT 2 (28 November 2008) at p 29-30.

for the respondent's procedural complaint, we respectfully submit.

40. Finally, the untenable nature of this ground is affirmed by the jurisprudence of the European Court of Human Rights, which has repeatedly held that common constitutional customs and international instruments provide content to human rights standards. It has held for instance in *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) and Hydro Seafood GSP Ltd v The Scottish Ministers* that:

“according to settled case-law, fundamental rights form an integral part of the general principles of law, whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories”.¹⁴

41. Thus the European Court has adopted a position similar to that established by article 21 of the SADC Protocol. The rich body of its jurisprudence demonstrates not only the practicality and efficacy with which regional human rights tribunals apply and rely upon the sources referred to in article 21 of the SADC Protocol, but also the desirability of so doing.

Conclusion on procedural objection

¹³ See *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) at p 16.

¹⁴ [2003] EUECJ C-20/00 (10 July 2003) at para 69. The Court also referred to Case 44/79 *Hauer* [1979] ECR 3727 at para 15; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611 at para 37; and Case C-94/00 *Roquette Frères* [2002] ECR I-9011 at para 25, expressly noting the significance of the Court in developing human rights standards through its jurisprudence.

42. Accordingly there is no substance in any of the two bases on which the procedural objection is brought. In our submission the section 67 application should therefore be dismissed. Inasmuch as neither basis had any substance whatever, the objection is to be characterised as frivolous or vexatious, and costs should follow.

INTERVENTION

43. As already mentioned, the ABZ seeks leave to intervene in the substantive application in terms of rule 70. That rule is to the effect that the Tribunal is to decide whether or not to grant the application. Rule 70 provides:

- “1. A Member State, Institution, or person may apply to intervene in any proceedings.
2. An application in terms of this Rule shall be made as soon as possible and not later than the closure of the written proceedings or in exceptional cases, and upon good cause shown, not later than the date set for the oral hearing.
3. The application shall specify the following:
 - (a) the case to which it relates;
 - (b) the precise object of the intervention;
 - (c) the interest, which must be of a legal nature, which the intervener considers may be affected by the decision of the case;
 - (d) any basis for jurisdiction; and
 - (e) a list of documents in support of the application.
4. The application must be made against all parties to the proceedings.
5. The Tribunal shall decide whether or not to grant the application.

6. If the application to intervene in terms of this Rule is granted then the intervener shall be supplied with copies of the pleadings and documents produced and shall be entitled to submit a written statement within the time limit set by the Tribunal” (emphasis added).
44. The Tribunal held in *Nixon Chirinda and Others v The Republic of Zimbabwe*¹⁵ that rule 70 had to be read subject to the requirements laid down by the Protocol. Article 15(1) of the Protocol reads:
- “The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and State.”
45. Accordingly the Tribunal does not have jurisdiction over disputes between a natural person, like the Mr Tembani, and a legal person, like the ABZ. It was, amongst others, on this basis that the intervention application had been dismissed in the *Nixon Chirinda* matter.¹⁶
46. Not only is the ABZ not a State party, but it has also failed to establish a sufficient legal basis for its intervention. Nor does it suggest that there is any essential body of fact or evidence relevant to the (purely legal) issue raised, namely whether section 38 trenches upon articles 4 and 6 of the Treaty which,

¹⁵ *Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others and the Republic of Zimbabwe* SADC (T) Case No 09/08 at p 5.

¹⁶ *Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others and the Republic of Zimbabwe* SADC (T) Case No 09/08 at p 5. See also *Albert Funai Mutize and Others v Mike Campbell (Pvt) Limited and others* SADC (T) Case No 8/08.

unless it is admitted to the case, will be lost to the Tribunal. It may be noted that the allegation in the intervention application that local remedies have not been exhausted because no violation of human rights has been raised in the High Court is neither here nor there.¹⁷ Nor is it of substance. The High Court has no jurisdiction over a conflict between the Treaty and section 38 (as little as the Tribunal is concerned with whether statutory provisions do or do not comply with domestic constitutions. The same argument was raised by the same litigant in *Campbell*, and rejected.

THE MERITS

BREACH OF SADC TREATY

47. The respondent's violation of its obligations under the SADC Treaty is threefold, in respects already substantially argued before and upheld by the Tribunal in *Campbell*.¹⁸ Firstly, the sanctioning of any extra-curial, arbitrary or irregular deprivation of property – as the AFA authorises – constitutes a breach of the rule of law. Secondly, it constitutes an infringement of the applicant's human rights by depriving him and his family of property, family residence and livelihood. Thirdly, failure to repeal the AFA constitutes a clear failure to “take all necessary steps to accord all of the provisions of the SADC Treaty the force of law at municipal level”. These breaches violate article 4(c), 6(1) and 6(5) of the SADC Treaty.

¹⁷ See the submissions on jurisdiction.

48. Article 4(c) of the Treaty provides:

“SADC and its Member States shall act in accordance with the following principles . . . human rights, democracy and the rule of law”¹⁹ (emphasis added).

49. In terms of article 6(1) the principles identified in article 4 must be promoted. Implementing procedures prejudicial to these principles are prohibited. Article 6(1) provides:

“Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty” (emphasis added).

50. Article 6(5) provides:

“Member States shall take all necessary steps to accord this Treaty the force of national law.”

51. Constitutional case-law from within the SADC Community has already affirmed that the sanctioning of any extra-curial, arbitrary or irregular deprivations of property similar to that authorised by the AFA constitutes a

¹⁸ Form 1, p iii para 3; Affidavit by the Applicant, p 11 para 51-52; Notice of Application para 1.

¹⁹ See also the Preamble to the Treaty, which heeds the

“need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law” (emphasis added).

breach of the rule of law and human rights.

(4) THE AFA BREACHES THE RULE OF LAW AND HUMAN RIGHTS

52. In *Chief Lesapo v North West Agricultural Bank and Another*²⁰ the South Africa Constitutional Court considered the constitutional compatibility of section 38(2) of the North West Agricultural Bank Act 14 of 1981. Similar to section 38(2) of the AFA, its twin section in the South African act permitted the North West Agricultural Bank to seize a defaulting debtor's property, without recourse to a court of law, and to sell it by public auction.

53. The Court held that the act conflicted with the principle against self-help, which was an aspect of the rule of law.²¹ Self-help, the court held, was "inimical to a society where the rule of law prevails".²² This is so because it contradicted the principle that no person could be deprived of property except as established in the ordinary legal manner before the ordinary courts of the land.²³

54. Furthermore, that section infringed the right of access to court,²⁴ and denied to

²⁰ 2000 (1) SA 409 (CC).

²¹ Id at para 1; see also *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others* 2000 (3) SA 626 (CC) at para 5.

²² *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 11.

²³ Id at para 16.

²⁴ Section 34 of the Constitution of the Republic of South Africa, 1996 provides:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

the debtor the protection of the judicial process and the supervision exercised by the court over the execution process.²⁵ The act also violated the principle that no person could be judge in his or her own cause, because it allowed the bank itself to decide whether or not it had an enforceable claim and then enforce its own decision. This usurped the powers and functions of the courts.²⁶

55. The Court reiterated the importance of access to court.²⁷ It held

“The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”²⁸

56. But there was no justification to be found for the Act, because the ostensible purpose for the limitation (to save time and money) only minimally achieved its purpose,²⁹ while it seriously restricted the rights of debtors. Because less disproportionate measures were available,³⁰ the provision could not be saved by the proportionality analysis. It was thus declared inconsistent with the Constitution and invalidated.

²⁵ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 14.

²⁶ Para 20; see also *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others* 2000 (3) SA 626 (CC) at para 5.

²⁷ See also *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at paras 58, 61, 63.

²⁸ *Id* at para 22.

57. This judgment has subsequently been followed in numerous similar applications.³¹ In one of these cases the Constitutional Court has confirmed the proximity between the rule of law and the right of access to court. It held:

“The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the State and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law.”³²

58. It is submitted that the Constitutional Court’s judgment is compelling and establishes that the AFA is by exact parity of reasoning in breach of the rule of law, infringes the human right of access to court and constitutes a disproportionate legislative measure.

59. We further submit that such conclusion is also borne out by relevant instruments of international law, which we consider after first addressing the legal consequences of ostensible contractual consent to an ouster, on which the respondent seeks to rely as its defence.

(5) CONSENT TO OUSTER PROVIDES NO DEFENCE

²⁹ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 26.

³⁰ *Id* at para 27.

³¹ *Eg First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others* 2000 (3) SA 626 (CC); *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).

³² *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 82.

60. The issue relating to an ostensible contractual abandonment of the applicant's human right of access to court, as raised by the respondents in its procedural objection, misconstrues the issues for determination.
61. Firstly, any subjective or *inter partes* abandonment of a human right (if indeed inherent and inalienable rights can be abandoned) as is alleged the applicant has done by agreeing to a contract incorporating section 38 of the Act, is irrelevant. The approach to determine the constitutionality of legislation is objective, not subjective. The only relevant inquiry is whether in principle the legislation in question complies with human rights standards and the rule of law or not.³³
62. Secondly, the municipal common law of contract (including any defence provided by the law of contract) provides no defence to a complaint of a violation of international law.³⁴
63. Thirdly, the "cause of action" is not based on the private law of contract, but on a more fundamental social contract in terms of which public powers are conceded by the citizenry to the state to exercise subject to the rule of law and national and international human rights standards. Even if some agrarian loan

³³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 26; *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 7. It may further be noted that universally courts are in any event slow to find that human rights entrenched by constitutions or protected by human rights instruments are capable of being waived – or to find on the facts that they have been waived.

³⁴ *Constitutional Rights Project & Others v Nigeria* (2000) *African Human Rights Law Reports* 227 in which in 1999 the ACHPR at para 40:

agreement could detract from the right of access to court as entrenched in a municipal human rights instrument, it could not have effected the denunciation of rights the corollary of which are the state's duties under international law. It is inconceivable that public power can be conferred by private agreements.

64. Similarly a private agreement cannot absolve a state from complying with the rule of law. The rule of law, and the associated principle of legality, holds that government possesses no power which has not been conferred to it in terms of law. The exercise of powers contrary to international legal obligations can never be considered to have been conferred lawfully. Such conferral is per definition contrary to law. Hence no power has been conferred. And the exercise of a power that does not vest in, it is void.
65. Thus, the usurpation of the judiciary's powers by the executive, by becoming judge in its own cause and executing its own decision, is contrary to the rule of law and other international law principles which imposes the duty to maintain an independent judiciary. It is therefore invalid.
66. Hence the fundamental position in terms of article 27 of the Vienna Convention is arrived at: neither the respondent's national Constitution, nor the AFA, nor its law of contract provides a defence to the substantive application, which is based on the SADC Treaty and international law.

"To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making."

67. Therefore the fact that the applicant has entered into a contract which purportedly ousts the courts' jurisdiction constitutes no defence to the respondent.
68. However, even if it were competent to defend a claim based on international law by invoking municipal contract law, such invocation would not avail the respondent *in casu*. A defence based on the principle *pacta servanda sunt* (agreements are to be observed) must fail in the current circumstances. That defence is based on public policy. Public policy is informed by normative instruments like constitutions and relevant international instruments. Accordingly, a contractual clause which absolutely precludes recourse to courts of law is abhorrent to public policy as evinced by such instruments.³⁵ It would be unenforceable,³⁶ not only because it is in its own terms invalid in purportedly excluding recourse to court, but also because enforcing it in the circumstances would without exception be incapable of justification.³⁷ The categorical exclusion of legal recourse is manifestly unjustifiable and inherently contrary to *ius cogens* in international law in general and international legal policy considerations applicable in the SADC Community. Therefore no evidence is required to establish that the applicant did not consent freely to that contract.³⁸ Furthermore, the virtual monopoly held by the ABZ to provide agricultural loans strongly suggest that such unequal

³⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 33; 36.

³⁶ Id at paras 30; 52; 54; 70.

³⁷ Id at para 56.

³⁸ Id at paras 63; 66; 67.

bargaining power existed as to render the enforcement of the clause contrary to public policy also on this basis.³⁹

(3) THE AFA BREACHES INTERNATIONAL LAW

69. Apart from the domestic constitutional provisions mentioned by the South Africa Constitutional Court in *Chief Lesapo* as referred to above (which are entrenched in most domestic human rights legislation), international instruments also proscribes such ouster.

70. Numerous treaties specifically entrench the right to legal protection. Article 3 of the African Charter of Human and Peoples' Rights provides:

“Every individual is equal before the law and should be protected by the law.”

Article 7(1)(a) goes further:

“Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.”

71. The Universal Declaration of Human Rights provide in article 7:

³⁹ *Johannesburg Country Club v Stott and Another* 2004 (5) SA 511 (SCA) at para 12.

“All are equal before the law and are entitled without any discrimination to equal protection of the law.”

And article 10 reads:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations.”

72. Clearly an ouster of courts’ jurisdiction and judicial remedies categorically abrogates the right to legal protection.

73. Similarly international instruments entrench property rights. They guarantee the right not to be expropriated arbitrarily or without legal intervention. Clearly such protection resonates with the above provisions granting the right to legal protection.

74. Article 14 of the African Charter provides:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

75. The Universal Declaration of Human Rights states in article 17:

- “1. Everyone has the right to own property alone as well as in association with others.
- 2. No one shall be arbitrarily deprived of his property.”

76. International law also protects against interference with family life and domestic residency. Article 12 of the Universal Declaration of Human Rights provides:

“No one shall be subjected to arbitrary interference with his privacy, family, home . . . Everyone has the right to the protection of the law against such interference or attacks.”

77. The International Covenant on Civil and Political Rights states in article 17:

- “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home . . .
- 2. Everyone has the right to the protection of the law against such interference or attacks.”

78. We submit that these rights are all infringed by the section 38(2) as it has been applied in the present instance. This is borne out by the approach adopted by other regional human rights fora.

APPROACH TO ASSESSING RIGHTS INFRINGEMENTS

79. An example of the approach adopted where legislative provisions infringe property rights is to be found in the judgment by the European Court of

Human Rights in *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) and Hydro Seafood GSP Ltd v The Scottish Ministers*. The European Court clearly confirmed the justiciability of parliamentary policies pertaining to property rights thus:

“It is in the light of those criteria that the Court must assess the compatibility of the regime in issue in the main proceedings with the requirements arising from the protection of the fundamental right to property.”⁴⁰

80. We respectfully submit that that approach may also assist this Tribunal in the present application in discharging the Tribunal’s function to ensure the compliance of SADC member states with the duty to accord the SADC Treaty the force of national law and bring their municipal law into compliance with SADC law.⁴¹ Such approach proceeds by identifying the objectives of the relevant statutory provision. Then, in the light of those objectives, an assessment is made to discern whether the interference with the right to property is proportionate to the objectives it seeks to achieve.⁴²

81. Applied to the present application, the objective of the Agricultural Finance Act is clearly expedient and inexpensive debt recovery. In the light of this objective, the interference with the applicant’s right to property would be proportionate if it effectively, expediently and inexpensively recovers not more than the outstanding debt and does not cause more prejudice the debtor

⁴⁰ [2003] EUECJ C-20/00 (10 July 2003) at para 69.

⁴¹ In terms of article 6(5) read with article 16(1) of the SADC Treaty.

⁴² *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] EUECJ C-20/00 (10 July 2003) at para 70.

than is necessary. Where this can be achieved without expropriation, it would be disproportionate to the objectives sought should the debtor be expropriated in the process.

82. In the current circumstances, the undisputed facts before this Tribunal indicate that the debt sought to be recovered did not exceed Z\$6 000.⁴³ But this could have been achieved by accepting his proposed subdivision.⁴⁴ Thus expropriation was unnecessary in order to achieve the aims of the Act. Therefore the Act yields results which are *de facto* disproportionate. Accordingly the does not satisfy the SADC Treaty, and a failure to amend it constitutes a breach of SADC law in itself.

83. Furthermore, the disproportionate effects it had on the applicant *in casu* also evince the Act's disproportionality. In this regard it is of particular significance that debtors like him would invariably be left destitute. In the very nature of the property involved, where section 38(2) is invoked, the debtor and his or her family would most likely suffer the same loss of livelihood than the applicant stands to suffer here. This is an important indication of disproportionality of expropriatory measures.

84. So for instance, the extent of the impact upon the livelihood of the affected individuals has been applied as a significant consideration by the European Court of Human Rights in *Booker Aquaculture Ltd (t/a Marine Harvest*

⁴³ See p 7 para 30 read with p 9 para 49(a) of the affidavit by the applicant.

McConnell) and Hydro Seafood GSP Ltd v The Scottish Ministers.⁴⁵ In that case the Court held that the farm owners in question were not deprived “of the use of their fish farms, [and were able] . . . to continue to carry on their activities there”. But in this case the applicant and other farmers would be so deprived. What is more, execution sales not only deprive them of their livelihoods, but their very homes.

85. Another significant factor in the *Booker* case which led to upholding the provision was the fact that it allowed “all interested parties, including fish farm owners, [to] benefit”.⁴⁶ It is not suggested that the proportionality test can in every instance be satisfied only where all parties involved benefit. We do submit, however, that in the light of the direct disparity between the loss to the applicant – the entire negation of his whole family’s livelihood – and the benefit to the judgment debtor – realising only 40% of the market value of the property – the expropriation in question is utterly disproportionate. Such disproportionality is in itself reason to void the expropriation.

86. But because invoking the measure was insisted upon by the relevant officials despite apposite alternatives proposed by the applicant, the measure is still less supportable. And even less supportable when regard is had to the consequences its implementation yields. Clearly then the implementation of the measure is disproportionate at any level, even without applying a strict

⁴⁴ See p 6 para 19 and p 7 paras 20 and 29.

⁴⁵ [2003] EUECJ C-20/00 (10 July 2003) at para 80.

⁴⁶ *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] EUECJ C-20/00 (10 July 2003) at para 82.

proportionality standard requiring an absolute necessity of the measure in order to achieve the legitimate advantage it seeks to achieve.⁴⁷

87. But apart from constituting a disproportionate deprivation of property, the conduct under the Act in the circumstances also amounts to an arbitrary deprivation of property. Arbitrary deprivations of property *per se* violate human rights standards.⁴⁸
88. The conduct is arbitrary because it was resorted to regardless of the actual amount of the debt; regardless of whether it was necessary to do so; regardless of efforts to satisfy the debt; regardless of the actual value of the property; regardless of offers to settlement; and regardless of legal action instituted to prevent it.⁴⁹
89. And by ousting courts' jurisdiction to review and redress such arbitrariness the Act and any acts performed under it constitutes an irremediable breach of human rights. They compound what is already in and of itself an infringement of the right of access to court.⁵⁰ The limitation on the right to protection by the law, as provided for in article 3(2) of the African Charter, can never be justified – as has been held by the African Court on Human and Peoples' Rights

⁴⁷ The African Court on Human and Peoples' Rights has adopted such strict standard for the justification of limitations on charter rights in *Constitutional Rights Project & Others v Nigeria (2000)* *African Human Rights Law Reports* 227 in which in 1999 the ACHPR at para 42.

⁴⁸ As the instruments referred to above indicate.

⁴⁹ See p 7 paras 29 and 30; p 8 para 36; and p 9-10 para 49 of the applicant's affidavit.

“the only legitimate reasons for the limitation of the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter ‘shall be exercised with due regard to the rights of others, collective security, morality and common interest’.”⁵¹

90. Since the measure and its implementation is both disproportionate and arbitrary, it cannot be justified as having been resorted to “with due regard to the rights of others, collective security, morality and common interest”.
91. Even had there been any good attempt in (international) law by the respondent to justify the Act or its invocation, it could never have succeeded. This is because the ultimate test for justification is proportionality. An inherently disproportionate measure arbitrarily invoked cannot be justified.
92. Accordingly both the Act and its application in the circumstances infringe SADC law. Therefore both the Act and the sale in execution of the applicant’s property in terms thereof should be invalidated by the Tribunal, it is submitted.

RELIEF SOUGHT

93. It is submitted that the case establishes exceptional circumstances, such as to

⁵⁰ Davis *et al* *Fundamental Rights in the Constitution: Commentary and Cases* (Wetton, Juta & Co Ltd 1997) at 143.

⁵¹ *Constitutional Rights Project & Others v Nigeria (2000) African Human Rights Law Reports* 227 in which in 1999 the ACHPR at para 41.

warrant an order of costs. The respondent's defences have been so without substance as to be frivolous. To make a costs order against a State party such as the respondent, in favour of an individual of limited means such as the applicant, can moreover hardly have a 'chilling' effect. In fact, the converse is true: not to make such an order would be to send a clear message to individual litigants who, having been obliged to litigate their way up their domestic courts turn as a last resort to the Tribunal, that the Tribunal will not come to their aid as regards costs

94. In order to ensure the respondent's compliance with the rule of law and effectively vindicate the applicant's human rights, the applicant seeks the following relief:

- a. A declaration that the Government of Zimbabwe is in breach of its duties in terms of the SADC Treaty;
- b. A direction that the Government of Zimbabwe
 - i. amend its municipal law within 12 months from the date of the declaration referred to in paragraph (a) above to conform with the obligations in terms of the SADC Treaty.
 - ii. file with the Registrar of the SADC Tribunal the amendment to the municipal law for the Tribunal's certification that the amendment complies with the SADC Treaty.
- c. An order
 - i. annulling the sale in execution and subsequent transfer of the property held under Deed of Transfer 3673/85, known as the

“Remainder of Minverwag of Clare Estate Ranch”, situate in the Nyazura District, Zimbabwe (*“the property”*).

- ii. restoring the applicant’s title to the property, subject to such mortgage as has been held over it at the time of the sale in execution.
- d. An order restricting the Government of Zimbabwe from
 - i. evicting the applicant or his family from the property;
 - ii. interfering with the applicant’s use and occupation of the property;
 - iii. subjecting the property to any further sale, disposal, transfer, encumbrance or similar limitation of proprietary rights pending the determination in terms of paragraph (e) below;
- e. An order directing a proper determination of the applicant’s debt by an independent and impartial court or tribunal.
- f. Authorising the applicant, insofar as it may be necessary, to register this order with the High Court of Zimbabwe in accordance with the Protocol of the SADC Tribunal.
- g. An order directing the Government to take all legislative, administrative and other steps required to realise this order.
- h. A directive authorising the secretariat of the SADC to
 - i. investigate and report on the Government of Zimbabwe’s compliance with this order, and to re-enrol this application, on the same papers as amplified (if necessary), for the

determination of the Government of Zimbabwe's compliance with the order and any further rulings as deemed appropriate by the Tribunal;

- ii. make such recommendations to the Tribunal regarding further measures to be taken in relation to the order as it deems meet.
- i. An order directing the Government of Zimbabwe to pay the applicant's legal costs relating to these proceedings, including the costs of two instructed legal counsel, and including the reasonable travel and accommodation costs relating to the hearing.
- j. Further and/or alternative relief.

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19 April 2009