GRAMARA (PRIVATE) LIMITED
and
COLIN BAILIE CLOETE
versus
GOVERNMENT OF THE REPUBLIC OF ZIMBABWE
and
ATTORNEY-GENERAL OF ZIMBABWE
and
NORMAN KAPANGA (INTERVENER)

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 24 November 2009 and 26 January 2010

Adv. L. Uriri, for the applicants
Mrs. F. Maxwell, for the respondents
Mr. G. N. Mlotshwa for the intervener

PATEL J: The two applicants herein were parties together with 77 others in a matter that was adjudicated by the Southern African Development Community Tribunal (the Tribunal) in the case of *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* Case No. SADC(T) 2/2007. The Tribunal gave its judgment in favour of the applicants on the 28th of November 2008. They now seek an order for the registration of the decision of the Tribunal for the purposes of its enforcement in Zimbabwe.

Before dealing with the main issues in this matter, it is necessary to attend to several preliminary issues that have arisen for determination.

Applications for Condonation

The applicants filed and served their Heads of Argument herein on the 6th of July 2009. Four months later, on the 5th of November 2009, the respondents filed an application in Case No HC 5483/09 for the condonation of the late filing of their Heads and for the admission into evidence of a supplementary affidavit. The intervener was even more sluggish and only

filed his Heads one day before the hearing of this matter. His counsel then sought condonation at the hearing itself.

In view of the importance of this case and in order that all the relevant issues be fully ventilated, both applications were granted by consent. However, given the inordinate delay in filing their application, the respondents were ordered to pay the applicants' costs in respect of Case No. HC 5483/09.

Application for Joinder

The intervener in this matter avers that he is the holder of an offer letter to hold, use and occupy the property held by the applicants and that the effect of the relief sought by the applicants would be to nullify his offer letter. He accordingly submits that he has a direct personal and legal interest in the outcome of this case and should therefore be joined in opposition as the 3rd respondent.

The applicants oppose the intervener's application for joinder on the grounds that he does not have any direct or substantial interest in the subject-matter of these proceedings and that, in any event, he has not furnished any written proof of his acceptance of the State's offer. Moreover, registration of the Tribunal's judgment *per se* will not have the effect of dispossessing him of his right to occupy the property. That would only occur at a later stage, if and when separate proceedings are instituted for the enforcement of the judgment by way of eviction proceedings against him.

In terms of section 16B(2) of the Constitution, ownership of the property in question vests in the State. Any right of occupation conferred by the offer letter is in the nature of a personal right, deriving from the State's ownership of the property. Therefore, even if the intervener were to establish his acceptance of the State's offer, which on the papers he has failed to do, his right to occupy the land is purely derivative.

On the other hand, the papers indicate that there are two other matters currently pending before this Court, in Case Nos. HC 7256/07 and HC

3995/08, which involve a dispute between the applicants and the intervener concerning their respective rights to occupy and use the farm in question. The effect of granting the relief sough *in casu* would be to pre-empt and render academic the outcome of those two cases. More significantly, it seems somewhat artificial and casuistic to argue that registration of the Tribunal's judgment is entirely separate and distinct from the consequential enforcement of that judgment. While proceedings for the enforcement of the judgment may entail a different process, registration of the judgment will substantially operate to negate the intervener's rights in terms of the offer letter and he will be left with no defence whatsoever to any action taken by the applicants in enforcing the judgment. If he is not afforded the opportunity to be heard at this stage, he would clearly be prejudiced in the assertion and protection of the personal contractual right of occupation that he claims to the property *in casu*. See *Rose v Arnold & Others* 1995 (2) ZLR 17 (H); N*yamweda v Georgias* 1988 (2) ZLR 422 (SC).

In the event, I am satisfied that the intervener has established a sufficiently direct and substantial interest in the outcome of these proceedings. His application to be joined as a party to this case is accordingly granted, but with no order as to costs.

Enforcement of Tribunal's Judgments

The jurisdiction and powers of the Tribunal are spelt out in the Treaty of the Southern African Development Community (the SADC Treaty) and in the Protocol of the Tribunal. (The jurisdictional competence of the Tribunal, which competence is challenged by the respondents, is a matter that I shall revert to at a later stage). As regards the enforcement of the Tribunal's decisions, this is governed by Article 32 of the Protocol as follows:

> "1. The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement.

2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of the decisions of the Tribunal.

3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.

4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.

5. If the Tribunal establishes the existence of such a failure, it shall report its finding to the Summit for the latter to take appropriate action."

The overall effect of these provisions is that the decisions of the Tribunal are binding and enforceable within the territories of Member States which are under an obligation to take the measures necessary for the execution of those decisions. However, such enforcement is governed by the rules of civil procedure for the registration and enforcement of foreign judgments which are in force in the territory of the State in which the particular judgment is to be enforced. In other words, it is the domestic rules of procedure of each Member State, as opposed to any uniform adjectival law of the Tribunal, which must govern the enforcement of a given judgment in the territory of that State.

Where any Member State fails to comply with a specific decision of the Tribunal that it is bound by, such non-compliance is referable in the first instance to the Tribunal, which must then refer the matter to the Summit for the latter to take appropriate action. However, Article 32 does not explicate what remedial action may be taken, or by which authority or institution, in the event of a Member State's failure to comply with its broad obligation to take the measures necessary for the execution of the decisions of the Tribunal generally.

It is common cause that Zimbabwe has not taken any specific internal measures to domesticate the SADC Treaty or the Protocol of the Tribunal. More specifically, no legislative or administrative steps have been taken to

implement Zimbabwe's obligations under Article 32 or to transform those obligations into effectual provisions of the municipal law.

Nevertheless, as is correctly contended for the applicants, a State cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations. The fundamental tenet of international law is that *pacta sunt servanda*, viz. every party to a treaty in force is required to perform its obligations thereunder in good faith and, as a corollary to that obligation, such party may not invoke the provisions of its internal law, including its constitution, as justification for its failure to perform the treaty. See Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969); see also Shaw: *International Law* (4th ed. 1997) at 104.

However, it does not follow, as is further contended on behalf of the applicants, that the primacy of treaty obligations at international law must necessarily and invariably be taken into account in applying domestic law at the municipal level, even where there is a clear conflict between the two regimes. As I have recently had occasion to opine in *Route Toute BV & Others v Minister of National Security Responsible for Land, Land Reform and Resettlement & Others* HH 128-2009, at pp. 17-18:

> "On the pragmatic approach that has come to be adopted in international practice, neither legal system enjoys primacy over the other. In principle, they both hold sway and supremacy in their respective domains. See Brownlie: *Principles of Public International Law* (4th ed.) at pp. 34-35. The resultant divergence between the two systems is reconciled on the basis that the State incurs international responsibility for having violated its international obligations and must accordingly effect the requisite reparations in order to satisfy its international responsibility. See Brownlie, *op. cit.*, at pp. 35-37."

Registration of Foreign Judgments in Zimbabwe

Insofar as concerns the registration of foreign civil judgments, the relevant statutory provisions presently in force in Zimbabwe are contained in the Civil Matters (Mutual Assistance) Act [*Chapter 8:02*]. Section 3 of this Act extends the application of the Act to the judgments of any international

tribunal designated for that purpose. The word "judgment" is defined in section 2 of the Act to mean "a judgment or order given or made by any court or tribunal requiring the payment of money, and includes an award of compensation or damages to an aggrieved party in criminal proceedings". The judgment that the applicants seek to register herein is essentially declaratory and injunctive in nature and is not one sounding in money. Moreover, it is common cause that the decisions of the SADC Tribunal are not registrable or enforceable in terms of Chapter 8:02 for the simple reason that the Tribunal has not been specifically designated under the Act.

In any event, the Act is clearly not exhaustive in the coverage of its provisions. Section 25 expressly acknowledges that the Act does not derogate from other laws and provides that:

> "This Act shall be regarded as additional to, and not as limiting the provisions of any other law relating to the recognition and enforcement of foreign judgments, the service of process or the taking of evidence, whether on commission or otherwise."

It follows that Chapter 8:02 does not purport to override or exclude the operation of any other law, including the common law, pertaining to the recognition and enforcement of foreign judgments. In effect, section 25 accords with the general rule of statutory interpretation that the common law cannot be ousted except by clear language or in express terms.

Both in England and in South Africa, it is well established that foreign judgments are cognisable and enforceable under the common law. See North and Fawcett: *Cheshire and North's Private International Law* (13th ed. 2004) at 407; Forsyth: *Private International Law* (4th ed. 2003) at 389. In South Africa, the procedure for and scope of recognition proceedings are lucidly expounded in Joubert (ed.): *The Law of South Africa* (First Reissue, 1993) Vol. 2 at para. 476, as follows:

> "…….. the present position is that a foreign judgment is not directly enforceable in South Africa; but if it is pronounced by a proper court of law and certain requirements are met any determination therein (for example of a party's rights or status) will be recognised

> and the judgment will in fact found a defence of *res judicata* if it would have founded such a defence had it been a South African judgment. In addition, an authenticated foreign judgment constitutes a cause of action and as such is enforceable by ordinary action in a South African court, including, where appropriate, an action for provisional sentence or for a declaratory order or for default judgment.
>
> A South African court will not pronounce upon the merits of any issues of fact or of law tried by the foreign court and will not review or set aside its findings though it will adjudicate upon a 'jurisdictional fact' establishing international competency".

The general requirements for recognition and enforcement of foreign judgments are set out in Joubert (*op. cit.*), at para. 477. These requirements were adopted and applied by the Appellate Division in *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E and in *Purser v Sales* 2001 (3) SA 445 (SCA) at 450D-G. In *Jones's* case, CORBETT CJ summarised these requirements as follows:

> "As is explained in Joubert …….. , the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence') (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended."

In the present matter, counsel have not referred me to any Zimbabwean case authority on the subject, either following or deviating from the South African position, and I have been unable to readily locate any. I accordingly take the view, pursuant to the provisions of section 89 of the Constitution governing the law to be administered by our courts, that our common law position is *ad idem* with the common law of South Africa as

stated in the authorities cited above and that it has not been overtaken or significantly modified by local statute.

One further aspect that was not raised by counsel but which I need to canvass relates to the scope of recognition proceedings vis-à-vis the nature of the remedies that may properly be recognised and enforced through a foreign judgment. The provisions of Chapter 8:02 and the two cases cited above deal primarily with judgments sounding in money. They do not address judgments and rulings with broader proprietary implications and administrative consequences as is the case with the SADC Tribunal decision *in casu*. Nevertheless, having regard to the general rules articulated in Joubert (*op. cit.*) at para. 476, coupled with considerations of international comity in a globalised world, and provided that the judgment in question has been duly delivered by a court of recognised international competence and jurisdiction, it seems to me that it would be contrary to principle to restrict the scope of recognition proceedings by reference to the specific remedies enjoined by a given foreign judgment.

Issues for Determination

Notwithstanding the plethora of affidavit evidence and written legal argument filed of record, counsel for all of the parties herein concur that there are essentially two issues for determination *in casu*. The first is whether the SADC Tribunal was endowed with the requisite jurisdictional competence in the case before it. The second is whether the recognition and enforcement of the Tribunal's decision in that case would be contrary to public policy in Zimbabwe.

Jurisdictional Competence

It is trite that any jurisdictional fact which negates the existence of any obligation imposed by a foreign judgment constitutes an effective bar to the actionability of that judgment. One such obvious negativing fact would be

that the party impeaching the judgment owes no duty to obey the command of the court or tribunal purporting to impose the obligation.

The respondents' position on the status of the Tribunal is as follows. The Agreement amending the SADC Treaty (the Amendment Agreement), which was signed on the 14th of August 2001, never entered into force because it was not ratified by Zimbabwe or by the prescribed number of SADC Member States. Therefore, in terms of Article 22 of the Treaty as unamended, the Protocol of the Tribunal still requires the ratification of a Member State in order for that State to be bound by it. Since Zimbabwe has not ratified the Protocol, it is not bound by it and is not subject to the jurisdiction of the Tribunal. Consequently, the Tribunal lacked the requisite competence to adjudicate the *Campbell* case and, therefore, its judgment in that case cannot be registered and enforced in Zimbabwe or anywhere else.

The Vienna Convention on the Law of Treaties (1969) is generally recognised as an authoritative restatement of established or emergent rules of international customary law on the subject of treaties. See Brownlie, *op.cit.*, at 604. Article 39 of the Convention states the general rule regarding the amendment of treaties, as follows:

> "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

Part II of the Convention regulates the conclusion and entry into force of treaties and, by dint of Article 39, it also governs the conclusion and entry into force of treaty amendments. Article 11 prescribes the means of expressing consent to be bound by a treaty and provides that:

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

Article 24 of the Convention governs the entry into force of treaties and, in its relevant portions, stipulates that:

> "1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
>
> 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States."

Taken together, these provisions of the Convention illustrate the flexibility inherent in the conclusion and entry into force of treaties as well as amendments thereto. In particular, Article 11 makes it clear that the consent of States to be bound by a treaty may be expressed by signature, exchange of instruments, ratification or accession, **or by any other means if so agreed**. Thus, the States concerned are at liberty to agree on the conclusion of a treaty by means other than the traditionally accepted procedure of signature followed by ratification or accession. It is therefore perfectly possible for a treaty or an amendment of the treaty to be **adopted** and enter into force for all the adopting States instantly, without further ratification or any other formality, if that is the means of adhesion agreed to by those States. See Aust: *Modern Treaty Law and Practice* (2000) at 90.

Turning to the SADC Treaty itself, Articles 39, 40 and 42 of the Treaty deal respectively with signature and ratification of and accession to the Treaty. Article 41 governs the entry into force of the Treaty as follows:

> "This Treaty shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the States listed in the Preamble."

Article 39 makes it abundantly clear that ratification by two-thirds of the signatory States was a pre-requisite for the entry into force of the Treaty itself. However, amendments to the Treaty are governed by an entirely different procedure prescribed in Article 36.1, as follows:

> "An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit."

The term "Summit" is defined in Article 1 of the Treaty as:

> "…….. the Summit of the Heads of State or Government of SADC established by Article 9 of this Treaty".

Article 10 of the Treaty (in its unamended form) is instructive as to the composition of the Summit and its decision-making process. It provides as follows in its relevant portions:

> "1. The Summit shall consist of the Heads of State or Government of all Member States, and shall be the supreme policy-making institution of SADC.
> 3. The Summit shall adopt legal instruments for the implementation of the provisions of this Treaty …… .
> 8. Unless otherwise provided in this Treaty, the decisions of the Summit shall be by consensus and shall be binding."

The combined effect of these provisions is that an amendment to the Treaty is not concluded by way of ratification by Member States but is adopted by a decision of not less than three-quarters of the Summit, comprising the Heads of State or Government of all Member States. Furthermore, the decision of the Summit to adopt the amendment is binding on all Member States. The amendment becomes operative immediately thereafter and there is no need for any further ratification by Member States in order to bring the amendment into force and effect.

Turning to the Amendment Agreement itself, the Preamble thereto, in its relevant portions, declares that:

> "We, the Heads of State or Government of [all the Member States] …… HAVE AGREED, pursuant to Article 36 of the Treaty, to amend the Treaty as follows: …… ."

Article 32 of the Agreement provides for its entry into force, in conformity with Article 36.1 of the Treaty, as follows:

> "This Agreement shall enter into force on the date of its adoption by three-quarters of all Members of the Summit."

Article 22 of the SADC Treaty, both in its original and amended form, requires the signature and ratification of any Protocol approved by the SADC Summit. Article 9.1(f) as read with Article 16 provides for the establishment of the SADC Tribunal. Article 16.2 as amended provides that:

> "The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit."
>
> [amendment underlined]

The meaning and effect of the amending words are clear, to wit, the Protocol of the Tribunal forms an integral part of the Treaty without the need for its ratification by the Member States. To clarify this position and dispel any doubt on the matter, all the Member States, including Zimbabwe, concluded and signed the Agreement Amending the Protocol on Tribunal on the 3rd of October 2002. By virtue of Articles 16 and 19 of this Agreement, Articles 35 and 38 of the Protocol of the Tribunal, which required ratification of the Protocol by two-thirds of the Member States, were repealed *in toto*, thereby obviating the need to ratify the Protocol.

To conclude this aspect of the case, my assessment of and determination on the jurisdictional capacity of the Tribunal is as follows. On the 14th of August 2001, the Amendment Agreement was signed by 13 out of the 14 Heads of State or Government of the Member States, including Zimbabwe, thereby concluding the process of its adoption and entry into force. In my view, there can be no doubt whatsoever that the Agreement was duly adopted in terms of Article 36.1 of the Treaty and that it became binding upon all the Member States on the date of its adoption. It follows that as from that date, by virtue of Article 16.2 of the Treaty as amended, the Protocol of the Tribunal constituted an integral part of the Treaty and became binding on all Member States without the need for its further ratification by them. It also follows that the Republic of Zimbabwe thereupon became subject to the jurisdiction of the Tribunal and that the jurisdictional competence of the Tribunal in the *Campbell* case, which was heard and determined in 2008, cannot now be disputed.

The respondents' position in this regard, premised on the *ex post facto* official pronouncements repudiating the Tribunal's jurisdiction, is essentially

erroneous and misconceived. Their position is rendered even more untenable by the conduct of SADC governments, including the Government of Zimbabwe, subsequent to the adoption of the Amendment Agreement, which conduct has been entirely consistent with the provisions of the Treaty as amended by the Agreement. I refer, in particular, to the establishment of the Troika system and the Organ on Politics, Defence and Security Cooperation, in terms of Articles 9 and 9A of the Treaty (as amended by Articles 9 and 10 of the Agreement), and note that Zimbabwe has fully participated, together with all the other Member States, in the Troika system and the business of the newly constituted Organ. It seems to me legally unsustainable to espouse a major facet of the amended SADC regime and to simultaneously eschew those features of the same regime that are deemed to be politically inexpedient and unpalatable.

Before concluding, I think it necessary to mention one jurisdictional issue that was not canvassed by the parties, either in their affidavits or in argument, relative to the scope of the Tribunal's jurisdiction in terms of the SADC Treaty and its governing Protocol. In the case before it, the Tribunal relied upon the provisions contained in Articles 4(c) and 16 of the Treaty as read with Articles 14 and 15 of the Protocol to conclude that it was duly empowered to adjudicate any dispute concerning human rights, democracy and the rule of law. The jurisdiction of the Tribunal encompasses all disputes between States and between natural and legal persons and States relating to the interpretation and application of the Treaty. Despite this broad formulation, I am not entirely persuaded that the general stricture enunciated in Article 4(c) of the Treaty, which requires SADC and the Member States to act in accordance with the principles, *inter alia*, of "human rights, democracy and the rule of law", suffices to invest the Tribunal with the requisite capacity to entertain and adjudicate alleged violations of human rights which might be committed by Member States against their own nationals. Be that as it may, this is not an issue that was specifically raised in these proceedings and it

would therefore be inappropriate for me to deal with this jurisdictional point *mero motu* at this juncture.

Public Policy

As already stated above, a foreign judgment cannot be recognised and enforced if it is contrary to public policy. As is succinctly put in Joubert (*op. cit.*) at para. 425:

> "…….. a foreign judgment will not be recognised or enforced if it is in conflict with an overriding statute, if its terms conflict with public policy or if it was obtained without observance of the principles of natural justice."

What constitutes public policy in any given country is a matter that eludes precise definition. The notion is clearly not immutable and must perforce vary with time, place and circumstance, in tandem with changing social *mores*. Antecedent case authorities are obviously highly persuasive but may not always be germane or decisive.

In the instant case, public policy must be considered not only in the closed confines of the domestic sphere but also in the larger regional and international context. In principle, it would generally be contrary to public policy for any State to violate its international obligations within the domestic realm. As already stated above, every State party to a treaty in force is required to perform its obligations in good faith and, concomitantly, it cannot invoke its municipal law so as to absolve itself from its obligations at international law. Apart from being embodied and codified in Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969), these rules also form part of international customary law. See Shaw (*op. cit.*) at 104.

As was stated in the *Route Toute BV* case (*supra*) at pp. 10-11, the position in most Commonwealth jurisdictions is that customary international law is generally regarded as having been internally incorporated insofar as it is not inconsistent with statute law and judicial precedent. This position was affirmed by the Supreme Court, albeit *obiter*, in *Barker McCormac (Pvt) Ltd v*

Government of Kenya 1983 (2) ZLR 72 (SC) at 77, where it was observed that customary international law forms part of the law of Zimbabwe except to the extent that it is in conflict with statute or prior judicial precedent. Inasmuch as Zimbabwe is bound by the decisions of the SADC Tribunal at international law, by dint of its treaty obligations as well as international custom, it would be inconsistent with the public policy of Zimbabwe not to recognise and enforce any decision of the Tribunal at the municipal level, except insofar as that decision conflicts with statute or prior judicial precedent.

There is a further international dimension to the public policy of Zimbabwe. By adhering to the SADC Treaty as well as the Amendment Agreement and, therefore, by submitting to the jurisdiction of the Tribunal, the Government of Zimbabwe has created an enforceable legitimate expectation, both within and beyond the borders of Zimbabwe, that it would comply with the requirements of the Treaty and abide by the decisions of the Tribunal. Moreover, in terms of Article 32 of the Protocol of the Tribunal, the Government has bound itself to enforce the decisions of the Tribunal in accordance with domestic procedural law, and has thereby created a further legitimate expectation that it would act accordingly.

These points are illustrated by the decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 [(1995) 128 ALR 353] where Australia had ratified the United Nations Convention on the Rights of the Child but had not taken any steps to implement the Convention by statute. It was held by the High Court of Australia that despite the failure to incorporate the Convention in the domestic law of Australia, individuals had a legitimate expectation that the government would act in accordance with the Convention.

In the instant case, the legitimate expectation that the Government would adhere to the decisions of the Tribunal and take steps to enforce those decisions in the domestic sphere must be regarded as an intrinsic aspect of public policy in Zimbabwe. On that basis, the recognition and enforcement of

the Tribunal's decisions would not be contrary to the public policy of Zimbabwe.

The above propositions must be taken to apply in principle to the decisions of the Tribunal generally. In other words, as a rule, public policy dictates that the Tribunal's decisions, made within the bounds of its international jurisdictional competence, be recognised and enforced in Zimbabwe. However, in my view, the application of this general rule is subject to a consideration of the facts of each individual case and the legal and practical consequences of recognising and enforcing the Tribunal's decision in that particular case in Zimbabwe.

Turning specifically to the decision in the *Campbell* case, the findings and ruling of the Tribunal, insofar as they are relevant *in casu*, may be summarised as follows: (i) fair compensation is payable to the applicants, and must be paid by a fixed date to 3 of the applicants who have already been evicted, for their lands compulsorily acquired by the Government of Zimbabwe; (ii) the Government is in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty (pertaining to human rights, democracy and the rule of law and the principle of non-discrimination); (iii) Amendment 17 (see below) is in breach of Articles 4(c) and 6(2) of the Treaty; (iv) the Government is directed to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to ensure that no action is taken, pursuant to Amendment 17, to evict the applicants from their lands or to interfere with their peaceful residence thereon.

It is common cause that the Government of Zimbabwe embarked on a programme of land reform in the year 2000. The programme was constitutionally recognised in section 16A of the Constitution, which section was introduced by the Constitution of Zimbabwe Amendment (No. 16) Act 2000. Subsequently, the programme was further entrenched when the Legislature enacted section 16B through the Constitution of Zimbabwe

Amendment (No. 17) Act 2005. The legal effect of section 16B(2)(a) was to compulsorily acquire all agricultural land that was identified in the notices of acquisition itemised in the newly inserted Schedule 7. Consequently, full title in such land vested in the State with effect from the 14th of September 2005. Moreover, by virtue of section 16B(2)(b), no compensation is payable for this land except for any improvements effected thereon before it was acquired. In terms of section 16B(6), it was envisaged that an Act of Parliament would be framed to make it a criminal offence for any person, without lawful authority, to possess or occupy any land referred to in section 16B. Subsequently, such legislation was duly enacted in the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] which came into operation on the 20th of December 2006.

The legality of the land reform programme was considered in *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* SC 49/07. In essence, the Supreme Court confirmed the constitutionality of the programme as implemented under section 16B of the Constitution. Counsel for the respondents submits that the judgment of the SADC Tribunal is in total disharmony with the decision of the Supreme Court in Case No. SC 49/07. Although I do not perceive any direct conflict between the two decisions inasmuch as the Supreme Court was seized with the constitutionality of the programme under domestic law while the Tribunal's judgment centres on the violation of rights and obligations under the SADC Treaty, it must nevertheless be accepted that the indirect consequence of the Tribunal's judgment is to impugn the legality of the programme sanctioned by the Supreme Court. The potential conflict between the two decisions is actualized in the instant case because the effect of registering the Tribunal's judgment in Zimbabwe would be to challenge the decision of the Supreme Court within its jurisdictional domain and thereby undermine the authority of that Court in Zimbabwe. Any such result could surely not be contemplated as conforming with public policy in Zimbabwe

and must militate against the registration of the Tribunal's decision by this Court.

In any event, there is a further and more direct basis for declining the registration and consequent enforcement of the Tribunal's decision in this country. As indicated above, the decision directs the Government of Zimbabwe to do several things. In particular, the Government is ordered to protect the possession, occupation and ownership of the lands of the applicants. It must also ensure that no action is taken to evict the applicants from their lands or to interfere with their peaceful residence thereon. In addition, it is required to pay fair compensation to the applicants for their lands compulsorily acquired by the Government.

As already indicated, the applicants' lands were acquired by the Government in terms of section 16B of the Constitution without any compensation payable in respect of the land itself. If the Tribunal's judgment were to be registered by this Court and subsequently voluntarily complied with or enforced by court orders, the Government would be required to contravene and disregard what Parliament has specifically enacted in section 16B of the Constitution. This, in my view, simply cannot be countenanced as a matter of law, let alone as an incident of public policy. Section 3 of the Constitution proclaims what is axiomatic, viz. that:

> "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

The obvious implications of the supremacy of the Constitution are twofold. Firstly, to the extent that the common law is invoked to enforce a foreign judgment, the common law must be construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognised or enforced in Zimbabwe. The notion of public policy cannot be deployed and insinuated under cover of the common law to circumvent or subvert the fundamental law of the land. Secondly, I consider it to be patently contrary to

the public policy of any country, including Zimbabwe, to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained.

Although the Tribunal's decision, strictly regarded, is confined to the 79 applicants before it, its ramifications extend to the former owners of all the agricultural land that has been acquired by the Government since 2000 in terms of section 16B of the Constitution. In effect, enforcement of the decision vis-à-vis the 79 applicants in particular and compliance with it generally would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. Apart from the political enormity of any such exercise, it would entail the eviction, upheaval and eventual relocation of many if not most of the beneficiaries of the land reform programme. This programme, despite its administrative and practical shortcomings, is quintessentially a matter of public policy in Zimbabwe, conceived well before the country attained its sovereign independence.

As for the doctrine of legitimate expectation, the applicants before the Tribunal and others in their position are absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the decisions of the Tribunal. However, I take it that there is an incomparably greater number of Zimbabweans who share the legitimate expectation that the Government will effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail.

In the result, having regard to the foregoing considerations and the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country.

Costs

The applicants have not succeeded in the eventual outcome of this case. Nevertheless, it cannot be doubted that the issues raised herein are matters of paramount public importance and that their proper ventilation in these proceedings is of public value and benefit. I therefore deem it just and equitable that the parties should bear their own legal costs.

The application is accordingly dismissed with no order as to costs.

Gollop & Blank, applicants' legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners
Mlotshwa & Co., intervener's legal practitioners