Contextualising the SADC Tribunal and the land issue in Zimbabwe – A socio –legal perspective –Lloyd Msipa

Introduction

The land redistribution exercise in Zimbabwe has introduced a new dimension in the interpretation of international law, treaty law and general legal norms under domestic law. What has been controversial has been the interpretation by the different schools of thought as they seek to address, explain the new situations that now arise as different international institutions seek to do justice to the land question in Zimbabwe brought about by past colonial injustices.

The authorities in Zimbabwe following the fallout with their former coloniser, Britain over the methods for land acquisition agreed to at the Lancaster House Constitution in 1980 embarked on a land acquisition exercise designed primarily to empower the indigenous black Zimbabwean. Past colonial legacies and injustices had dispossessed a majority of some 12 million black Zimbabweans of their land and proceeded to relocate them in arid sandy small holdings commonly referred to as Tribal Trust Lands.

The Lancaster House Constitution

In the opening speech of the Lancaster House negotiations, land was one of the paramount issues mentioned by the patriotic front among the nine they had been presented for discussion. The British government insisted on stringent provisions in the constitution protecting the rights and privileges of the few white Zimbabweans that owned 70 percent of the arable land. This in itself served to perpetuate the status core whereby the rights and privileges of the few white settlers would be protected. The negotiations nearly collapsed due to this particular provision. An agreement was eventually reached and the Patriotic Front announced it as follows:
"We have now obtained assurances that ... Britain, the United States of America and other countries will participate in a multinational donor effort to assist in land, agricultural and economic development programmes. These assurances go a long way in allaying the great concern we have over the whole land question arising from the great need our people have for land and our commitment to satisfy that need when in government".

A provision was included in the Lancaster House Constitution protecting any acquisition of land by any other means except on a willing buyer willing seller basis. This provision was to remain in place for a period of ten years. The Lancaster House Agreement together with the ancillary agreements of paying for the land offered did not perform to expectation. For example the willing buyer and willing seller agreement was not adhered to in many ways. For example the white commercial farmers that held the bulk of the land failed to offer land in sufficient quantities to enable the new Zimbabwe government to adequately resettle the multitudes of Zimbabweans that were waiting to be resettled. Secondly the white commercial farmers were offering land that was in areas that had poor rainfall patterns, unsuitable for the black indigenous farmer who was coming from a subsistence type of farming. Further to this if the white commercial farmers did offer any good land at all, the market price was such that it made it impossible for the government to afford it. This was made more difficult by the "fair market" clause incorporated in the agreement. All this was exacerbated by the slow flow of promised funds from Britain the former coloniser. In 1981 the Zimbabwe Government held a conference with the objective of mobilising funds for the purpose speeding the land reform exercise. Great Britain, The United States and other western countries were invited. Great Britain was reminded of her obligation towards Zimbabwe as per the Lancaster House conference. However funds were not forth coming. Hence after seven years of independence the Zimbabwe government had managed to settle a total of 40 000 families from the original target of 162 000 families.
The Land Reform and Resettlement Programme

The desire by the Zimbabwe Government to settle the 162 000 families failed to materialise as the government failed to get land in sufficient quantities to reach this target. By 1995 the Zimbabwe government had only managed to resettle 71 000 families. As the thirst for land among the indigenous Zimbabweans and the constant reminder to government of the reasons for the liberation war by subsistence farmers in the communal areas, the government was now compelled to act. As the pressure for land reached fever pitch, communal farmers began the process of resettling themselves on farms owned by white commercial farmers.
This cajoled a government that was procrastinating into action. The Land Acquisition act 1992 was enacted as a follow up to the 1985 Act to deal with this new demand. This act was enacted to allow the Zimbabwe government to compulsorily acquire land for resettlement and at the same time provide fair compensation for land acquired for the purposes of resettlement. The former land owner was left with an option of contesting the price set by the acquiring authority if not in agreement with it. It is important to point out that at this time the government was still in bargaining mode and the land targeted at this stage was derelict land, under-utilised land, land owned by absentee landlords, land adjacent to communal areas and land from farmers with more than one farm or oversized farms.
The Zimbabwe Government at this stage still gave the farmer the option of challenging the acquisitions by written submission within thirty days after it has been gazetted in the government gazette.
In September 1998 the Zimbabwe Government convened another donor conference in an attempt to mobilise international support for the land reform exercise.

It is instructive to point out that of the 48 countries and numerous donor agencies represented at the conference agreed that the need for land reform in Zimbabwe was urgent in order to redress the colonial imbalances that existed. A number of countries pledged both financial and material support for this exercise.
As a follow up to the 1992 land acquisition Act, the government of Zimbabwe gazetted a list of 1,471 farms it had ear marked for compulsory acquisition. Previous owners still had the provision to legal recourse for challenging the acquisition by way of submissions within a thirty day period to the government of Zimbabwe. It was at this point that Britain showed even greater signs of withdrawing aid. When the labour government came to power in 1997, the Zimbabwe government petitioned Prime Minister Tony Blair to honour the commitments made by the previous conservative government regarding the financing of the land acquisition exercise.
On 6 November 1997 Clare Short sent a letter to Kumbirai Kangai, Minister of Agriculture in Zimbabwe in which she stated that
"We do not accept that Britain has a special responsibility to meet the costs of land purchase in Zimbabwe". We are a new government from diverse backgrounds, without links to former colonial interests. My own origins are Irish and, as you know, we were colonised, not colonisers."
This letter caused a rift with the Zimbabwean government, which asserted that the Lancaster House Agreement of 1979 had contained a continuing pledge from the United Kingdom government to assist in the land reform exercise. Former White commercial farmers began challenging the acquisition of their previous farms in the national courts. This prompted the Zimbabwe government to amend the Constitution by way of amendment no 17. Cited under the Constitution as amendment (no 17) of 2005, section 16B. This amendment was retrospective.
(2) Notwithstanding anything contained in this Chapter—
(a) All agricultural land—
(i) that was identified on or before the 8th July, 2005, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or(ii) that is identified after the 8th July, 2005, but before the appointed day, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes
no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.
a person having any right or interest in the land—
(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge; (b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in

force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.
Amendment (no 17) 2005 section 16B of the Zimbabwe Constitution made it unlawful for an interested party to challenge the acquisition of the actual land acquired by any acquiring authority. It only allowed for an interested party to challenge the value of the improvements made on the land.

SADC (Southern Africa Developmental Community) and the SADC Tribunal
Following the Constitutional provision barring former commercial farmers from challenging the actual acquisition of their former farms under Zimbabwe domestic law, a few of the aggrieved former white farmers decided to take their legal battle to the SADC Tribunal.
The SADC Tribunal derives its origin from SADC, an institution original established in 1980 under Article 2 of the SADC treaty with its headquarters in Gaborone, Botswana. It was original a loose coalition of African nations with the sole purpose of coordinating developmental projects within its member states, hence lessening dependence on the then apartheid South Africa. The original members of this institution included Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.
The SADC Tribunal was established in 1992 under Article 9 of the SADC Treaty as one of the institution of SADC. The summit of Heads of States or Governments which is the supreme Policy Institution of SADC pursuant to Article 4 (4) of the protocol on Tribunal appointed the members during the summit of Heads of States and Governments held in Gaborone, Botswana in August 2005. One of its vital components for sustainability has been its legitimacy and effectiveness in regional integration. It is important at this stage to mention that the SADC Tribunal was modelled on the European Union model as a dispute resolution mechanism among states.

However the approach adapted by member states when it came to creating the SADC Tribunal was to achieve dispute resolution without necessarily affecting the sovereignty of the member state. Hence a pan africanist institution was the ideal model. It is in this light that the jurisdictional scope of the SADC Tribunal together with its applicable laws in the said jurisdiction, decision enforcement, its independence, impartiality and the protection of human rights would be closely monitored. This was to be so in light of the fact that SADC as an institution is largely not self financing and relies heavily on external funding, the danger of third party influencing its decision making processes was a reality.

The SADC Tribunal has been recently adjudicating over land disputes in Zimbabwe after receiving it initial case in 2007 from disgruntled former commercial land owners. For the purposes of this paper I propose to look at the Campbell case and its subsequent repercussions and how it was the precursor for the member states to reassess the role of the SADC Tribunal in regional integration.

Campbell VS The Republic of Zimbabwe

In October 2007 Mike Campbell (PVT) Limited, a company duly incorporated in Zimbabwe in terms of the companies act brought a case before the SADC Tribunal challenging the acquisition of agricultural land in Zimbabwe by the government of Zimbabwe. It is instructive to also point out that this case was also pending in the domestic courts of Zimbabwe, namely in the Supreme Court.

The matter was brought before the Tribunal in terms of article 28 of the SADC Protocol for an interim measure to interdict the government of Zimbabwe from acquiring the said piece of land pending the finalisation of the matter.
Article 28 provides that
The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.

Campbell argued that the process of land acquisition in Zimbabwe was racist and illegal by virtue of Article 6 of the SADC Treaty and that of the African union Charter. These provisions basically outlaw any racially motivated action by public institutions. Article 4 stipulates that SADC and its member states shall act in accordance with the principles of

human rights, democracy and the rule of law as well as equity, balance and mutual benefit; and the peaceful settlement of disputes, inter alia. According to Article 6 (2) of the SADC Treaty, 'SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability'.

It was argued that amendment no 17 (section 16B) 2005 that outlawed any challenges to land acquisitions under national law were contrary to SADC Statutes and that the Supreme Court of Zimbabwe had either failed or neglected to rule on an application made by Campbell and 74 other Zimbabwean Commercial farmers .

In turn the Zimbabwe government argued that the land acquisition was a process of natural justice based on the restorative justice principle whereby the black indigenous people of Zimbabwe must be given back their land taken away from them through the illegal processes of colonialism. Furthermore Campbell and others had failed or neglected to exhaust all remedies provided for under domestic law.

The central problem of this case seemed to be the relationship between the legal regime of SADC on the one side and Zimbabwe's national law on the other. The Constitution of Zimbabwe in its Section 23 states: 'No law shall make any provision that is discriminatory either of itself or in its effect; and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'.

The Constitutional Amendment Act No. 17 of 2005 allows the government of Zimbabwe to seize or expropriate farmland without compensation and bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved white farmers. Section 2(2) of the above amendment provides that 'all agricultural land – (follows the description of such agricultural land identified by the Government)…is acquired by and vested in the State with full title therein…; and…no compensation shall be payable for land referred to in Paragraph (a) except for any improvements effected on such land before it was acquired'.

The practical implications of the Constitutional Amendment Act No. 17 resulted in farm seizures, where the majority of the approximately 5000 white farmers were forcibly ejected from their properties with no compensation being paid for the land, since, according to the Zimbabwe Government, it was stolen in the first place.

The government has compensated some farmers only for developments on the land such as dams, farm buildings and other improvements. On 13 December 2007 the SADC Tribunal ruled that Campbell should remain on his acquired farm until the dispute in the main case had been resolved by the Tribunal.

"The Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by its orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Campbell in the Chegutu District in Zimbabwe, by Mike Campbell Ltd and William M Campbell, their employees and the families of such employees and of William Michael Campbell"

The above interim relief was also applied for by and granted to other applicants/interveners on 28 March 2008.On 22 January 2008, the Zimbabwean Supreme Court (sitting as a Constitutional Court) dismissed the application by the white commercial farmers challenging the forcible seizure and acquisition of their lands without compensation. The Court ruled that 'by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded'.

On 23 January 2008 the Zimbabwean government announced that it would seize the farm.

Land Reform Minister Daytimes Mutasa said the farm would be handed over to a black owner as part of state land reforms and following the ruling by the Zimbabwean Supreme Court. The main hearing before the SADC Tribunal was scheduled for 28 May 2008, but postponed until 16 July 2008. On 18 July 2008, applicants and other interveners in the Campbell case made an urgent application to the Tribunal seeking a declaration to the effect that the Zimbabwe Government was in breach and contempt of the Tribunal's orders.

After hearing the urgent application, the Tribunal found that the respondent state was indeed in contempt of the Tribunal's orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the Summit for the latter to take appropriate action.

Meanwhile, a significant number of recently resettled indigenous farmers filed an application seeking an order to allow them to intervene in the main case. The application was, however, dismissed with costs. In the Tribunal's view, the applicants/interveners could not be allowed to intervene in the main case for the following reasons:

· The present application to intervene was filed out of time and no good reason was advanced to justify the inordinate delays; the alleged dispute in the present application is between present applicants and applicants in the main case (Campbell case) and not between persons (either natural or juristic) and a state; and
· the applicants in the present application have failed to demonstrate any legal right or interests which are likely to be prejudiced or affected by the Tribunal's decision in the Campbell case. The hearing of the Campbell case was finalised on 28 November 2008.

The SADC Tribunal in its final decision ruled in favour of the applicants Mike and William Campbell and 77 other white commercial farmers. In conclusion, the Tribunal held that the Republic of Zimbabwe is in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty and that :

the Applicants have been denied access to the courts in Zimbabwe;
the Applicants have been discriminated against on the ground of race,
fair compensation is payable to the Applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

The Tribunal furthermore directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants who had not yet been evicted from their lands, and to pay fair compensation to those three applicants who had already been evicted from their farms.

The SADC Tribunal and the withdrawal of Zimbabwe's membership

The SADC Tribunal is primarily a product of a pan africanist political process set up to protect the rights and interests of SADC members states and their citizens and most importantly to develop the community's jurisprudence vis a vis the applicable treaties, general principles and the rules under international law. Subject to the exhaustion of remedies available under national law the Tribunal has the jurisdiction to adjudicate disputes between states, natural and legal persons of the community. (protocol Art 15(2).

Having realised that the SADC Tribunal had now become a wayward animal heads of State and Government requested the member states ministers of justice move quickly to rectify the anomaly.
In 2008 President (Jakaya) Kikwete (of Tanzania) said 'we have created a monster that will devour us all. Can our Justice Ministers make sure that this monster is destroyed before it devours us all'?
The Zimbabwe government in consultation with other member governments announced on

the 2nd of September 2009 the pull out of Zimbabwe from the membership of the SADC Tribunal. The pull out by Zimbabwe automatically rendered any decisions or judgements by the SADC Tribunal against the government of Zimbabwe ineffective and unenforceable. Upon careful and studious inspection by government Lawyers of the SADC Tribunal Protocol it was found that it was not validly constituted and hence it could not validly exercise jurisdiction over Zimbabwe or any other SADC State.

Hence the fact that only five of the fourteen member's countries have so far ratified the Tribunal Protocol meant that the purported application of the provisions of the protocol on Zimbabwe was a serious violation of international law.

The Zimbabwe government cited Article 35 and 38 of the Tribunal Protocol which reads under Article 35

This Protocol shall be ratified by Signatory States in accordance with their constitutional procedures.'

And under article 38 The Tribunal Protocol reads

This Protocol shall enter into force thirty (30) days after deposit, in terms of Article 43 of the Treaty, of instruments of ratification by two-thirds of the States.'

Critics to this argument coming mainly from organizations that are largely funded by the United States and Europe argued that in 2001, the SADC Treaty was amended so as to make the SADC Tribunal an integral part of both the Treaty and the Institution of SADC. And that the said amendment to the SADC Treaty specifically established the SADC Tribunal and incorporated it into SADC as an integral part of the institution. The amendment went on to refer to the Tribunal Protocol and categorically excluded it from the usual requirement for ratification by two-thirds before it could come into force and effect. The relevant section of the Amendment to the SADC Treaty referred under article 16 reads as follows:

1. The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.2. The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty. Members of the Tribunal shall be appointed for a specified period.4. The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.5. The decisions of the Tribunal shall be final and binding.'

Article 22 referred to in Article 16 above provides as follows:

1. Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.2. Each Protocol shall be approved by the Summit on the recommendation of the Council.3. Each Protocol shall be open to signature and ratification.4. Each Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the Member States. [Own emphasis added.]5. Once a Protocol has entered into force, a Member State may only become a party thereto by accession.6. Each Protocol shall remain open for accession by any State subject to Article 8 of this Treaty.7. The original texts of each Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies thereof to all Member States.8. The Executive Secretary shall register each Protocol with the Secretariat of the United Nations Organization and the Commission of the African Union.9. Each Protocol shall be binding only on the Member States that are party to the Protocol in question.10. Decisions concerning any Protocol that has entered into force shall be taken by the parties to the protocol in question.11. No reservation shall be made to any Protocol.'

As a result of this amendment to the SADC Treaty, Articles 35 and 38 of the Tribunal Protocol, which had required the two-thirds ratification, were repealed and the requirement therefore fell away. The agreement amending the protocol is argued to provide for this and hence

Article 35 of the Protocol is repealed.'

Article 38 of the Protocol is repealed.'

Therefore it is argued by these critics that the Tribunal is a creation of the Declaration and Treaty of SADC, and does not owe its existence to the ratification of the Tribunal Protocol by member states.

However, the argument above is contradicted by the Constitution of Zimbabwe and the decision to withdraw from the SADC Tribunal by Zimbabwe has been vindicated by a constitutional provision that few seem to have taken notice of.

The current position at law is that under the Constitution of Zimbabwe the repealing of Article 35 and 38 of the SADC Tribunal does not affect the decision by the Zimbabwe Government to withdraw from the Tribunal. Section 111B of the Zimbabwe Constitution mandates all international treaties entered into by the government of Zimbabwe to be approved by parliament. Section 111B was introduced into the Zimbabwe Constitution in 1987 by Constitutional amendment (No 7) Act of 1987. Section 111B was later amended in 1993 as Constitutional amendment (no 12) act of 1993. Section 111B as introduced into the Zimbabwe Constitution in 1987 restricted to parliament the ratification of any international treaty or agreement entered to by the head of state which imposed a fiscal obligation on the republic of Zimbabwe. SADC requires its member states to pay annual subscriptions. It is then for this reason that the SADC Treaty had to be ratified by the Zimbabwean parliament in 1992 in compliance with section 111B of the Zimbabwe Constitution. Therefore for all intents and purposes Zimbabwe has never been a bona fide member of the SADC Tribunal from its inception.

From a socio-legal perspective it has not helped matters that the applicants that have complained to the SADC Tribunal are all whites and hence arguments for African intervention have been ignored as the wounds created by the colonial system are still fresh. The Zimbabwe land legacy was created through a process which was illegal, cruel and largely unjust. With most Zimbabwean black farmers irking out a living in semi-arid small communal plots and the neighbouring South Africa mooting a land expropriation bill, it seems sentiment for the white commercial farm does not look at all positive. It remains that title for land in Zimbabwe must be premised on a negotiated settlement between the former coloniser, Britain and the Zimbabwe government. Britain must now stop playing politics with the Zimbabwe land issue and accept the responsibilities it took upon itself to fund the land reform exercise at Lancaster. The SADC Tribunal needs to be reformed in order for it to be in sync with the reality on the African continent, especially when it comes to the emotive issue of land.