IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL
(HELD AT WINDHOEK) Case No. SADC (T) /2011

WILLIAM MICHAEL CAMPBELL First applicant

MIKE CAMPBELL (PVT) LTD Second applicant

LUKE MUNYANDU TEMBANI Third applicant

and

SUMMIT OF HEADS OF STATE OR GOVERNMENT OF SADC First respondent

COUNCIL OF MINISTERS OF SADC Second respondent

REPUBLIC OF ZIMBABWE Third respondent

FOUNDING AFFIDAVIT

I, the undersigned

WILLIAM MICHAEL CAMPBELL

do hereby make oath and state:

A. Introduction

1. I am a citizen of Zimbabwe, previously resident at Mount Carmel Farm, Chegutu, Zimbabwe, and now in Harare, and a director of the second applicant (and duly authorised to act herein on its behalf). I and the second applicant were applicants (with some 75 others) in the proceedings before this

Tribunal culminating in its main award of 28 November 2008 against the third respondent. We have also been applicants in a prior proceeding for interim injunctive relief against the third respondent pursuant to Article 16(1) of the Protocol on the Tribunal (in June 2008), and two subsequent proceedings resulting in orders, including punitive costs orders (on 5 June 2009 and 16 July 2010), against the third respondent by the Tribunal in terms of Article 32(2), (4) and (5) of the Protocol on the Tribunal. As these awards are in the possession of all the parties to the present application, and in order to avoid burdening the present record and adding to its cost, I do not attach copies.

2. I refer to the confirmatory affidavit of the third applicant, filed herewith. Like me, the third applicant has successfully obtained a final award from this Tribunal, but has equally faced a failure by the third respondent and its agents to honour the award. He would be entitled to procure, as I and others have done, a further award by this Tribunal in terms of Article 32 of the Protocol on the Tribunal referring a failure by Zimbabwe as a member State to the Summit for "appropriate action". As appears below, the third applicant, like me and the other parties to the main "Campbell award", is now deprived of full access to the Tribunal in the circumstances I shall describe.

3. In the urgent circumstances in which I am forced to bring this application, it has not been possible to list as co-applicants the further 75 persons and entities who joined with the second applicant and me in the original main Campbell proceedings (and in certain instances, the Article 32 enforcement proceedings too). Many have been forced from their farms and are scattered

around Zimbabwe in circumstances which make communication very difficult. On a legal basis which I am advised will be elucidated in argument, I bring this application also on their behalf and also on behalf of the employees, former employees and their families, who have lived and worked with us, in some cases for many years. With us they have suffered evictions, destruction of their homes and possessions, assaults, torture, and other gross human right violations. In the circumstances to which I have referred, it is not possible either to join hundreds of thousands of such affected farmworkers, or to obtain separate affidavits from them. They live in daily fear of further attacks and dispossession, and of reprisals. Many now live hand-to-mouth, scattered near relief centres and across the country. I accordingly bring this application not only on their behalf but given the issues raised below and their impact on the entire region also in the public interest.

4. The facts to which I depose are within my own knowledge; they are true and correct.

5. The third applicant is Mr Luke Munyandu Tembani (who was himself a successful applicant before the Tribunal in Case No. SADC (T) 07/2008 against the first respondent, also relating to the deprivation of his title to land in Zimbabwe).

6. The first respondent is the Summit of Heads of State or Government ("the Summit"), established as an institution of SADC in terms of Article 9(1)(a) of the SADC Treaty ("the Treaty"), of care of the Secretariat of SADC, pursuant

to the provisions of Article 14(1)(e) of the Treaty, of SADC Headquarters, Plot No. 54385, Gaborone, Botswana.

7. The second respondent is the Council of Ministers of SADC established by Article 9(1)(c) read with Article 11 of the Treaty, of care of the Secretariat of SADC, pursuant to the provisions of Article 14(1)(e) of the Treaty, of SADC Headquarters, Plot No. 54385, Gaborone, Botswana.

8. The third respondent is the Republic of Zimbabwe, of care of the High Commissioner for Zimbabwe, Windhoek, and the Attorney-General of Zimbabwe, Harare, represented herein by its government. Its status both as a member of SADC under the Treaty and as a party bound by the jurisdiction of this Tribunal has been established in the prior awards aforesaid. In addition, the jurisdiction of the Tribunal in respect of the third respondent has been formally conceded both by the statements of its legal representatives before the Tribunal (including the Deputy Attorney-General (Civil) of Zimbabwe) and by admissions in the affidavits filed on its behalf. It may moreover be noted that, in separate applications in both Zimbabwe and South Africa for the registration of the aforesaid awards pursuant to Article 32 of the Protocol on the Tribunal the High Courts of both countries held that the Tribunal had such jurisdiction (in the case of the Zimbabwe proceedings expressly rejecting the third respondent's contrary contentions).

B. <u>This application in outline</u>

9. On 17 August 2010 a decision ("the decision") was made by the Summit purporting to suspend the Tribunal's jurisdiction to adjudicate new cases, to allow the appointment of no less than four of the ten members of the Tribunal (all four of whom had been party to adverse rulings against the third respondent) to expire without renewal or replacement, and to subject the Tribunal to "review". I attach a copy, marked "A". For the reasons and on the grounds which follow, and I am advised will be more fully developed in argument, the decision is unauthorised by and in violation of the Treaty, the Protocol on the Tribunal, its Rules and international law.

10. This is an application for an order by the Tribunal in terms of Article 16(1) read with Article 32 of the Treaty, and Articles 14, 15 and 18 (as amended) of the Protocol on the Tribunal, declaring that:

(a) the Tribunal continues to function in all respects as established by Article 16 of the Treaty;

(b) the decision of 17 August 2010 does not in law have the effect of suspending its operations and functioning;

(c) the Summit is bound by the provisions of Articles 6(1) and (6) read with Article 9(1)(g) read with Article 4(c) and (e) Article 16(1), Article 32, Article 36 of the Treaty to support and facilitate the functioning of the Tribunal;

(d) the Council is bound by Articles 3, 4 and 6 of the Protocol on the Tribunal to ensure that the Tribunal consist of not less than ten members and to designate five of such members as regular members,

failing which it is declared that the Tribunal continues to be constituted as it was as of 16 August 2010; and

(e) Justices Pillay, Kambovo, Chomba and Tshosa continue as members of the Tribunal.

C. Background

11. The applicants and the further 75 applicants to the original Campbell proceedings have been deprived of their title to land by the third respondent in breach, the Tribunal has found, of its Treaty obligations in terms of Articles 4 and 6 of the Treaty. The third respondent has continued to repudiate and otherwise defy the aforesaid awards by the Tribunal, as fully documented in the prior proceedings referred to above and found as facts by the Tribunal itself in its awards. Since the last of these, on 16 July 2010, the third respondent, through its government and its agents, has continued in its course of systematic disregard for the human rights and international and other law obligations protected under the Treaty in relation to the applicants specifically and to untold numbers of other Zimbabwean citizens and residents. Despite the explicit terms of the awards of 28 November 2008, 6 June 2009 and 16 July 2010 (and in the case of Mr Tembani on 14 August 2009) prosecutions have continued of the applicants for the supposed statutory offence (pursuant to the purported constitutional amendment, to the protection of property rights under the Constitution of Zimbabwe, 1980) created by the parliament of Zimbabwe of continuing to live on their farms and to work their lands; several have been assaulted, otherwise harassed and

threatened with death; nearly all the farmers listed in the gazette with which the award of 28 November 2008 have been concerned have been driven off their farms by force. In my own case both my own home on Mount Carmel was burnt to the ground as was that of my daughter and son in law (with their domestic animals inside). As recently as 21 March 2011, my son, Bruce, has continued to occupy a house in the vicinity, without being permitted to farm, has been surrounded by invaders at the instigation of a local political leader now set on taking the house for herself.

12. Like my son, a number of the original applicants, their workers and families continue at serious risk to their lives and what remains of their property. The urgency in these circumstances of an early hearing by the Tribunal and a prompt award is self-evident. We are now deprived of our incomes and our capital assets and in most instances dependent on benefactors. Thus our need to be able to proceed urgently for the assessment of compensation by the Tribunal in respect of our losses is acute.

13. In this regard a number of the original applicants have pending claims for compensation instituted before the Tribunal under Case No. 02/2010 while others (including myself) are still in the process of assembling the necessary proof of loss. As regards the former, again (so as not to burden the record) I do not attach such application, but beg leave to refer to it as if incorporated herein.

D. <u>The invalidity of the decision</u>

14. The effect of the decision – indeed, I shall show, its purpose – is to interfere with and limit the proper working of the Tribunal as authorised and indeed required by the Treaty, the Protocol on the Tribunal and its Rules.

(1) Ultra vires

15. This is in the first place evidenced by the purported directive that the Tribunal might only continue during the period of the "review" to deal with pending matters. There is (I am advised will be more fully demonstrated in argument) no legal authority in either the Summit or the Council to achieve an effective suspension of the Tribunal's capacity to address new matters. Significantly no such authority is reflected in the decision itself.

16. In the second place, it is wholly unclear from the terms of the decision reflected in annexure A what purports to be a "pending matter". While I contend that claims for compensation, such as my own, not already lodged by 17 August 2010 should so qualify by virtue of the fact that the main and Article 32 of the Protocol on the Tribunal proceedings had been instituted before then, the decision itself is wholly vague and uncertain in its terms in this respect. I am advised that the rule of law, as protected by Article 4(c) of the Treaty, does not permit vague or uncertain or arbitrary distinctions.

17. In the third place, the decision is not only unauthorised by the Treaty, but in direct conflict with several of its provisions, the Protocol on the Tribunal and

its Rules and international law generally. Article 2 read with Articles 14 and 15(1) of the Protocol on the Tribunal state, in peremptory terms, that the Tribunal *shall* function "in accordance with the provisions of the Treaty and this Protocol". Article 16(1) of the Treaty itself states, again in peremptory terms, that the Tribunal "*shall* be constituted to ensure adherence to and the proper interpretation of the Treaty . . . and subsidiary instruments and to adjudicate upon *such disputes as may be referred to it.*" (my emphasis). Similarly Article 32 of the Treaty states, again in imperative language that "*any* dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, *shall* be referred to the Tribunal" (my emphasis). These cornerstones of the Tribunal's functioning are directly undermined by the decision.

18. The role of the Summit itself is clear. In terms of Article 10(1) of the Treaty it is "the supreme *policy-making* Institution of SADC" (my emphasis). In terms of Article 10(2) it is "responsible for the overall *policy* direction and control of the functions of SADC" (my emphasis). Concomitantly, the Council has the responsibility to "oversee and advise" in respect of the general matters specified in Article 11(2) of the Treaty. Neither institution has the power to determine the functioning of the Tribunal, and is as little able to confine its activities to new matters, or refrain from making appointments essential to its functioning, as it could make any such determination in relation to any of the other institutions listed in Article 9 of the Treaty. In the case of the Tribunal, the case is an *a fortiori* one.

19. Viewed from a related perspective, the division of powers between the Tribunal (as the adjudicative arm of SADC), with specifically "final and binding decision-making powers" (Article 16(5) of the Treaty) cannot be interfered with or traduced.

20. Fourthly, the Summit is bound by the provisions of Articles 6(1) and (6) read with Article 9(1)(g) read with Article 4(c) and (e) Article 16(1), Article 32, Article 36 of the Treaty to support and facilitate the functioning of the Tribunal; and the Council is bound by Articles 3, 4 and 6 of the Protocol on the Tribunal to ensure that the Tribunal consist of not less than ten members and to designate five of such members as regular members. The decision reflects a deliberate failure to carry out these obligations. The effect of the decision was to reduce the number of appointed members of the Tribunal by four (given the third respondent's belated decision to withdraw its nominee) and, I shall show, by failing to ensure that the Tribunal exists in the plenary, stipulated, number of ten – given the loss of these four members, Zimbabwe's withdrawal of its nominee, and the recent resignation as a judge of Justice Mondlane – only four members now remain as members of the Tribunal. It is now impossible for a full bench to sit (as contemplated by Article 3(3) and (4) of the Protocol on the Tribunal), whenever the Tribunal itself decides that it should (Article 3(3)). Moreover, there is no margin of safety: the retirement, resignation, ill-health or other unavailability of just two more members will prevent the Tribunal from even convening.

21. Fifthly, the powers of the President of the Tribunal himself to determine listing before the Tribunal and its sessions (including the determination of what "business [is to be] before the Tribunal") is contraverted, in conflict of the provisions of Rules 20 and 22.

22. For these and related reasons, which I am advised are more properly a matter for legal argument, the purported decision disclosed on 17 August 2010 is *ultra vires*, unauthorised by law, in conflict with the Treaty, the Protocol on the Treaty and the Rules, and is in law invalid.

23. I should add that I do not accept that a "review" of the Tribunal's role and function is itself authorised in law where its ambit and purpose is palpably to undermine the final and binding nature of Tribunal decisions (as stated by Article 16(5) of the Treaty itself). Given the scale and gravity, however, of the *ultra vires* aspects already specified, I am advised that it is not necessary to state more in this regard at this stage.

(2) Improper purpose

24. The decision is void *ab initio* for a separate reason. This is that no proper purpose attended the effective suspension of the Tribunal's jurisdiction in relation to non-pending matters. If either the Summit or Council wished to review the functioning of the Tribunal, with a view to this being altered in accordance with the Treaty and international law generally, there was no good purpose in the meanwhile to interfere with its daily functioning.

Consequentially by achieving the latter the Summit has acted with an improper purpose.

(3) Bad faith

25. The decision is not only improper, by coupling a *pro tanto* suspension with the purported "review". It is also in bad faith.

26. As already described, the third respondent has waged a campaign of open defiance against the Tribunal's awards. The result has been not one, but two, referrals by the Tribunal to the Summit in terms of Article 32(5) of the Protocol on the Tribunal. Instead of responding promptly to these direct referrals by SADC's highest adjudicative body, and treating its decisions as indeed "final and binding" (the wording of Article 16(5) of the Treaty) the Summit has procrastinated and now (in its decision) prevaricated. Although the matter was on its mid-2009 agenda at Kinshasa, the Summit postponed it. No special Summit was thereafter convened to deal with it in 2009. Nor was any special Summit convened in 2010. Instead the Windhoek Summit of July 2010 contrived the decision precisely to avoid acting (in terms of its Treaty and wider international law obligations) by considering measures including Article 33 of the Treaty. Its conduct in this regard has been inconsistent; it is strikingly at odds with its swift action against Madagascar as a member State following the outcome of an election there as dubious as those in Zimbabwe in 2002 and 2008.

27. The only proceedings before the Tribunal which could have prompted the decision to "review", coupled with *pro tanto* suspension of the Tribunal's jurisdiction are those by the applicants. There has been no professional or academic call of which I or my legal advisers are aware for this measure. The only public assaults presaging the decision have been by: the Minister of Lands of Zimbabwe, Mr Didimus Mutasa MP following the main award (stating that the Tribunal was "day-dreaming"); a similar public statement by the President of Zimbabwe, Mr Robert Mugabe; a supportive attack by the Deputy Chief Justice of Zimbabwe, Justice Malaba, at a ceremony to open the Court in January 2009; and the Minister of Justice of Zimbabwe, Mr Patrick Chinamasa in a purported legal opinion issues under his name and placed by way of advertisement in *The Herald* newspaper, Harare (a government-controlled organ) in early 2009. In short, the third respondent procured the making of the decision by the Summit as a stratagem to win time, to subvert the Tribunal's award and to prevent new proceedings against it.

28. If further confirmation of the arrant bad faith entailed in the decision was required, it is supplied by the fact that the decision includes a determination not to renew the periods of office of four of the five members of the Tribunal who had delivered a series of adverse rulings against the third respondent.

29. As noted, the decision was only disclosed some time after it was taken. I challenge the Summit and the Council, in the interests of truth and transparency, to disclose their reasons for not transparently publishing the decision earlier. Worse, as noted more fully below, in dealing with procedural

irregularities related to the decision, the Summit gave no prior notice or an opportunity to be heard to affected parties such as the applicants. (This was despite the fact that the applicants have repeatedly – through the Secretariat – sought an opportunity to address the Summit as regards the referral, twice, by the Tribunal in terms of Article 32 of the Protocol on the Tribunal (as aforesaid), with a view *inter alia* to the implementation of appropriate measures by the Summit against the third respondent in terms of Article 33 of the Treaty.)

30. In all the circumstances, the device of not merely initiating a "review" of an international-law Tribunal whose decisions are explicitly final and binding, but coupling this with the interim curtailing of its jurisdiction is in bad faith. The rule of law itself has thereby been suspended in the region as regards the reach of international law, both explicitly in terms of Article 4(c) of the Treaty and international law. In effect, by cynical contrivance the third respondent has compounded the infringement of the rule of law to which the applicants were subjected (the Tribunal has already found) in Zimbabwe by a second infringement now in international law itself.

(4) Arbitrary and irrational

31. By parity of reasoning, the two-pronged decision to prevent the Tribunal receiving new cases while the reviewing process is under way is arbitrary and not rationally related to a true reappraisal in good faith of the functioning of the Tribunal.

32. Moreover, Article 6(4) of the Treaty has itself been traduced by the decision: the mandatory obligation on member States to "take all steps necessary to ensure the uniform application of this Treaty" has been subverted. There is no basis in law to differentiate, as the Summit has purported to do, in the treatment of old (or "pending") and new cases.

(5) Access to justice

33. The decision is also in violation of the Treaty's guarantee (through Article 4(e)) of the peaceful settlement of disputes. It is to be emphasised that the Tribunal has been disabled from determining disputes between

(a) member States (in breach of Article 15(1) of the Protocol on the Tribunal);

(b) natural or legal persons and member States (also in breach of Article 15(1) of the Protocol on the Tribunal);

(c) member States and the Community (in breach of Article 17(1) of the Protocol on the Tribunal);

(d) natural or legal persons and the Community (in breach of Article 18(1) of the Protocol on the Tribunal);

(e) the community and its staff (in breach of Article 15(1) of the Protocol on the Tribunal).

34. The seriousness of the situation cannot be overemphasised. At any time a peace-threatening conflict may emerge between member States. Gross

violations of individuals' rights may emerge (and this in circumstances where the domestic law and domestic courts afford, as exemplified by the experience of the applicants, no adequate access to justice). The Community and a member State may be deadlocked in conflict. Employees may find themselves deprived of basic rights related to their employment by the Community, with no other body of competent jurisdiction. In all these respects, access to adjudication – itself a fundamental facet of the rule of law – has been violated by the decision.

35. There is an inroad on access to justice in a further respect. This is that parties face the prospect that they will not have access to a full bench composed of five members of the Tribunal sit in their matters, as contemplated by Article 3(3) of the Protocol on the Tribunal particularly where this is indicated by the complexity or importance of matters, given the fact that the membership of the Tribunal has been reduced from ten to five members, despite the provisions of the Protocol on the Tribunal. Concomitantly, the President of the Tribunal has been deprived of his independent entitlement not only to empanel a full panel of *his* selection as Article 3(3) contemplates, but also of his express responsibility "for selecting the members who shall constitute the Tribunal for the purpose of hearing any case brought before it" (Article 3(4) of the Protocol on the Tribunal).

36. This concern operates not merely at the level of high principle, but also as a matter of the most basic practicality. The members of the Tribunal are all part-time members: they all discharge other national judicial functions. It is

not merely, as I have indicated, intervening resignations (such as that of Justice Mondlane) withdrawals (such as the Zimbabwean nominee) or indisposition which may paralyse the Tribunal. Extended national court commitments may negate the availability of one or more of the surviving members. Certainly the capacity of the Tribunal to convene urgently has now been greatly weakened. Over and above these considerations is the further fact that a particular member of the Tribunal must be recused from sitting in any case with which he or she has any personal connection or in relation to which his or her State is a party (Article 9(2) of the Protocol on the Tribunal).

37. Thus not only has the Summit substantially incapacitated the Tribunal. It has also arrogated to itself the independent judicial task of constituting a full bench of the Tribunal appropriate to the particular circumstances of particular cases.

38. In all these circumstances, the guarantee of access to justice under the Treaty has been abrogated, and the Summit has unlawfully claimed the power to determine the composition of the Tribunal henceforth.

(6) Procedure

39. Even had there been a valid substantive basis for the decision, it is vitiated by patent procedural irregularity. Firstly, in terms of the Treaty itself (Article 23) and on elementary legal principle, the decision could not lawfully be taken without prior noticed to and a good-faith consultation with affected parties such as the Tribunal itself and the present applicants. Secondly, the Treaty

makes proper and exclusive provision for amendment of the Treaty, in terms of Article 36; thus if a valid substantive basis existed to seek to curtail the jurisdiction of the Tribunal and to alter its functioning, as regards new cases, this had to be achieved in compliance with the procedural requirements of the Treaty itself. Instead these have been circumvented and undermined.

E. Continuation in office of Tribunal members

40. As already noted, a key element of the decision entails the Tribunal deliberately failing to renew the appointment of four members of the Tribunal (those who were parties to the adverse awards against the third respondent) for further terms of office, in terms of Article 6(1) of the Protocol on the Tribunal. In terms of Article 6(2), their term of office "shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw" (in terms of Article 6(1).

41. In any event, pursuant to the provisions of Article 3(1) of the Protocol on the Tribunal (read with Article 2), and also read with Articles 4(c), 6(6), 16(1) of the Treaty, the terms of office of members of the Tribunal in law are extended by necessity in the circumstances of this matter.

42. I would point out that, further and in any event, by virtue of the provisions of Article 8(4) of the Protocol on the Tribunal, "[n]otwithstanding the expiration of his or her terms of office, a Member shall continue to hear and to complete those cases partly heard by him or her." The relief sought in this matter,

together with the assessment of compensation already pending before the Tribunal, constitutes an integral part of “those cases partly heard” by the four Tribunal members.

43. In these circumstances, I submit that the applicants are entitled to the declaratory order that Justices Pillay, Kambovo, Chomba and Tshosa continue as members of the Tribunal until their positions are otherwise lawfully filled in proper compliance with the Treaty and the Protocol on the Tribunal.

F. Urgency

44. In the light of the facts already set out above, I submit that this application requires to be heard as a matter of great urgency. It is now nearly two and a half years since the applicants obtained what, in its terms, was a final award. It is some three and a half years since the main case was instituted. The third respondent persists in what the awards of the Tribunal has established is international lawlessness and the violation of human rights. Our lives and livelihoods, as are those of the hundreds of thousands of farm workers and their families, have been damaged and are at grave risk.

45. In any event, the matter is inherently urgent because the highest international law adjudicative body in the region has been gravely incapacitated. Issues involving peace in the region, conflicts between member States and gross violations of human rights may arise at any time. Moreover, the issues of

international law in general and compliance with the Treaty and Protocol on the Tribunal in particular are of the gravest public importance to potentially millions of affected people in the region. Also, as already indicated, the Tribunal is the only adjudicative body with jurisdiction as regards employment disputes concerning SADC employees. In law they have no other forum to which they may turn.

G. Conclusion

46. I accordingly ask that the President of the Tribunal direct an urgent date for a sitting of the Tribunal (in terms of Rule 20(1)), and I ask for an order in terms of the notice to which this affidavit is attached.

47. As regards the costs order sought, I submit that circumstances within the contemplation of Article 29 of the Protocol on the Tribunal exist such as to warrant such an order. This is the fifth proceeding that I (and certain of the applicants) have been obliged to institute before the Tribunal to vindicate rights under the Treaty. The third respondent has been the architect of a campaign of contempt and defiance towards the Tribunal on its own international-law obligations. It has compounded its conduct by the gross violations I have documented and which the Tribunal in its previous awards have found to have occurred. The Summit itself has acted in arrant breach of the Treaty and the Protocol on the Treaty in the respects specified. I and my co-applicants, deprived as we have been, of assets and our income have once again been put to needless legal expense we cannot afford. Any failure

to award us a costs order will itself ensure that our access to justice is inhibited. I submit that the circumstances which the Tribunal previously considered such as to warrant a costs order are now, if anything, compounded.

_____

WILLIAM MICHAEL CAMPBELL

THIS IS TO CERTIFY THAT THE ABOVENAMED DEPONENT HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT WHICH WAS SIGNED AND SWORN TO BEFORE ME AT
ON THIS THE DAY OF 2011.

_____

COMMISSIONER OF OATHS