

**IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)
TRIBUNAL, WINDHOEK, NAMIBIA**

CASE NO. SADC (T) 05/2008

IN THE MATTER BETWEEN

**BARRY L. T. GONDO
KERINA GWESHE
NYARADZAI KATSANDE
PETER CHIRINDA
PHANUEL MAPINGURE
RUTH MANIKA
SOPHIA MATASVA
TRUST SHUMBA
MERCY MAGUNJE**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT
6TH APPLICANT
7TH APPLICANT
8TH APPLICANT
9TH APPLICANT**

AND

THE REPUBLIC OF ZIMBABWE

RESPONDENT

CORAM

H.E. JUSTICE A.G. PILLAY

President

H.E. JUSTICE I.J. MTAMBO, SC

Member

H.E. JUSTICE DR. L.A. MONDLANE

Member

**J.J. Gauntlett, SC
Assisted by F.B. Pelser**

Applicants' Agent

Hon. Justice M.C.C. Mkandawire

Registrar

D. Shivangulula

Court Clerk

JUDGMENT

Delivered by H.E. Justice Ariranga Govindasamy Pillay, President

The applicants are victims of violence inflicted upon them by the National Police and/or the National Army of the Republic of Zimbabwe (the Respondent). Consequent upon the acts of violence, the Applicants instituted proceedings against the Government of Zimbabwe in various Courts in Zimbabwe. They were successful and judgments were entered as follows -

<u>Applicant's Name</u>	<u>Amount Awarded</u>	<u>Date of Judgment</u>
1. Barry L. T. Gondo	Z\$ 5, 650, 000.00	May 17, 2006
2. Kerina Gweshe	Z\$ 810, 000.00	March 01, 2006
3. Nyaradzai Katsande	Z\$ 133, 144.00	February 20, 2003
4. Peter Chirinda	Z\$ 3, 264, 000.00	August 17, 2003
5. Phaniel Mapingure	Z\$ 950, 000.00	November 16, 2005
6. Ruth Manika	Z\$ 8, 552.50	July 01, 2005
7. Sophia Matasva	Z\$ 4, 850, 000.00	March 29, 2006
8. Trust Shumba	Z\$ 1, 085, 000.00	October 04, 2004
9. Mercy Magunje	Z\$ 9, 030.00	January 2007

The Courts also made orders for interest in respect of each award and gave costs to the Applicants. The judgment debts have not been paid. It is upon the non-compliance with the judgments or orders of the Courts that this application has been brought.

The Applicants' case is that the Respondent has violated Articles 4 (c) and 6 (1) of the Treaty of the Southern African Development Community, SADC, (the Treaty) by:

- (a) failing to ensure that effective remedies are available to them, and thus failing to act in accordance with the principles of human rights, and

- (b) implementing measures likely to jeopardize the principles of human rights provided for in the Treaty.

Article 4 (c) provides:

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

Article 6 (1) states as follows:

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

In the circumstances, the Applicants seek, the following reliefs:

- (a) a declaration that the Respondent is in breach of the Treaty by failing to comply with Orders of the High Court of that country;
- (b) a declaration that section 5 (2) of the State Liability Act [Cap 8:14] of the Respondent is in breach of the Treaty in so far as it provides that property of the State may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;
- (c) such further and/or alternative reliefs as the Tribunal may deem fit.

They also claim costs of the proceedings.

We note at the outset that while the application is indeed chiefly about the Respondent's non-compliance with the orders or judgments of its own Courts of law, it also raises the issue whether section 5 (2) of the State Liability Act of the Respondent, is compatible with the obligations of the Respondent under the Treaty in so far as it immunizes the Respondent from enforcement of judgment debts

and, ultimately, the observance of the rule of law. Section 5 (2), in the relevant part, reads:

“Subject to this section, no execution, or attachment, or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings... against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or petitioner, as the case may be.”

Such are the facts before us to which we must now apply the law. We must also mention here that the Respondent has left default and not opposed the application on the merits.

As held by this Tribunal in **Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe (SADC (T) Case No 2 of 2007**, Article 4 (c) of the Treaty obliges Member States of SADC to respect principles of *“human rights, democracy and the rule of law”* and to undertake in terms of Article 6 (1) of the Treaty *“to 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 the Treaty”*. Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote human rights, democracy and the rule of law.

It is settled law that the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial court or tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equality before the law and the right to equal protection of the law.

Article 2 (3) of the International Covenant on Civil and Political Rights (the Covenant), which the Respondent has ratified, states as follows –

“Each State Party to the present Covenant undertakes:

- (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) to ensure that the competent authorities shall enforce such remedies when granted (the underlining is ours)”.*

Article 5 (1) of the Covenant states that the provisions of Article 2 (3) above may not be impaired or limited through governmental acts, legislative or otherwise. It provides as follows –

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.

Article 2 (3) of the Covenant, when read in conjunction with Article 5, thus forbids, in our view, any legislation or conduct which may render remedies ineffective or may obstruct the implementation of judicial remedies or may provide State immunity from enforcement of Court orders.

Furthermore, Articles 27 and 60 of the Vienna Declaration and Programme of Action provide as follows –

“Every State should provide an effective framework of remedies to redress

human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. . . .” (the emphasis is ours).

Article 13 of the European Convention on Human Rights provides as follows -

“Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

In **Ramirez, Sanchez, v. France [GC], No. 59450/00, ECHR 2006-IX – (4.7.06)**, the European Court of Human Rights held that the absence of a remedy constitutes a violation of the Convention. Where a remedy exists, it must be both effective in practice as well as in law.

In the **Campbell** case, cited above, reference was made by this Tribunal to the pronouncement of the Inter-American Court of Human Rights on Article 27 (2) of the American Convention of Human Rights which requires American States to respect effective remedies before Courts of law or competent tribunals as follows -

“the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of

the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective” (underlining is ours) – vide paragraph 41 of the Advisory Opinion OC-9-87 of October, 1987, Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights).

The African Charter on Human and Peoples’ Rights (the Charter) which the Respondent has ratified, for its part, provides in Article 7(1) (a) as follows –

*“Every individual shall have the right to have his case heard. This comprises:
(a) the right to an appeal to competent national organs against acts of violating his fundamental rights”*

In Bissangou v Republic of (2006) AHRLR 80 (ACHPR 2006), the African Commission in dealing with the State’s refusal to pay a judgment debt stated at paragraphs 75 and 77 as follows –

“. . . Article 7 includes the right to the execution of judgment. It would therefore be inconceivable for this article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings... as a result, the execution of a final judgment passed by a tribunal or legal court should be considered as an integral part of ‘the right to be heard which is protected in Article 7.

The African Commission remains conscious of the fact that without a system of effective execution, other forms of private justice can spring up and have negative consequences on the confidence and credibility of the public in the justice system.”

Article 26 of the Charter provides as follows: -

“States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and

improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

In **Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) Zimbabwe 294/04**, the African Commission held that Zimbabwe had violated Articles 26 and stated in paragraphs 118 to 120 as follows: -

“It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law of the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.

It is a vital requirement in a state governed by law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.

Thus, by refusing to comply with the High Court orders, staying the deportation of Mr. Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of Article 26 of the African Charter (the emphasis is ours).

Finally, reference may be made to a decision of one of the Courts in the SADC region, the Constitutional Court of South Africa, which has underlined the importance of States complying with Court orders. In **Nyathi v MEC for**

Department of Health, Gauteng and Another Case CCT 19/07 (2008) ZACC 8 the Constitutional Court stated at paragraph 80 as follows -

"...In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That... means at the very least that there should be strict compliance with court orders."

We hold, therefore, in the light of the authorities quoted above, that the Respondent is in breach of Articles 4 (c) and 6 (1) of the Treaty in that it has acted in contravention of various fundamental human rights, namely the right to an effective remedy, the right to have access to an independent and impartial Court or tribunal and the right to a fair hearing.

We now turn to examine the effect of section 5 (2) of the State Liability Act (Chapter 8:14) of the Respondent which has already been reproduced.

Section 5(2) is similar to section 3 of the State Liability Act 20 of 1957 of South Africa which was declared unconstitutional by the Constitutional Court in **Nyathi**, already cited above. The Court held that section 3 placed the State above the law since it did not oblige the State to comply with court orders. The Court stated, inter alia, that section 3 infringed –

- (a) the right to equality since it disallows a judgment creditor who obtains judgment against the State the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys;
- (b) the right of access to Courts since *"deliberate non-compliance with, or disobedience of, a court order by the State detracts from the dignity, accessibility and effectiveness of the courts"*. Indeed, the right of access to Courts obliges the State to ensure the enforceability of Court orders – vide paragraphs 40 and 43.

The Court stated at paragraph 18 that the State liability Act *“is a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that “the king can do no wrong”. That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions”* (the emphasis is ours).

The Constitutional Court also considered at paragraph 50 that these violations constituted unreasonable and unjustifiable limitations to the human rights involved and that *“the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be...”* The Court then explained at paragraphs 51 and 52 that *“section 3 serves to protect the state interests by disallowing attachment as it has the potential to disrupt service delivery and interfere with the state’s accounting procedures. The Act does purport to make the state liable for judgment debts that accrue against it. However, the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved.”*

The Court went on to remark at paragraph 79 on the practical effect of section 3 as follows –

“The practical effect of section 3 is that the state cannot be forced to honour court orders as there is no manner in which compliance can be enforced. In the result, the ordinary citizen has no effective remedy available in a situation where the state and its officials fail to comply with a court order.”

The Court tellingly rejected at paragraphs 75 and 79 an argument to the effect that since a judgment creditor could seek a *mandamus* or, for that matter, initiate contempt of court proceedings, the restriction or execution against state assets was justified. The Court stated that such an argument ignored the harsh realities of litigation with its risks and expenses.

We would also refer to Article 26 of the Covenant which states as follows –

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Human Rights Committee has explained the provisions of Article 26 in its **General Comment No. 18 on Non-Discrimination:1989/11/10, C.C.P.R.** at paragraphs 7 and 12 as follows:

“The Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”

“. . . Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other

words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for the Covenant"
(the underlining is ours).

It follows, therefore, that the list of grounds of discrimination in Article 26 is non-exhaustive and that section 5(2) of the State Liability Act of the Respondent is discriminatory in its content under Article 26 of the Covenant since it treats judgment creditors unequally in that a judgment creditor who obtains judgment against the State is not given the same protection and benefit that a judgment creditor who obtains judgment against a private litigant is accorded.

Article 3(1) of the Charter states as follows –

"Every individual shall be equal before the law."

In the Zimbabwe Lawyers' case, cited above, the African Commission has interpreted this article as follows at paragraph 96 –

"The most fundamental meaning of equality before the law under Article 3 (1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws."

We consider that, although the African Commission has restricted its meaning of the right to equality before the law to the enforcement of the law as such, if the content of the law itself does not allow the law to be enforced equally, as in the case of section 5(2) of the State Liability Act of the Respondent, then Article 3 (1) would be infringed, as the Human Rights Committee has demonstrated in the General Comment No. 18, quoted earlier.

We consider that section 5 (2) of the State Liability Act of the Respondent is also in contravention of Article 3 (2) of the African Charter which lays down that *“every individual shall be entitled to equal protection of the law.”*

The African Commission has interpreted Article 3 (2) in the **Zimbabwe Lawyers'** case, already quoted, at paragraphs 99 – 101 as follows -

“Equal protection of the law under Article 3 (2) on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law.
*In its decision in **Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development [in Africa]//Republic of Zimbabwe (293/04)** this Commission relied on the Supreme Court decision in **Brown v Board of Education of Topeka**, in which Chief Justice Earl Warren of the United States of America argued that ‘equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness’.*

In order for a party therefore to establish a successful claim under Article 3 (2) of the Charter, it should show that the Respondent State had not given the

Complainant the same treatment it accorded to the others. Or that the Respondent State had accorded favourable treatment to others in the same position as the Complainant."

We hold, therefore, that, in the light of all the authorities already quoted by us, section 5(2) of the State Liability Act of the Respondent is not only in breach of the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing but also in contravention of the right to equality before the law and the right to equal protection of the law, and, therefore, is incompatible with the Respondent's obligations under Articles 4 (c) and 6 (1) of the Treaty.

We can only reiterate at this stage what the Inter-American Court of Human Rights stated at paragraph 35 of its Advisory Opinion given in 1987, quoted in Campbell, already cited, namely that the rule of law, representative democracy and personal liberty are essential for the protection of human rights and that *"in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."*

In this regard, we draw the attention of any Member State of SADC to the adverse effect which its existing State immunity or State liability legislation has on the principles of human rights, democracy and the rule of law in so far as such legislation provides that State property cannot be the subject-matter of execution, attachment or process in satisfaction of a judgment debt.

We turn now to the issue of the damages awarded to the Applicants which, according to learned Counsel for the Applicants, should be revalorised, given that the currency of the Respondent has suffered excessive depreciation over the years.

In Eden and Another v Pienaar 2000 (1) SA 158 (WLD), the Court explained the process of revalorisation, at paragraph 159B as follows -

"This process by which the law seeks to reflect and (counteract) the influence of inflation on the amount of a claim is known as 'revalorisation'. Its effect is that the depreciation of currency does not redound to the benefit of the judgment debtor, and to ensure that judgment creditor is protected against the ravages of inflation by receiving the actual value of the amount awarded in judgment, as on the day on which he is paid – no less and certainly no more. Although the face value of the debt increases once revalorisation is applied, its real value does not: the purchasing power of the currency in which it is expressed remains constant. Accordingly, revalorisation has nothing to do with interest, nor does it increase the real value of a debt."

In this connection, reference may also be usefully made to Article 12(h) of the SADC Charter of Fundamental Social Rights where the process of revalorisation is also mentioned and which states as follows -

"Workers have the right to services, that provide for the prevention, recognition, detection and compensation work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation-adjusted compensation" (the underlining is ours).

The amount of damages awarded to the Applicants must, in our opinion, be revalorised, in the interests of justice, in order to ensure that the real or actual value of the compensation awarded in the various Court orders is received by each Applicant on the date of full and final payment, after taking into account the adverse effects of runaway inflation. In other words, the damages awarded to the Applicants must be inflation-adjusted.

We therefore hold and declare that –

- (a) section 5 (2) of the State Liability Act [Chapter 8:14] of the Respondent is in contravention of the fundamental rights to have an effective remedy; to have access to the Courts; to be entitled to a fair hearing, to equality before the law and to equal protection of the law; in so far as it provides that property of the State may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;
- (b) the Respondent has acted in contravention of Article 4 (c) and 6 (1) of the Treaty by:
 - (i) failing to comply with the orders of the High Court of Zimbabwe regarding the Applicants;
 - (ii) persisting in its non-compliance with the Court orders referred to in sub paragraph (i) above.

We further order the Respondent's agents to meet with the agents of the Applicants, under the supervision of the Registrar, to agree to a mutually satisfactory adjustment to the damages awarded in the Court orders referred to in paragraph (b)(i) above.

In the event of non-compliance with the order made above by the Tribunal, the Applicants may revert to this Tribunal on the same papers, appropriately amplified if necessary, in terms of Article 32 (4) of the Protocol on Tribunal, on written notice to the Respondent's agents, for further relief regarding enforcement.

With regard to the issue of costs, we shall first refer to Rule 78 of the Rules of Procedure of SADC Tribunal (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.*

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.

We consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the Applicants in the interests of justice. We need only to highlight in this regard the fact that the Respondent persistently flouted the orders of its own High Court and that the Applicants have not yet been paid the compensation to which they are entitled since the court orders were made in their favour in 2006 (in respect of the first and second Applicants), 2003 (in respect of the third and fourth Applicants), 2005 (in respect of the fifth and sixth Applicants), 2006 (in respect of the seventh Applicant), 2004 (in respect of the eighth Applicant) and 2007 (in respect of the ninth Applicant). We accordingly award costs to the Applicants, under Rule 78(2) of the Rules. The costs are to be taxed by the Registrar.

Delivered in open Court this 9th day of December 2010, at Windhoek in the Republic of Namibia.

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H.E. Justice Ariranga Govindasamy Pillay
PRESIDENT

H. E. Justice Isaac Jamu Mtambo, SC
MEMBER

H.E. Justice Dr Luis Antonio Mondlane
MEMBER