**14 August 2009**

**Case No. SADCT: 07/2008**

**SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL**

**LUKE MUNYANDU TEMBANI**
**v.**
**THE REPUBLIC OF ZIMBABWE**

**JUDGMENT**

| | |
|---|---|
| BEFORE: | PRESIDENT: A. G. Pillay<br>JUDGES: Dr. L. A. Mondlane; I. J. Mtambo; Dr. R. Kambovo; Dr. O. B. Tshosa |
| PermaLink: | http://www.worldcourts.com/sadct/eng/decisions/2009.08.14_Tembani_v_Zimbabwe.htm |
| Citation: | Tembani v. Zimbabwe, Judgment, Case No. SADCT: 07/2008 (SADC, Aug. 14, 2009) |
| Represented By: | APPLICANTS' AGENTS: J. J. Gauntlett; F. Pelser<br>RESPONDENT'S AGENTS: P. Machaya and N. Mutsonziwa |

---

JUDGMENT

DELIVERED BY H. E. JUSTICE ARIRANGA G. PILLAY

1. BACKGROUND

[1] This application involves the consideration of the issue as to whether section 38 of the Agricultural Finance Corporation Act (cap. 18:02) [the Act] of the Laws of Zimbabwe conforms with Articles 4(c) and 6(1) of the Treaty of the Southern African Development Community (the Treaty), which provide as follows:

ARTICLE 4:
"SADC and its Member States shall act in accordance with the following principles:
(c) human rights, democracy and the rule of law."
ARTICLE 6:
"(1) 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 jeopardize the sustenance of its principles, objectives and the implementation of the provisions of this Treaty."

[2] We will also bear in mind sub-articles (4) and (5) of Article 6 which read as follows:

"(4) Member States shall take all steps necessary to ensure the uniform application of this Treaty.
(5) Member States shall take all necessary steps to accord this Treaty the force of national law".

[3] The Applicant is a registered owner of a farm of 1265 hectares known as the Remainder of Minverwag of Clare Estate Ranch in Nyazura District in the Republic of Zimbabwe. He and his family have resided on the farm since 1983.

[4] To finance his farming activities, the Applicant borrowed various sums of money from a parastatal bank called the Agricultural Bank of Zimbabwe (ABZ) on the security of the farm. Each of the loan agreements included a standard clause 6 authorizing ABZ, if at any time any sum of money due in respect of an advance is unpaid, to enter upon and take possession of the whole or any part of the security. The clause read as follows:

"Should the borrower commit or be in breach of any of the terms or conditions of this agreement the Corporation specifically stipulates as provided in section 40 of the Act, that it shall have the right in terms of that section of the Act, after demand by registered letter addressed to the borrower at his last known address or to the address given by him in his application for this loan, and without recourse to a court of law, to enter upon the property hypothecated and to take possession thereof and sell and dispose of the same in whole or in part as the Corporation may determine, always in terms of and subject to the provisions of the Act" (the underlining is ours).

[5] Clause 6 is based on the former section 40 of the Act which is now section 38 and which, in the relevant part, provides as follows:

"38 (2) The Corporation may, in the case of an advance in respect of which security is given, including any security by way of a notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable … the Corporation, in addition to the powers conferred … , shall be entitled, … after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given by him in his application for the advance, to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security …".

[6] The section is itself anchored to section 16(7) (d) of the Constitution of the Respondent which reads as follows:

"(7) Nothing contained or done under the authority of any law shall be held to be in contravention of sub-section (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases ... :
(d) As an incident of a contract, including a lease or mortgage, which has been agreed upon between the parties to the contract, or of a title deed to land fixed at the time of the grant or transfer thereof or at any other time with the consent of the owner of the land."

[7] Subsection (1) of section 16 of the Constitution of the Respondent prohibits compulsory acquisition of property, except under the authority of the law in certain specified circumstances.

[8] The Applicant was unable to liquidate his indebtedness to ABZ, whose exact amount from the record is unclear, and, therefore, his farm was attached in terms of section 38 of the Act. The farm was then sold. The Applicant sought to set aside the sale and so he applied to the High Court (Luke Manyandu Thembani vs Eagle Estate Agents (Pty) Ltd and Others), contending that the farm was sold at an unreasonably low price and that this was due to inadequate advertisement of the sale. He also questioned the constitutionality of the Act. It was submitted on his behalf, in paragraph 14 of the Heads of Arguments that the point about the constitutionality of the Act was "decisive of this case and there is no need or discretion for the court to look any further", and then it was argued further in paragraph 15 as follows:

"However, if this court is not persuaded on that, it is respectfully submitted that the applicant has bona fide and legitimate grounds to dispute that:
(a) the Act; and
(b) the way in which it was administered in regard to himself and his property,
are consistent with all the requirements of the Constitution, and to request that if necessary this should be referred to the Supreme Court".

[9] It was further contended on behalf of the Applicant in paragraphs 16 and 17 as follows:

"16 The Supreme Court is not the sole court that must have regard to the Constitution, but if any party requests that a question concerning the Bill of Rights be referred there by a lower court, the lower court must refer it unless the request is frivolous and vexatious.
17 Section 3 of the Constitution is totally explicit. It states that any law inconsistent with any provision of the Constitution is void, and not merely voidable, and that prevents any court from enforcing it".

[10] After considering the issues before it, the learned Judge of the High Court granted the application, but concerning the constitutionality of section 38, it had this to say:

"What one has to consider as I said earlier on is the issue of whether or not the property was adequately advertised. If the property was adequately advertised, then in my view no issue would arise as the Supreme Court of this country has already decided on the issues touching the AFC sales".

[11] What the High Court was saying here is that there would be no point in referring the question of the constitutionality of section 38 of the Act to the Supreme Court because that Court has already resolved the issue in its earlier decisions. One such case in which the Supreme Court made the position very clear is that of Augustine Runesu Chizikani v Agricultural Finance Corporation Civil Appeal No. 567/94, in which it stated, per Gubbay, C.J., as he then was, as follows:

"The Appellant has overlooked the recent judgment of this court in the case of Nyamukusa v Agricultural Finance Corporation SC 174/94 which conclusively affirms the correctness of the decision of the court a quo. In that case the Court, after citing section 4(1), section 40(2) and section 40(2a) of the Act, went on to hold as follows:
It is noted that he (the Appellant) was signatory to the agreement which gave powers to the

Respondent to act in the manner it did. My reading of section 40(2) and (2a) is that provided there is a stipulation in the loan agreement, to the effect that the Respondent can take possession of the property hypothecated without recourse to law, the Respondent is perfectly entitled to proceed either under section 40(1) or (2) and (2a) of the Act. For obvious advantageous reasons it chose to proceed in terms of the latter subsection in which it is supported by clause 6 of the loan agreement."

[12] This position has been maintained in all subsequent cases which include the cases of Agricultural Bank of Zimbabwe v (1) Luke Manyandu Thembani and Others (SC 39/07).

[13] Such is the background of the present case.

2. EXHAUSTION OF LOCAL REMEDIES

[14] On April 23, 2009, when the hearing of the application was called on, the Respondent sought leave to file its defence to the claim. The Tribunal allowed it to do so, albeit reluctantly, within 7 days from that date and directed the parties to ensure that the pleadings were settled well before June 04, 2009, the date to which the hearing of the case was postponed. The Respondent did not file the defence within the period allowed. But on May 29, 2009, the Respondent brought an application to file a supplementary affidavit by which it sought to adduce further evidence and to contend that the Tribunal had no jurisdiction to hear the application which was before it.

[15] Rule 41 of the Rules of Procedure of SADC Tribunal (the Rules) is about closure of pleadings. It stipulates that pleadings shall close after the completion of written proceedings. By fixing a period within which the Respondent was to have filed the defence, the Tribunal, by necessary inference, also fixed the date by which pleadings were to close, namely, April 30, 2009, the date by which the defence was to be filed.

[16] In terms of sub-rule (2) of Rule 41, no further documents may be submitted to the Tribunal by either party after the closure of pleadings except with the consent of the other party. The Applicant refused to consent, arguing, among other things, that the Respondent was in the habit of not following the Rules, pointing out that the Tribunal was only being indulgent when it allowed the Respondent a further period to file the defence because that should have been done earlier than April 23, 2009. We agree with this observation and would only add that it is high time parties respect the orders of the Tribunal. The application to file a Supplementary Affidavit is, therefore, rejected.

[17] This, however, does not settle the issue of jurisdiction because it is a question which we have to consider anyway in order to satisfy ourselves whether the matter is properly before us and that we have jurisdiction to hear it. We now proceed to do so.

[18] Under Article 15(2) of the Protocol on Tribunal (the Protocol), no person may bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction. We have also referred to other international conventions such as the European Convention on Human Rights and Fundamental Freedoms of 1950 (the European Convention) and the African Charter on Human and People's Rights (the African Charter), to mention but two. In Article 26 of the European Convention, it is provided as follows:

"The Commission ... may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law ...".

[19] The African Charter, in Article 50, stipulates as follows:

"The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged."

[20] We also recall the case of Mike Campbell (PVT) Limited v Minister of National Security Responsible for Land, Land Reform and Resettlement (SC 49/07). The Supreme Court in Zimbabwe had dismissed Campbell's claim saying, among other things, that the question of what protection an individual should be afforded in the Constitution in the use and enjoyment of a private property, is a question of a political and legislative character, and that as to what property should be acquired and in what manner is not a judicial question. The Court went further and observed that, by the clear and unambiguous language of the Constitution, the legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought.

[21] We have also reproduced section 16(7) (d) of the Constitution of the Respondent above which provides, among other things, that nothing contained or done under the authority of any law shall be held to be in contravention of the Constitution to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein, even as an incident of a contract, including a lease or mortgage, which has been agreed between the parties to the contract. We have also replicated section 38(2) of the Act above. That section authorizes the inclusion of a clause in a loan agreement entitling the lending institution to enter upon, and take possession of the whole or any part of, the security concerned and to dispose of it.

[22] The Supreme Court in Zimbabwe had held that in the circumstances where such clause is incorporated in a loan agreement, as is the case in the matter before us, the lending institution was entitled to proceed in terms of section 38(2) of the Act, without recourse to a court of law.

[23] Such indeed are the circumstances in which we must decide whether or not the Applicant in the present case has exhausted all available remedies or is unable to proceed, under the domestic jurisdiction. Under Article 21(b) of the Protocol, in addition to authorizing the Tribunal to develop its own jurisprudence, the Tribunal is instructed to do so, having regard to applicable treaties, general principles and rules of public international law.

[24] In Mike Campbell (PVT) Limited and Others v The Republic of Zimbabwe (Case No. SADC (T) 11/08) when considering the question of exhaustion of local remedies, the Tribunal observed as follows:

"The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law ... . However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Further, where, as the African Charter on Human and People's Rights states, "... it is obvious ... that the

procedure of achieving the remedies would have been unduly prolonged," the individual is not expected to exhaust local remedies. These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal".

[25] We would add that one of the aims concerning exhaustion of local remedies is to prevent individuals from abuse of remedies through concurrent proceedings and thus the requirement aims at avoiding parallelism of proceedings.

[26] The effect of section 38 of the Act and indeed section 16(7) (d) of the Constitution of the Respondent is that the jurisdiction of the courts of law in Zimbabwe is ousted whenever agricultural land is acquired in the circumstances obtaining in the present application. This has been confirmed in the decisions of the Supreme Court, the highest Court in that country, which we have already referred to above.

[27] Thus, it would be meaningless, in our view, to insist that the Applicant should have first exhausted his domestic remedies. In the circumstances, we are of the view that the Applicant is properly before us and that we have jurisdiction to consider the application, and we now proceed to do so.

3. DENIAL OF ACCESS TO THE COURTS

[28] The next issue to be decided is whether or not the Applicant has been denied access to the courts and deprived of a fair hearing, in breach of Articles 4(c) and 6(1) of the Treaty when in November 2000 his immovable property, a farm, which he had mortgaged to ABZ as security for his loans, pursuant to various loan agreements, had been seized and sold by ABZ after he had defaulted on his debts.

[29] It is to be noted that the loan agreements entered into by the Applicant with ABZ derived their authority from, and are governed by, the then provisions of section 40(2) and (2a) of the Act which have now been replaced by similar provisions in section 38(2), as stated already.

[30] Section 40(2) and (2a) of the Act stated as follows:

"(2) The Corporation may in the case of an advance in respect of which security is given, including any security by way of notarial bond or note of hand, stipulate that it shall be a condition of the advance that if any advance in respect of which security has been given becomes repayable in terms of subsection (1) the Corporation, in addition to the powers conferred by subsection (1), shall be entitled, subject to the provisions of subsection 2(a), after a period of ten days have elapsed since the posting of a registered letter of demand addressed to the borrower at his last known address or at the address given to him in his application for the advance to enter upon and take possession of the whole or any part of the security concerned and to dispose of such security in accordance with the provisions of the Second Schedule.
(2a) The Corporation shall be entitled to exercise the powers conferred upon it in accordance with any condition referred to in subsection (2) as soon as it has posted a registered letter of demand to the borrower in terms of that subsection where in any event referred to in paragraph (c), (d) or (e) of subsection (1) occurs:
Provided that the Corporation shall not dispose of any security so seized until the period of

ten days has elapsed since the posting of the registered letter of demand."

[31] The Supreme Court of the Respondent had the opportunity, in John Nyamukusa v Agricultural Finance Corporation SC 174/94 and Augustine Renusu Chizikikani v Agricultural Finance Corporation SC 123/95, of construing section 40(2) and (2a) of the Act, together with clause 6 of the loan agreements, and came to the inevitable conclusion that ABZ could seize and take possession of the mortgaged property of the defaulting debtor without any recourse to a court of law. Moreover, the Court in Nyamukusa, cited above, held that the seizure of the mortgaged property of the defaulting debtor, as in the present case, was specifically sanctioned by section 16 (7) (d) of the Constitution of the Respondent, already referred to above.

[32] The decision in these two cases was reaffirmed in Agricultural Bank of Zimbabwe v Tembani and Others (SC 39/07), already quoted above. In the light of those three judgments of the Supreme Court of the Respondent, we cannot but agree with learned Agent for the Applicant that the seizure and the sale of the property of the Applicant in the circumstances by the ABZ under the authority of the Act and the Constitution of the Respondent was in contravention of Articles 4(c) and 6(1) of the Treaty.

[33] As the Tribunal had held in the Mike Campbell v The Republic of Zimbabwe case already quoted above, after citing numerous authorities:

"It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation… Article 4 (c) of the Treaty obliges Member States of SADC to respect principle of "human rights, democracy and the rule of law" and to undertake under Article 6 (1) of the Treaty "to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty. Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote those twin fundamental rights".

[34] In Chief Lesapo v North West Agricultural Bank and Another 2001 (1) SA 409 CC, the Constitutional Court of South Africa considered section 38(2) of the North West Agricultural Bank Act No. 14 of 1981 which is identical to the then section 40(2) of the Act which is now section 38(2), as indicated already. The Court held that section 38(2) of the North West Agricultural Bank Act was in contravention of section 34 of the Constitution of the Republic of South Africa which provides as follows:-

"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."

[35] The Court made the following pertinent observations which are applicable to the present case:

(1) When the constitutional status of a law is impugned, the approach to determine its constitutionality is objective, not subjective. The subjective position in which the parties find themselves cannot affect the relevant enquiry as to whether the legislation in question complies or not with human rights standards and the rule of law.

[36] The Tribunal wishes to underline at this stage that in the present case the fact that the Applicant voluntarily signed the loan agreements which contained the standard clause 6, already mentioned above, could have no bearing on the issue as to whether or not section 40(2) of the Act and section 16(7)(d) of the Constitution of the Respondent comply with articles 4(c) and 6(1) of the Treaty, especially in view of the fact that the loan agreements derived their authority from, and are governed by, section 40(2) of the Act itself which in turn is sanctioned by section 16(7) (d) of the Constitution of the Respondent, as indicated already.

(2) "A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalizing the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails"- vide paragraph 11.
(3) "An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has inherent jurisdiction to stay the execution if the interests of justice so require. If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it to be sold by the creditor's agent on the condition stipulated by the creditor to secure payment of a debt denies to the debtor the protection of the judicial process and the supervision exercised by the court through its Rules over the process of execution. Yet this is what section 38 (2) purports to do. It entitles the Bank to seize and sell property in execution whether the debt alleged to be due is disputed or not" (the emphasis is ours)-vide paragraphs 13 and 14.
(4) Section 38 (2) the North West Agricultural Bank "authorizes the Bank, an adversary of the debtor, to decide the outcome of the dispute. The Bank thus becomes a judge in its own cause. The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter vests in the courts of the land. Section 38 (2), however, limits the debtor's rights in section 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank itself enforces its own discretion, thereby usurping the powers and functions of the courts" (the underlining is ours) - vide paragraph 20.

[37] Moreover, in Barkhuizen v Napier 2007 (5) SA 323 (CC), the Constitutional Court of South Africa stated at paragraphs 34 and 52 respectively as follows:-

(1) "Courts have long held that a term in a contract that deprives a party of the right to seek judicial redress is contrary to public policy."

(2) "... the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy."

[38] It is our considered opinion that section 38(2) of the Act and section 16(7)(d) of the Constitution of the Respondent, by preventing access to the courts, also breaches principles

of international law, in the light of the various authorities quoted by us in the Mike Campbell v The Republic of Zimbabwe case, cited already.

4. BREACH OF THE RULES OF NATURAL JUSTICE

[39] As held in the Mike Campbell v The Republic of Zimbabwe case, quoted above, 'the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and embodied in law'.

[40] We can only restate what Lord Diplock for the Board of the Judicial Committee of the Privy Council stated in Attorney-General of the Commonwealth of the Bahamas v Ryan (1980) A.C. 718:-

"It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority."

[41] It is noteworthy that, in the present case, ABZ had acted against the principles of natural justice in that the Applicant was not only denied the right of a hearing before an independent and impartial court or tribunal where he could contest the amount of the debt allegedly owed by him and the value of his farm which he claimed had been sold by ABZ at little more than half of its actual price, but that ABZ also became a judge in its own cause.

[42] It is significant that no argument whatsoever was advanced by learned Agent for the Respondent in respect of the issue as to whether the Applicant has been denied access to the courts and deprived of a fair hearing before his property was seized and sold at auction by ABZ under the Act, in breach of Articles 4(c) and 6(1) of the Treaty. Counsel simply contented himself with observing that he would not at this stage, as he put it, "respond to the legal issues" presented on behalf of the Applicant since he considered that those issues should first be raised in the Supreme Court of the Respondent before they were dealt with by the Tribunal.

[43] The only argument made on behalf of ABZ was in the affidavit of its representative which was to the effect that the seizure and sale of the Applicant's immovable property was analogous to the common law rights of a pledge. The short answer to this argument is, as rightly pointed out by learned Agent for the Applicant, that a pledge applies to a movable thing and not to immovable property which is subject to a mortgage, as is the case with the immoveable property of the Applicant.

[44] We consequently hold that the Applicant has been denied access to the courts and deprived of a fair hearing, in contravention of Articles 4(c) and 6(1) of the Treaty, when his mortgaged property was seized and sold by ABZ under section 38(2) of the Act, and that the sale was illegal and void since both section 38(2) of the Act and section 16(7)(d) of the Constitution of the Respondent, which sanctions that provision of the Act , contravene Articles 4(c) and 6(1) of the Treaty.

5. CONCLUSIONS

[45] For the reasons given, the Tribunal holds and declares that:

a) the Applicant has exhausted all local remedies;
b) the Applicant has been denied access to the courts in Zimbabwe;
c) the Respondent is in breach of its obligations under Articles 4(c) and 6(1) of the Treaty;
d) 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) is illegal and void;
e) 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, remains valid;
f) the Respondent is directed to take all necessary measures, through its agents, 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 or permitting any other person or body to do so, pending the proper determination of the Applicant's debt by an independent and impartial court or tribunal.

6. COSTS

[46] With regard to the issue of costs, we shall first refer to Rule 78 of the Rules.
Rule 78 provides as follows:

"1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party."

[47] In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

[48] The Tribunal has already construed Rule 78 in a broad and purposive manner in the case of Nixon Chirinda and Others v Mike Campbell (PVT) Limited and Others and the Republic of Zimbabwe ( SADC (T) CASE No. 09/2008) and held that there were exceptional circumstances justifying the grant of costs in the interests of justice against a party that brought before the Tribunal a patently frivolous and vexatious application.

[49] The Tribunal also made a costs order in Luke Munyandu Tembani v The Republic of Zimbabwe (SADC (T) CASE No.07/2008 against the Respondent when the latter abandoned a preliminary objection on the day of hearing. The Tribunal did not appreciate the fact that the withdrawal of the objection came at the last minute and that no prior notice of the withdrawal was given to the Tribunal or to the Applicant. The Tribunal came to the conclusion that the objection taken by the Respondent was in the circumstances a frivolous and vexatious one.

[50] We consider that there are also exceptional circumstances, on the particular facts of the present case, justifying the award of costs in favour of the Applicant in the interests of justice. In this regard, we have taken into account the fact that the Applicant is an old man of 71 years who has had to bear an intolerable burden, financial, moral and otherwise, for some nine years in fighting against the power and resources of the Respondent, which had successively and systematically used all kinds of delaying tactics, procedural objections of all kinds and even tried at the eleventh hour, against all evidence to the contrary, to contend before us that the Applicant had not exhausted domestic remedies through the failure of his

legal advisers to raise certain fundamental issues relating to the case before the High Court and the Supreme Court of the Respondent, as indicated already, when in fact they had done so.

[51] Moreover, the Respondent's learned Agent chose not to address those issues before us on the ground that, in his view, it would be better to raise them first before the Supreme Court of the Respondent. We consider that the stand taken by Counsel both pre-empted and pre-judged our decision on the issue
of the exhaustion of local remedies which, it must be stressed again, he had raised not in the defence of the Respondent but in a supplementary affidavit which he sought belatedly to produce and which we refused to admit, as indicated already.

[52] We take the view that, if an objective observer were present at the proceedings of the Tribunal, he or she would have come to the irresistible conclusion in the circumstances that no counter-arguments were offered on behalf of the Respondent since the Respondent knew or ought to have known that it stood no prospect of success; that the Respondent persisted all the same to pursue the matter regardless, instead of coming to terms with the Applicant who has always been willing to compromise and come to an amicable settlement with the Respondent, especially in the light of the formidable authorities produced before the Tribunal on behalf of the Applicant, including the Mike Campbell v The Republic of Zimbabwe case, quoted already, which had significantly decided the very same legal issues against the Respondent and in which learned Agent for the Respondent had appeared.

[53] For all the reasons given, we consequently make a costs order against the Respondent under Rule 78(2) of the Rules. The costs are to be determined by the Registrar in case of disagreement between the parties.
Delivered in open court this 14th day of August 2009, at Windhoek in the Republic of Namibia.

H. E. Justice Ariranga Govindasamy Pillay
PRESIDENT

H. E. Justice Isaac Jamu Mtambo, SC
MEMBER

H. E. Justice Dr. Luis Antonio Mondlane
MEMBER

H. E. Justice Dr. Rigoberto Kambovo
MEMBER

H. E. Dr. Onkemetse B. Tshosa
MEMBER