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**A PRESIDENT, AN INTERNATIONAL TRIBUNAL AND A  
BAND OF FARMERS WALK INTO A CONSTITUTIONAL  
COURT—THE LAST LAUGH:  
MIKE CAMPBELL V. THE GOVERNMENT OF THE REPUBLIC  
OF ZIMBABWE**

*Drew F. Cohen*\*

*Land distribution will continue. It will not stop . . . the few remaining white farmers should quickly vacate their farms as they have no place there.*

—Robert Mugabe, President of the Republic of Zimbabwe, Speech Delivered During His 85th Birthday Celebration, March 2009.<sup>1</sup>

*We cannot rest on our laurels because if we do not play an active role in promoting constitutional democracies in the region, we are then allowing a situation to exist that is conducive to coup d'états and dictatorships. If, however, we help create a human rights culture in other African countries backed by constitutional democracies, stability will set in . . . and people will find employment and stay home to develop their own countries.*

—Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, September 2013.<sup>2</sup>

INTRODUCTION

Ben Freeth, a white, former commercial farmer from Chinhoyi area of Zimbabwe, is a patient man.<sup>3</sup> Dressed in rustic attire, almost out of Steinbeck's *Grapes of Wrath*, he sits quietly as the eleven justices of the South African

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\* Drew F. Cohen, J.D., The George Washington University Law School, 2012. In writing this Article, I was fortunate to draw upon my experiences as a 2013 foreign law clerk to Chief Justice Mogoeng Mogoeng of the South African Constitutional Court. I would like to thank Samuel D. Permutt for his incisive comments.

<sup>1</sup> Barry Bearak, *For Zimbabwe, Party is a Chance to Eat, Not Cheer*, N.Y. TIMES, Mar. 1, 2009, at A12 (reporting that the President's party cost \$250,000, the birthday cake weighed 187 pounds, and "seven million Zimbabweans, more than half the population, need emergency food aid to stave off starvation").

<sup>2</sup> Interview with Mogoeng Mogoeng, Chief Justice, Constitutional Ct. of S. Afr., Johannesburg, in S. Afr. (Sept. 4, 2013) (on file with author).

<sup>3</sup> Mark Jenkins, *'Mugabe And The White African' Fight For Farmland*, NPR (July 22, 2010), <http://www.npr.org/templates/story/story.php?storyId=128653056>.

Constitutional Court hear arguments that will determine the fate of his, and 78 other, farms. It has been almost five years since he and his father-in-law, Mike Campbell, rose to international prominence after contesting Zimbabwe's constitutionally sanctioned land redistribution program, and by implication, the nation's autocratic liberation leader in an open international tribunal. Campbell had purchased his land before Zimbabwe won its independence from the white minority rule in 1980 but received a "certificate of no interest" from the government authenticating the transaction in 1999 and soon built a successful business growing citrus trees.<sup>4</sup> The government nonetheless targeted the farm for redevelopment and Campbell resisted.<sup>5</sup> It was not a popular decision. Soon after he filed his case, a gang of young men loyal to the President ransacked his farmhouse and beat Campbell, his wife, and Freeth for remaining on their land.<sup>6</sup> The three had then been bundled into a truck and dumped into a nearby field where the youths threatened them with death if they pursued legal action against the President's indigenization policies.<sup>7</sup> A *New York Times* article described the encounter:

Mrs. Campbell . . . was dragged by her hair, after her arm was broken in multiple places, and dumped next to her husband. . . . "Mike was so battered, I hardly recognized him," Mrs. Campbell said. "I didn't know he was alive until he groaned." . . . It was cold, and men poured freezing water over them. Mr. Campbell drifted in and out of consciousness. By the flickering light of bonfires, the youths denounced the Campbells as white pigs, Mrs. Campbell said, and ordered her to sing revolutionary songs. She remembers singing a children's song instead, which enraged one of her intoxicated tormentors. He charged at her, she said, trying to thrust a burning stick into her mouth.<sup>8</sup>

In September 2009, the mobs returned and this time burned down the farmhouse.<sup>9</sup> The government then evicted Campbell and Freeth, this time permanently.<sup>10</sup> In April 2011, Mike Campbell died from brain injuries sustained during the earlier beating, living out his final days in poverty in

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<sup>4</sup> *Id.*

<sup>5</sup> Celia W. Dugger, *White Zimbabwe Farmers Defy Mugabe in Legal Battle for Land*, N.Y. TIMES, Dec. 28, 2008, at A1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Campbell Farmhouse Razed to the Ground*, CITY PRESS, Sept. 2, 2009, <http://www.citypress.co.za/news/campbell-farmhouse-razed-to-the-ground-20090902/>.

<sup>10</sup> Robyn Dixon, *Mike Campbell Dies at 78; White Zimbabwean Challenged Seizure of Lands*, L.A. TIMES (Apr. 8, 2011), <http://articles.latimes.com/2011/apr/08/local/la-me-mike-campbell-20110408>.

Harare, the capital.<sup>11</sup> His case continued, unabated, which is why on a cold morning in late February 2013, Freeth found himself seated in the gallery before the eleven Justices of the South African Constitutional Court.<sup>12</sup>

Zimbabwe's informal and formal post-colonial land-reform policy has had a checkered past. In the early 2000s, Zimbabwe's President, Robert Mugabe, encouraged violent takeovers of large commercial white-owned farms as part of his campaign to redistribute the country's fertile agricultural lands to previously disenfranchised blacks.<sup>13</sup> The land grabs crippled the economy, decimating the agricultural sector, as the number of white-owned commercial farms diminished to about 250 from 4500.<sup>14</sup> Mugabe's land indigenization policy was formalized in 2005 through a constitutional amendment that provided for compulsory acquisition of identified agricultural land without compensation, save for improvements made to the land.<sup>15</sup> To secure the executive mandate, Amendment 17, as it became known, ousted the jurisdiction of Zimbabwean courts to challenge any such confiscation.<sup>16</sup>

Freeth, Campbell, and others contested the legality of the government's program in domestic courts, international tribunals and lower courts in South Africa before finally taking their case to the Constitutional Court of South Africa.<sup>17</sup> The dispute reverberated across the post-colonial region, pitting initiatives to create a more just and equitable society against the principles of democracy, human rights and the rule of law.<sup>18</sup> In June 2013, the Constitutional Court delivered a judgment that developed its common law to

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<sup>11</sup> *Id.*; Mike Campbell, *ECONOMIST* (Apr. 20, 2011), <http://www.economist.com/node/18584000>.

<sup>12</sup> *Farmers Fight Land Grab*, *CITY PRESS* (March 3, 2010), <http://www.citypress.co.za/news/farmers-fight-land-grabs/>.

<sup>13</sup> Peta Thornycroft and Sebastien Berger, *100 White Farmers Targeted in Zimbabwe Land Grab*, *TELEGRAPH* (Feb. 23, 2009), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/4788168/100-white-farmers-targeted-in-Zimbabwe-land-grab.html>.

<sup>14</sup> *Id.*

<sup>15</sup> CONST. OF ZIMBABWE § 16B (stating, in relevant part, that "all agricultural land" as "required for resettlement purposes" is "acquired by and vested in the State with full title" and "no compensation shall be payable for land . . . except for any improvements effected. . . before it was acquired").

<sup>16</sup> *Id.* § 16B(3)(a)–(b).

<sup>17</sup> See *Farmers Fight Land Grabs*, *supra* note 12.

<sup>18</sup> Compare Tony Hawkins, *Zimbabwe's Land Seizures: Joseph Hanlon's Racist Myopia*, *POLITICSWEB* (May 31, 2013), <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=380254&sn=Detail&pid=71619> (describing the disastrous socioeconomic consequences of the program) with Lydia Polgreen, *Zimbabwe Land Takeover, A Golden Lining*, *N.Y. TIMES*, July 20, 2012, at A1 (reporting how Mugabe's land reform program benefited 60,000 predominately black Zimbabwe tobacco farmers). See also Douglas Roger, *The Truth About Mugabe's Land Reform*, *AMERICAN* (July 31, 2013), <http://www.american.com/archive/2013/july/the-truth-about-mugabes-land-reform> (assessing the "successfulness" of Zimbabwe's land reform policies and providing links to articles on both sides of the debate).

empower South African domestic courts to register, recognize, and enforce decisions of regional tribunals when the country has an international obligation.<sup>19</sup> Over the course of the case, however, Campbell and Freeth's challenge brought the Southern African Development Community ("SADC") to the brink of dissolution<sup>20</sup> and tested southern African leaders' commitment to regional organizations. At the same time, it also forced South Africa's courts to take a more proactive role in protecting human rights in the region and pressed the Constitutional Court to reinterpret some of the country's basic constitutional rights.

### I. THE FARMERS' CASE

On October 11, 2007, Campbell and Freeth, together with seventy-eight others who had been affected by Zimbabwe's land reform policy, took an unusual step by challenging the government's acquisition program before the Southern African Development Community Tribunal ("Tribunal")<sup>21</sup>—an international organization established under the Treaty of the Southern African Development Community.<sup>22</sup> Over the course of its existence, the Tribunal had heard and decided only twelve individual claims of human rights abuses.<sup>23</sup> Its predominant function had been to adjudicate disputes between member nation-states.<sup>24</sup> The Treaty, nonetheless, bound member states to act in accordance with the principle of "human rights, democracy and the rule of law."<sup>25</sup> Article 14 of the Protocol granted the Tribunal jurisdiction over all disputes relating to the interpretation and application of the Treaty and Article 15(1) granted the Tribunal jurisdiction over disputes between member states and natural or legal persons.<sup>26</sup>

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<sup>19</sup> *Republic of Zim. v. Fick* 2013 (5) SA 325 (CC) (S. Afr.).

<sup>20</sup> See, e.g., Sean Christie, *The SADC Tribunal's Last Gasp*, MAIL & GUARDIAN (June 10, 2011), <http://mg.co.za/article/2011-06-10-the-sadc-tribunals-last-gasp>.

<sup>21</sup> Mike Campbell (Pvt) Ltd v. Republic of Zim., [2008] SADCT 2 (Nov. 28, 2008), <http://www.saflii.org/sa/cases/SADCT/2008/2.html>.

<sup>22</sup> Southern African Development Community Treaty art. 16, Aug. 17, 1992, 32 I.L.M. 116 [hereinafter SADC Treaty].

<sup>23</sup> *The (Today Limited Role of the) SADC Tribunal*, CLAIMING HUMAN RIGHTS, <http://www.claiminghumanrights.org/sadc.html> (last updated March 8, 2013).

<sup>24</sup> *South African Development Community Tribunal*, INT'L JUSTICE RESOURCE CNT., <http://www.ijrcenter.org/regional-communities/southern-african-development-community-tribunal/> (last visited May 29, 2014).

<sup>25</sup> SADC Treaty, *supra* note 22, art. 4(c) ("SADC and its Member States shall act in accordance with the following principles: . . . (c) human rights, democracy and the rule of law. . .").

<sup>26</sup> *Id.* arts 14, 15(1).

Zimbabwe initially contested the Tribunal's jurisdiction to entertain the application on the grounds that the farmers—who had approached the Tribunal while the matter was still pending before the Supreme Court of Zimbabwe<sup>27</sup>—had failed to first exhaust all domestic remedies.<sup>28</sup> The government proceeded to argue that its land reform initiative must be understood within context “as a means of correcting colonially inherited land ownership inequities.”<sup>29</sup> It could not be “attributed to racism but to circumstance brought about by colonial history.”<sup>30</sup> The government maintained that the policy did discriminate on the basis of race as the state had seized some farms from the few black Zimbabweans who owned large tracts of land.<sup>31</sup>

As a preliminary matter, the Tribunal determined the Treaty afforded it broad jurisdiction over any matter involving “human rights, democracy and the rule of law.”<sup>32</sup> The farmers, moreover, were not required to exhaust local remedies where the remedy offered by municipal law was “ineffective” or nonexistent.<sup>33</sup> In ultimately ruling in favor of the farmers, it held that the land seizure policy breached Zimbabwe's international obligations under the Treaty on three separate grounds: (1) It denied individuals access to courts; (2) it discriminated on the basis of race; and (3) it amounted to expropriation without just compensation.<sup>34</sup>

On the first ground, the Tribunal noted that to give effect to the rule of law principle, a state must provide meaningful access to courts as well as a fair hearing before it can deprive any person of a right.<sup>35</sup> The ouster clause in Amendment 17—which provides that “the decision of the Minister shall not be subject to appeal or review in any court”—created an explicit deprivation of judicial review in relation to agricultural land acquired under the constitution.<sup>36</sup> It therefore held that Zimbabwe failed to act in accordance with the rule of law

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<sup>27</sup> Supreme Court of Zimbabwe eventually ruled that it had no power to intervene. *See* Mike Campbell (Pvt) Ltd v. Republic of Zim., [2008] SADCT 2, at 22 (Nov. 28, 2008), <http://www.saflii.org/za/cases/SADCT/2008/2.html>.

<sup>28</sup> *Id.* at 19.

<sup>29</sup> *Id.* at 16.

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 24–25.

<sup>33</sup> *Id.* at 21.

<sup>34</sup> *Id.* at 58.

<sup>35</sup> *Id.* at 26.

<sup>36</sup> *Id.* at 35.

principle stipulated in the Treaty.<sup>37</sup> Second, the Tribunal found that although Amendment 17 affected all agricultural land, the government implemented the program in a manner that disproportionately impacted white Zimbabwe farmers and thus constituted de facto discrimination contravening the Treaty's nondiscrimination clause.<sup>38</sup> The government's measures, moreover, were found to have benefitted the ruling elite, not to redress inequitable land ownership as the government had maintained.<sup>39</sup> "The aim of [Zimbabwe] . . . might be legitimate if and when all lands under the program were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups."<sup>40</sup> Last, the Tribunal held that international law required the "acquiring state," not a formal colonial power, to pay just compensation when seizing private lands.<sup>41</sup> Accordingly, the Tribunal ordered that Zimbabwe protect the ownership and possession of those farms that had not yet been confiscated and pay appropriate compensation to those farmers whose farms had already been confiscated.<sup>42</sup>

Zimbabwe balked—Mugabe referred to the Tribunal's decision as "nonsense" and "of no consequence"—and the government continued, unabated, to seize farmlands pursuant to its Constitution.<sup>43</sup> Farmers who "defaulted" were intimidated and prosecuted.<sup>44</sup> On May 7, 2009, Campbell and Freeth again approached the regional forum for relief.<sup>45</sup> Zimbabwe, consistent with its belief that the Tribunal lacked jurisdiction to entertain the matter, declined to participate in the proceedings and, on June 5, 2009, the Tribunal found that the government was indeed guilty of contempt and ordered it to pay

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<sup>37</sup> *Id.* at 41. See also SADC Treaty, *supra* note 22, art. 4(c) ("SADC and its Member States shall act in accordance with the following principles: . . . human rights, democracy, and the rule of law.").

<sup>38</sup> Mike Campbell (Pvt) Ltd v. Republic of Zim., [2008] SADCT 2, at 52–53. See also SADC Treaty, *supra* note 22, at art. 6(2) ("SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability." (emphasis added)).

<sup>39</sup> Mike Campbell (Pvt) Ltd v. Republic of Zim., [2008] SADCT 2, at 53–54. See also *Mugabe Dismisses Farm Invasion Allegations*, IOL NEWS (Apr. 9, 2009 7:37 PM), <http://www.iol.co.za/news/africa/mugabe-dismisses-farm-invasion-allegations-1.439625#.UksUy0KfuRI> ("Human rights organizations say [government] cronies have taken over the violently vacated farms, usually in violation of court orders to allow the farmers to stay.").

<sup>40</sup> Mike Campbell (Pvt) Ltd v. Republic of Zim., [2008] SADCT 2, at 53.

<sup>41</sup> *Id.* at 56.

<sup>42</sup> *Id.* at 57–59.

<sup>43</sup> Campbell v. Republic of Zim., [2009] SADCT 1 (June 5, 2009) (quoting Robert Mugabe).

<sup>44</sup> *Mugabe Orders White Farmers to Leave*, BBC NEWS (Aug. 12, 2002 14:32 GMT), <http://news.bbc.co.uk/2/hi/africa/2187453.stm> (reporting farmers could be jailed for up to two years for resisting).

<sup>45</sup> Campbell, [2009] SADCT 1 (June 5, 2009), <http://www.saflii.org/sa/cases/SADCT/2009/1.html>.

the farmers' costs.<sup>46</sup> The government, unmoved, ignored the Tribunal's orders.<sup>47</sup>

## II. SOUTH AFRICAN COURTS INTERVENE

As mentioned above, SADC member states are obligated under the Treaty to act in accordance with the principles of “human rights, democracy and the rule of law.” To give effect to that mandate, Article 32(2) of the Treaty requires member states to take all measures necessary to ensure execution of the decisions of the Tribunal.<sup>48</sup> When Zimbabwe disregarded the Tribunal's June 2009 order, the farmers, under the auspices of Article 32(2), approached a trial court in South Africa—a SADC member state—for relief. The South African courts' inquiry focused on whether the South African Constitution's broad guarantee of access to courts included a right of access to international forums. If that right did exist, did South African common law permit the enforcement of orders of international tribunals in domestic courts so as to give effect to that right?

### A. *Enforcement of the Tribunal's Orders*

The North Guateng High Court granted a default cost order recognizing and registering the order of the Tribunal in South Africa.<sup>49</sup> Zimbabwe only responded once it realized that the trial court had issued a writ of execution authorizing the attachment and sale of Zimbabwe's property in Cape Town, South African to fulfill the order.<sup>50</sup> Zimbabwe appealed both orders in the Supreme Court of Appeal, which is South Africa's appellate-level court, on the grounds that each should be rescinded for want of jurisdiction.<sup>51</sup> In a unanimous judgment written by Nugent JA, the appeal was dismissed.<sup>52</sup>

In 2013, Zimbabwe turned finally to the Constitutional Court of South Africa—the country's apex court.<sup>53</sup> Zimbabwe had vociferously argued, in its papers and during oral argument, that the issue before the Constitutional Court

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> SADC Treaty, *supra* note 22, art. 32(2).

<sup>49</sup> *Republic of Zim. v Fick* 2010 Case No. 77881/09 (North Guateng High Ct.) (S. Afr.).

<sup>50</sup> *Republic of Zim. v Fick* Case No. 657/11, 2012 ZASCA 122, 3–4 (SCA), <http://www.saflii.org/za/cases/ZASCA/2012/122.html> (S. Afr.).

<sup>51</sup> *Id.* at 3.

<sup>52</sup> *Id.*

<sup>53</sup> *Republic of Zim. v. Fick* 2013 (5) SA 325 (CC) (S. Afr.)

was not whether the Tribunal had jurisdiction according to its rules, but whether it had power to entertain the case according to the principles of jurisdiction under South African law.<sup>54</sup> It submitted that under common law principles South African courts had no jurisdiction over a sovereign state via an international tribunal.<sup>55</sup> At the outset, the Court agreed and noted that the South African common law not did provide for the enforcement of international tribunal decisions in South African domestic courts:

[T]he enforcement provided for in our common law relates only to judgments or orders made by a domestic court of a particular foreign country. If international courts like the Tribunal were within the contemplation of our courts when they developed the common law and laid down these foreign judgment-enforcement requirements, the condition[s]. . . would have been differently or more appropriately and inclusively crafted.<sup>56</sup>

But that was not the end of the matter.

### *B. Development of the Common Law*

Two clauses in the South African Constitution empower and obligate judges to “develop” the common law in a spirit consistent with the Constitution. South Africa, itself, had endured decades of racist policies and laws under apartheid before enacting an autochthonous, progressive Constitution in 1996. The drafters recognized the disconnect between the document’s modern founding principles of egalitarianism and a Roman-Dutch traditional common law that had been shaped by centuries of subjugation and decades of apartheid rule. To counterbalance these concerns, two “development” clauses were inserted. The relevant language of the first, Section 39(2), provides that “when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”<sup>57</sup> The second development clause, located in Section 8(3), requires that when giving effect to a right contained in the Bill of Rights, a court “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.”<sup>58</sup>

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<sup>54</sup> *Id.* para. 96.

<sup>55</sup> *Id.* para. 20.

<sup>56</sup> *Id.* para. 52.

<sup>57</sup> S. AFR. CONST. 1996 § 39(2).

<sup>58</sup> *Id.* § 8(3).

Up until the farmers approached, the Constitutional Court—as well as the lower courts—had been criticized for its infrequent and ineffective use of the two clauses as a transformative means to create a more equitable society. In the first eighteen years under the new constitutional dispensation, South African courts had “made little effort to theori[z]e the Constitution’s impact on the common law, to sketch the content of the constitutional vision of a free and equal society, or to develop methods of common law reasoning suitable to the new dispensation.”<sup>59</sup> The farmers’ case presented the Court with a unique opportunity to review the common law and enunciate a paradigmatic-shift in its approach to developing it.

### C. *Expanding the Right of Access to Courts*

To begin, a foreign judgment is not directly enforceable in South Africa under its common law but can constitute a cause of action if the following requirements are met:

- a) The court which handed down the foreign judgment had jurisdiction to entertain the case, according to principles recognised by South African law with reference to the jurisdiction of foreign courts (sometimes referred to as international competence).
- b) The judgment is final and conclusive and must not have prescribed.
- c) The recognition and enforcement of the judgment in South Africa is not contrary to public policy.<sup>60</sup>

At common law, the term “foreign judgment” had been interpreted restrictively to exclude orders of international tribunals, rendering them unenforceable by a South African court.<sup>61</sup> The South African Constitution, however, provides liberal access to courts. Section 34 of the Constitution requires that “[e]veryone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”<sup>62</sup> Unlike

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<sup>59</sup> Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 S. AFR. J. ON HUM. RTS. 403, 414 (2010) (arguing for greater and more effective use of Sections 39(2) and 8(3)).

<sup>60</sup> These requirements are subject to a number of exceptions which are not relevant to this case. *Purser v. Sales* 2001 (3) SA 445 (SCA) at 9 para. 11 (S. Afr.).

<sup>61</sup> *Republic of Zim. v. Fick* 2013 (5) SA 325 at para. 53.

<sup>62</sup> S. AFR. CONST. 1996 §34.

other rights that are specifically limited to “citizens,”<sup>63</sup> the right to access to courts is granted to “everyone”—encompassing citizens and aliens alike. Furthermore, Section 233 of the South African Constitution obliges a court to prefer “any reasonable interpretation of legislation,” including the Constitution, “that is consistent with international law over any alternative interpretation that is inconsistent.”<sup>64</sup> By signing the SADC Treaty, South Africa had a clear international law obligation to give effect to orders of the Tribunal, and to ensure that their citizens have access to that tribunal.<sup>65</sup>

The opportunity to modernize the law was not lost on the justices. Relying on the two development clauses to align the common law with the spirit of the constitutional guarantee that citizens and aliens alike enjoy “access to courts,” the Chief Justice wrote:

[The SADC Treaty] places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Section 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country.<sup>66</sup>

After it determined that “foreign judgment” encompassed an order of international tribunal, the Court concluded that the elements for a cause of action in this case were met, dismissed Zimbabwe’s appeal, and upheld the Tribunal’s order.<sup>67</sup>

### III. THE DISMANTLEMENT OF SADC

The SADC Tribunal’s vindication, however, was short-lived. After it ruled in favor of the farmers, Zimbabwe commenced a lobbying campaign to convince Southern African leaders to disband the Tribunal.<sup>68</sup> On August 17, 2010, SADC leadership capitulated ordering a review of the “role, function and

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<sup>63</sup> See, e.g., *id.* §19 (restricting political rights to “every citizen” or “every adult citizen”); §22 (limiting the right of freedom of trade, occupation and profession to “every citizen”).

<sup>64</sup> *Id.* §233.

<sup>65</sup> *Republic of Zim. v. Fick* 2013 (5) SA 325 at para. 69.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* paras. 71–72.

<sup>68</sup> Caesar Zvayi, *Zim Wants SADC Tribunal Rulings Nullified*, HERALD (May 19, 2011), <http://www.herald.co.zw/zim-wants-sadc-tribunal-rulings-nullified/>.

terms of reference of the Tribunal.”<sup>69</sup> During the review process, the Tribunal was provisionally suspended, and in August 2012, it was stripped of its jurisdiction to hear individual human rights claims, relegating it to disputes between nation-states.<sup>70</sup>

Indeed, SADC’s diminished capacity and resolve to uphold and enforce democracy, human rights and the rule of law was on full display earlier this year. In August 2013, Botswana requested SADC to open a formal investigation into voting irregularities in the July 31 Zimbabwean presidential elections.<sup>71</sup> The eighty-nine year-old Mugabe collected sixty-one percent of the presidential vote to extend his thirty-three year rule by another five years.<sup>72</sup> According to Botswana’s eighty member team that was dispatched to monitor the election, “[e]vidence of possible shortfalls include. . . questions about the inclusion and exclusion of people on the rolls, questions over the forms of identification required to vote. . . as well as credible allegations of people otherwise being denied the right to vote.”<sup>73</sup> Two commissioners on the nine-member Zimbabwe Electoral Commission resigned within days of the election, citing concerns of ballot fraud.<sup>74</sup> An editorial in a leading South African newspaper declared: “Justice and democracy in the whole region are at stake.”<sup>75</sup>

SADC’s initial response was cautious. Its preliminary electoral observation assessment characterized the elections as “free and peaceful” but stopped short of calling it legitimate.<sup>76</sup> “We did not say it was fair. The question of fairness is broad and you cannot answer it in one day,” remarked the head of SADC’s

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<sup>69</sup> 30th Jubilee Summit of Southern African Development Community Heads of State, Aug. 16–17, 2010, *Communiqué* (Aug. 19, 2010), available at <http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan040981.pdf>.

<sup>70</sup> Editorial, *Re-Empower SADC Tribunal*, MAIL & GUARDIAN, June 28, 2013, <http://mg.co.za/article/2013-06-28-editorial-re-empower-sadc-tribunal> (“Justice can come wrapped in cruel irony.”).

<sup>71</sup> Press Release, Statement by the Gov’t of the Republic of Bots. on the 2013 Election in the Republic of Zim. (Aug. 5, 2013), <http://www.swradioafrica.com/statement-from-botswana-govt-on-zim-election/>.

<sup>72</sup> Lydia Polgreen, *Mugabe Wins Again in Zimbabwe, Leaving Rival Greatly Weakened*, N.Y. TIMES, Aug. 3, 2013, at A11.

<sup>73</sup> Press Release, *supra* note 71.

<sup>74</sup> Nomalanga Moyo, *Zimbabwe: Electoral Commissioner Resigns in Protest At Unfair Election*, SW AFR. RADIO (Aug. 3, 2013), <http://allafrica.com/stories/201308030291.html>.

<sup>75</sup> Kerry Kennedy, *SADC: Justice and Democracy in the Whole Region are at Stake*, MAIL & GUARDIAN, Aug. 15, 2013, <http://mg.co.za/article/2013-08-15-00-justice-and-democracy-in-the-whole-region-are-at-stake> (entreating SADC to investigate).

<sup>76</sup> Preliminary Statement, Bernard Kamillius Membe, SADC Election Observation Mission to the Republic of Zimbabwe (Aug. 2, 2013), <http://www.sadc.int/documents-publications/show/2179>.

election observer mission.<sup>77</sup> Soon after SADC released its initial report, many of the region's most powerful leaders endorsed Mugabe's victory.<sup>78</sup>

By the time SADC leaders met at the 33<sup>rd</sup> SADC Summit in Malawi over the August 17<sup>th</sup> weekend, Mugabe's electoral victory was all but certain. On the first day of the conference, SADC officially endorsed the presidential election results.<sup>79</sup> Malawi President and SADC chairperson Joyce Banda congratulated Mugabe on the "peaceful and fair polls" and "wish[ed] to offer [him] continued support as a member of the family." By weekends end, Mugabe's victory was complete: His colleagues elected him the next chairman of SADC.<sup>80</sup>

### CONCLUSION: THE LAST LAUGH

On Tuesday, September 17, 2013, an "unremarkable" house with a dirtied backyard pool located in an upscale neighborhood in Cape Town, South Africa was scheduled for auction.<sup>81</sup> The remarkable part of the prospective transaction was that the government of Zimbabwe owned the property. Mugabe's representatives "hastily" halted the sale and by weeks end made a 200,000 rand payment (\$20,000) to a trust account of the legal representatives of the seventy-eight farmers who challenged the government's land seizures in compliance with the SADC Tribunal's 2009 punitive costs order.<sup>82</sup> "The payment of the punitive cost order is a breakthrough for justice in the region. This is but the first step in our struggle for justice for Zimbabwean farmers.

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<sup>77</sup> David Smith, *Robert Mugabe Election Victory Could Force West to Lift Zimbabwe Sanctions*, Aug. 2, 2013, *GUARDIAN*, <http://www.theguardian.com/world/2013/aug/02/robert-mugabe-election-zimbabwe-sanctions>.

<sup>78</sup> On August 5, for instance, South African President Jacob Zuma extended his "profound congratulations" on a "successful vote" and urged "all political parties in Zimbabwe to accept the outcome of the elections as election observers reported it to be an expression of the will of the people." Daniel Nemukuyu and Zvamaida Murwira, *Zuma Endorses Poll Outcome, All Urged to Accept Result*, *HERALD*, Aug. 5, 2013, <http://www.herald.co.zw/zuma-endorses-poll-outcome-all-urged-to-accept-result-china-kenya-echo-facilitators-sentiments-mdc-t-leader-gangs-up-with-handlers/>.

<sup>79</sup> Nomalanga Moyo, *Mugabe's SADC 'Comrades' Endorse Disputed Poll Result*, *ZIMBABWEAN*, Aug. 20, 2013, <http://www.thezimbabwean.co/news/zimbabwe/67819/mugabes-sadc-comrades-endorse-disputed.html>.

<sup>80</sup> Nicholas Kotch, *Mugabe Leapfrogs Alphabet to Become Next SADC Leader*, *BUS. DAY*, Aug. 20, 2013, <http://www.bdlive.co.za/africa/africanews/2013/08/20/mugabe-leapfrogs-alphabet-to-become-next-sadc-leader> (characterizing the election to lead SADC as a "stunning diplomatic comeback" for Mugabe).

<sup>81</sup> David Smith, *Zimbabwe Government's U-Turn on White Farmers*, *MAIL & GUARDIAN*, Sept. 20, 2013, <http://mg.co.za/article/2013-09-20-00-zimbabwe-governments-u-turn-on-white-farmers/>.

<sup>82</sup> *Id.*; Bekezela Phakathi, *AfriForum Hails Zimbabwe 'Land Grab' Payment*, *BUS. DAY*, Sept. 17, 2013, <http://www.bdlive.co.za/national/2013/09/17/afriforum-hails-zimbabwe-land-grab-payment>.

That struggle will continue,” said a legal advisor to some of the farmers.<sup>83</sup> Lawyers for the farmers indicated that they intended to pursue full compensation for the value of the land seized by the Zimbabwe government.<sup>84</sup>

Somewhere, Ben Freeth is smiling.

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*