IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL AT WINDHOEK, REPUBLIC OF NAMIBIA

SADC (T) CASE No. 09/08

IN THE MATTER BETWEEN:

Nixon Chirinda and Others	**Applicants**
Versus	
Mike Campbell (Pvt) Limited and Others	**1st Respondents**
And	
The Republic of Zimbabwe	**2nd Respondent**

CORAM:

H. E. Justice Dr. L. A. Mondlane	**President**
H. E. Justice A. G. Pillay	**Member**
H. E. Justice I. J. Mtambo	**Member**
H. E. Justice Dr R. Kambovo	**Member**
H. E. Justice Dr O. B. Tshosa	**Member**

Applicants' Agents:	**Farai Mutamangira, Counsel** **C. Mlotshwa, Counsel** **A. E. J. Kamanja, Counsel**
First Respondents' Agents:	**A. P. de Bourbon, SC** **E. M. Angula, Counsel**
Second Respondent's Agent:	**P. Machaya** **Deputy Attorney-General**

Hon. Justice M. C. C. Mkandawire:	**Registrar**
Mr. D. Shivangulula:	**Court Clerk**

RULING

Delivered by H. E. Justice Ariranga G. Pillay

On 17 June, 2008 the applicants filed an application to intervene in the case of **Mike Campbell (Pvt) Limited and Others versus The Republic of Zimbabwe (Case No SADC (T) 2/07)**. The application was made pursuant to Article 30 of the Protocol on Tribunal (the Protocol) and Rule 70 of the Rules of Procedure of the SADC Tribunal (the Rules).

We shall first address the issue referred to so many times by learned counsel for the applicants in the course of his arguments, namely that the Tribunal was wrong to have heard the **Campbell** case, cited above, before dealing with the application of his clients, and at the same time to set the record straight. To be sure, if all other things were equal, the Rules and even plain commonsense would have required us to give priority to any intervener application and hear it before dealing with the main case to which it relates- vide Rule 43 which governs priority of cases. We refused, however, to hear the application during the July session of the Tribunal for two basic reasons.

First, the application was not even listed on the cause list of cases to be considered by us during that session. The **Campbell** case, however, was listed. The application had indeed been filed only on 17 June, 2008, as mentioned above. If we had heard the application, we would have acted in

breach of the Rules and opened the floodgates to last-minute applications like the present one.

Second, we saw at first glance from the application that the alleged dispute is between the present applicants and the applicants in the **Campbell** case and not between persons and State, as in the case of **Albert Fungai Mutize and others versus Mike Campbell (Pvt) Limited and others (SADC (T) Case No. 8/08.** It is to be noted that, in that case, learned counsel for the applicants also appeared and the Tribunal held that it had no jurisdiction to hear that application. We did not consider, therefore, that it was proper to give priority to the application and hear it.

We in fact decided to call in Chambers on 16th July, 2008 the agents of all the parties to the application. We then specifically explained to the agents of the applicants the reasons, mentioned above, for being unable to hear the application during the present July session. Learned counsel for the present applicants, realizing no doubt his predicament, requested of his own accord for an early date in September for the hearing of the application. We acceded to his request. Surely, counsel knew or ought to have known that in such circumstances the **Campbell** case which was scheduled to be heard during the July session was bound to be heard before the application. Surely, counsel could not reasonably have expected the Tribunal to postpone the **Campbell** case to September for the application of his clients to be heard first, especially in the light of the argument advanced by the agents of the **Campbell** applicants that the application was a mere ploy to further delay the hearing of the **Campbell** case.

One would have expected, however, that counsel would not have pressed ahead in September with the application of his clients in the circumstances, given that the **Campbell** case had already been heard during the July session and that the **Mutize** case had been dismissed by the Tribunal. Counsel chose, however, as he was entitled, to pursue the application, but at the cost and peril of his clients. In any event, it should also be stressed in this regard that the Tribunal is the master of its own procedure, as is made clear by Rule 2 (2) which is in the following terms:

> "*Nothing in these Rules shall limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary to meet the ends of justice*".

The main question to be decided is whether the Tribunal has jurisdiction to hear the application. Article 15 (1) of the Protocol states as follows:

> "*The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States*".

The alleged dispute in the application is between the present applicants and the applicants in the **Campbell** case. Since the dispute is not between persons and State, the Tribunal has no jurisdiction to hear the application, as was decided in the **Mutize** case, cited above.

In the course of his submissions learned Counsel for the applicants laid much emphasis on Rule 70 (1) of the Rules, which is as follows:

> *"A Member State, Institution, or person may apply to intervene in any proceedings" (emphasis supplied).*

Counsel submitted that his clients could intervene in the **Campbell** case without having to comply with the requirements of Article 15 (1) of the Protocol. He cited in aid several rules and decisions of the International Court of Justice and some decisions of the European Court of Human Rights. We consider that the rules and authorities quoted by learned counsel are irrelevant, given the clear and unequivocal terms in which Article 15 (1) of the Protocol is couched. Rule 70 (1), which has been made under the Protocol, cannot by any means have precedence over the Protocol itself. The Rule must be read subject to the requirements laid down by the Protocol. Indeed, Rule 70 (3) (d) requires an intervener to state in his application *"any basis for jurisdiction*".

Further, the application does not satisfy the requirements of Rule 70 (2), which in the relevant part reads as follows:

> "A*n application in terms of this Rule shall be made as soon as possible and not later than the closure of the written proceedings…"*

The written pleadings in fact had closed on 25 February, 2008. The application was therefore made after the closure of the pleadings. The fact that the Tribunal exercised its discretion, pursuant to Rule 2 (2), in allowing

a party to submit certain documents after the closure of pleadings, in order to meet the interests of justice, did not amount to a re-opening of pleadings. Any contention to the contrary would, in our opinion, be untenable.

There is an additional reason for rejecting the application. The applicants have not shown an interest of a legal nature which may be affected by our decision on the issues raised in the **Campbell** case. The main issues in the **Campbell** case are the denial of access to justice, racial discrimination and compensation. We fail to see how the interests of the applicants would be affected by our decision on these issues since the applicants have not adduced any evidence before us to the effect that they have indeed been denied access to justice and have suffered racial discrimination or loss.

Learned Counsel for the applicants also raised the issue of joinder, relying on Rule 39, which states as follows:

> *"The Tribunal may at anytime direct that the proceedings in two or more cases be joined for purposes of written or oral submissions or of the final decisions"*.

There is no basis for this contention since there are no cases to be joined.

For these reasons, we consider that the application for intervention has not been made out. In fact, this application is frivolous, constitutes an abuse of process and is consequently thrown out.

In the circumstances, we make an order of costs against the applicants under Rule 78 (2). The costs are to be determined by the Registrar if the parties are not agreed.

Delivered in open court this 17th Day of September, 2008 at Windhoek in the Republic of Namibia.

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H.E Justice Dr Luis Antonio Mondlane

PRESIDENT

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H.E Justice Ariranga Govindasamy Pillay

MEMBER

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H.E Justice Isaac Jamu Mtambo, SC

MEMBER

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H.E Justice Dr Rigoberto Kambovo

MEMBER

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H.E Justice Dr Onkemetse B. Tshosa

MEMBER