

## **ROBERT MUGABE'S SIEGE ON JUSTICE: THE DEMISE OF THE SADC TRIBUNAL AND SOUTH AFRICA'S JUDICIAL REPARATIONS FOR ZIMBABWEANS**

**D. PETRICA**

**Dan PETRICA**

Ph.D. Assistant Professor

Faculty of Juridical and Administrative Sciences, Agora University of Oradea, Romania

Email: [phd.dan.petricea@gmail.com](mailto:phd.dan.petricea@gmail.com)

### **ABSTRACT:**

*This research piece investigates how Zimbabwe's government was successful in rendering a regional court obsolete, with the implicit approval of South Africa. It also tackles how South Africa's judiciary stepped in to fill the resulting jurisdictional void by enforcing a distinctively detrimental decision on Robert Mugabe's regime on a particularly controversial subject for both countries: namely, land restitution. In achieving the above, South Africa's judicial branch managed to repair some of its executive's missteps in handling Zimbabwe's descent to authoritarianism – one brimming with human rights infringements and attacks on the rule of law. The article lies at the intersection of two humanities: political science and law, drawing themes and research methods from each. Still, it is not limited to practitioners from the said fields, being specifically constructed to be accessible to any interested reader.*

**KEYWORDS:** *democracy; the rule of law; authoritarianism; national jurisdiction; sovereignty, land restitution, dispossession*

### **ZIMBABWE'S DEMOCRACY BESIEGED**

During the Lancaster House Conference of 1979, Zimbabwe's regime conceded defeat, and the country once again became a colony of Britain, thereby receiving a new constitution. Ian Smith's defeat also put an end to the internal war between Zimbabwe's liberation movements<sup>1</sup> and the minority government. Shortly thereafter, the British ended a period of 14 years of sanctions, and most of Zimbabwe's neighbours followed suit, alongside the UN. Zimbabwe emerged as an independent state on 18 April 1980, with Robert Mugabe as its Prime Minister and head of government and Canaan Banana as its ceremonial President, after ZANU's landslide victory in elections. In the decades to follow, Mugabe established himself as the *de facto* ruler of Zimbabwe by gradually seizing the country's power structures. Dissent was silenced through either coercion or co-optation for almost three decades. ZANU-PF's elites eventually ousted Robert Mugabe from power in 2017, after an intraparty fight for power.

In the late 1990s, Zimbabwe's political system was marked by a classical form of authoritarianism. Political power was centralised around the figure of President Mugabe and his clientele – mainly composed of ruling party members and supporters. This client-patron relationship is what enabled ruptures in the democratic process. The holders of political power relied on nationalism when promoting a culture of intolerance towards the other part of society, which encapsulated political parties, civil society organisations, labour unions, and professionals from all spheres of work, including the judiciary. On the other hand, the divergent part of the population articulated narratives of 'transition', amid hopes that ZANU-PF would cede power and that a new regime would strive for further democratisation. The establishment grew tired of this latter category not falling in line with its *modus operandi*;

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<sup>1</sup> The Zimbabwe African National Union (ZANU) and Zimbabwe African People's Union (ZAPU)

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thus, it started considering them enemies of the state – as the former took upon themselves to be the only legitimate representatives of the state.

Briefly, the independent judiciary was bullied into submission; the remaining cluster of the free press was manipulated into demonising the political opposition, and civil society was either drawn in by threats or incentivised to give up their advocacy role.

Due to government overspending, generalised corruption, and gross mismanagement, Zimbabwe faced one of the most catastrophic financial crises of modernity, which gave birth to popular dissatisfaction. As a result, Mugabe's government pushed back – in an attempt to cling to power and shrug off disapproval. Still, Mugabe was left unconstrained from other state powers.

Zimbabwe's (mostly) liberal Constitution was applied discretionarily, and one could not speak of a truly independent judiciary. This fertile ground allowed authoritarianism to foster and enabled President Mugabe to act as the supreme authority in law – sometimes the only such authority. Capitalising on his position, he often ignored court rulings, which the executive chose not to enforce<sup>2</sup> because, as Mugabe phrased it, Zimbabwe's administration “*respect[ed] judgments where the judgments [were] true judgments*”<sup>3</sup>. One can argue that the government sometimes acted as a control power - a sort of supra-judiciary, if you may: court decisions were measured, weighed, and those found wanting were dismissed. In numerous instances, dissenting judges were forced to resign,<sup>4</sup> while other judges retired in good health, without any declared reasons, only to have their posts filled by Mugabe loyalists.<sup>5</sup> White judges gradually left the judiciary amid pressures, as they were “*maligned because of their race and alleged links to the colonial era*”.<sup>6</sup> One of the most pertinent examples of exclusion based on race is former Chief Justice Anthony Gubbay, who was forced to resign in 2001 after months of vilification. In theory, Zimbabwe's legislation provides checks and balances in the way the executive and legislative exercise their respective powers. However, in the period perused by our research, this system's effectiveness fell tributary to numerous controversies.

### DE JURE AND DE FACTO – ON FORMS WITHOUT SUBSTANCE

In 2013, Zimbabwe introduced a new Constitution, after several counter-democratic amendments had made their way in the body of text in previous years. Relating to the independence of the judiciary, Section 164 of the said Constitution states that courts are independent and are subject only to the Constitution and the law, which they must apply impartially, and that no actor, regardless if they are a part of the state apparatus or an individual, may interfere to breach independence, which is crucial to the rule of law and, subsequently, to democratic governance.<sup>7</sup> The state is required to both assist and provide protection to the courts, not only through legislative means, which would “*ensure their independence, impartiality, dignity, accessibility and effectiveness*”.<sup>8</sup> Nevertheless, courts'

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<sup>2</sup> For a list of court decisions which had been ignored by 2003 see the footnote section of Arnold Tsunga, “The Legal Profession and the Judiciary as Human Rights Defenders in Zimbabwe in 2003. Separation or Consolidation of Powers on the part of the State?”, Zimbabwe Lawyers for Human Rights (ZLHR), p. 2, Available at: [http://archive.kubatana.net/docs/hr/zlhr\\_legal\\_judic\\_hrdef\\_031224.pdf](http://archive.kubatana.net/docs/hr/zlhr_legal_judic_hrdef_031224.pdf).

<sup>3</sup> Robert Mugabe quoted in Tsunga, *ibid*.

<sup>4</sup> James R. Arnold and Roberta Weiner, *Robert Mugabe's Zimbabwe (Revised Edition)*, Minneapolis: Lerner Publishing, 2008, p. 84.

<sup>5</sup> Peta Thornycroft, “Zimbabwe High Court judge quits”, *The Telegraph*, 04 January 2002, Available at: [www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/1380399/Zimbabwe-High-Court-judge-quits.html](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/1380399/Zimbabwe-High-Court-judge-quits.html).

<sup>6</sup> *Ibid*.

<sup>7</sup> *Constitution of Zimbabwe 2013*, 22 May 2013, Section 164, Available at: [www.refworld.org/docid/51ed090f4.html](http://www.refworld.org/docid/51ed090f4.html).

<sup>8</sup> *Ibid.*, Section 165.3.

impartiality and independence had been stipulated, albeit in simplified terms, in Zimbabwe's 1980 constitution and reinforced by a series of amendments, including one in 1990.<sup>9</sup>

Furthermore, Zimbabwe's new Constitution stipulates that the courts' decisions are binding on everyone, including the institutions and agencies of the state.<sup>10</sup> All the provisions above draw their inspiration from the 1996 Constitution of South Africa<sup>11</sup> and seek to cover the double-sided essence of judicial independence: institutional independence and the independence of decision-making. Even by afar, the text of the two constitutions, especially regarding judicial independence, is similar to such a degree that Zimbabwe's legislative power seems to have only rephrased what had been laid down by its South African counterpart. Taking the principles that function in South Africa and including them in the Zimbabwe's Constitution demonstrates an act of goodwill while also revealing a tangible way in which South Africa has impacted the legislative process of its neighbour. Nonetheless, we argue that similar to the case of the Lancaster Constitution, drawing inspiration from the form of a decree does not suffice, for certain values have to be embedded inside the branches of power, thereby providing a guarantee that the essence behind drafted legislation is known and understood, and can be applied. As for the presence of these 'guardian values', Mugabe's government's actions since the 1990s prompt one to show restraint and scepticism - to put it mildly.

If we were to extend the comparison between the constitutions of South Africa and Zimbabwe, we must note that the distinct ways in which the political settlements came to fruition. In South Africa, transition materialised organically - it was negotiated between stakeholders; whereas, in Zimbabwe's case, the transition was super-imposed by external entities, such as the UN or UK. Van Zyl Slabbert warned in 1992 that the constitutional order in Zimbabwe had been imposed by external actors, leading to a perilous construction from the get-go.<sup>12</sup> With no organic, internally negotiated settlement - such as in South Africa - the super-imposed Constitution, while not lacking in democratic principles, suffered from the absence of a sound source for those principles. Zimbabwe's independence came in the circumstances of a forceful marriage between a profoundly racist authoritarian regime and a Marxist liberation movement, namely ZANU. A long-lasting democratic order could hardly emerge from such a combination because the essential foundations needed were missing. Furthermore, ZANU was contested by its rival, ZAPU, and needed to identify ways to assert its supremacy within national politics: thereby, the construction of a healthy democratic order was not necessarily the main priority for the latter.

There are numerous historical ties between South Africa and Zimbabwe, as their colonial past made the two states fall victim to many of the same plagues. As such, the two countries sometimes have similar objectives. Restituting land to those dispossessed by the former regimes is *par excellence*, one of them. While in the past, the methods used by the two for pursuing said objectives demonstrated striking differences, the distinctions seem to have all but faded as of recent. South Africa's constant tacit approval of Mugabe's human rights infringements related to land restitution has attracted the government in Pretoria a sum of critiques from the West. Western leaders envisaged the regional hegemon as its own foothold in Africa. While that still rings true on many issues, when it comes to the historical retribution for the past minority governments' sins, one can understand South Africa's tendency to side with those with shared similar experiences.

## ON LAND RESTITUTION AND FARM SEIZURES

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<sup>9</sup> *Constitution of Zimbabwe 1980*, 18 April 1980, Ch. 8, Section. 79b, Available at: <https://www.refworld.org/docid/3ae6b5720.html>

<sup>10</sup> *Constitution of Zimbabwe 2013*, *op. cit.*, Section 164.

<sup>11</sup> *Constitution of the Republic of South Africa*, 10 December 1996, Section 165, Available at: [www.refworld.org/docid/3ae6b5de4.html](http://www.refworld.org/docid/3ae6b5de4.html).

<sup>12</sup> See Frederik Van Zyl Slabbert, *The Quest for Democracy: South Africa in Transition*, London: Penguin, 1992.

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The land seizures that took place under the colonial regimes of the past represent one of Zimbabwe's major unhealed wounds. Through a series of racist laws, land was confiscated from the majority population, who were sometimes resettled, and awarded to large scale white farmers. As such, historical retribution remains latched in Zimbabwe to the question of land. However, while returning land to the dispossessed black citizens of Zimbabwe has always been a prerogative, Zimbabwe's 1980 constitution has a generous part dedicated to the protection of property<sup>13</sup>, in which forceful seizure was restricted but not forbidden. Amendments to the Constitution – most notably Act 30 of 1990,<sup>14</sup> further detailed the circumstances in which land could be acquired by mandatory compensation – and the jurisdiction to decide on possible litigations. In 1992, the Land Acquisition Act was passed, thereby extending the government's capacity to acquire land through compulsory action. Even with the said legislation in place, the land reform went slowly, and no decisive government action was taken in this regard until the end of the 1990s.<sup>15</sup> In 2000, the majority of Zimbabweans, rallied by the opposing party, Movement for Democratic Change (MDC), voted against the new Constitution proposed by Mugabe's regime. This fact sparked a violent outbreak orchestrated by ZANU-PF, which led to a series of occupations of white-owned farms. The administration called the seizures led by so-called war veterans' spontaneous' and did not admit to any involvement. Nevertheless, it soon became clear that the government was behind the entire affair, in a desperate attempt to flex their muscles so that they might deter the opposition from consolidating their standing within national politics. As the overwhelming part of literature in the field uses the syntagm 'war veterans' when referring to the squatters taking over farms, we have also adopted it. Still, some critics argue that only a small percentage of the squatters were veterans, the rest being too young to have fought in the independence war 20 years earlier.<sup>16</sup> In truth, up to 85% of the said veterans were unemployed youths paid by the ruling party.

### THE SADC TRIBUNAL'S DEMISE

While the South African Development Community (SADC) was either limited or outright powerless in enforcing decisions about Zimbabwe, there had been binding treaties that made several institutions of the SADC, such as the SADC Tribunal, capable of resolving disputes and tackling the issues in the said state. The SADC Tribunal had been created back in 1992, but due to a series of delays and incidents,<sup>17</sup> it only appointed judges in 2005 and started hearing cases two years later.

A decision was reached in one of the Tribunal's first human rights cases, in November 2008. In *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*, the plaintiffs argued that the land redistribution put in practice by the government against whites was illegal.<sup>18</sup> In 2007, the Tribunal had issued an interim ruling affirming its jurisdiction, granted that the Supreme Court of Zimbabwe had previously denied the plaintiffs the right to object to their land's seizure. Thus, the plaintiffs had been left without any potential domestic legal remedy. The SADC Tribunal ruled in favour of the plaintiffs, thereby reinforcing these specific farmers' right to lock the government's acquisition of their farms. The Tribunal also argued that farm evictions under Amendment 17 of Zimbabwe's Constitution<sup>19</sup> represented a *de facto*

<sup>13</sup> *Constitution of Zimbabwe 1980, op. cit.*, Ch. 3, Para. Section 16.

<sup>14</sup> Also *Constitution of Zimbabwe Amendment (No. 14) Act, 1996*

<sup>15</sup> Beverly L. Peters and Naudé Malan, "Caveats for land reform in South Africa: Lessons from Zimbabwe", in *South African Journal of International Affairs*, 7 (2), 2000, p. 154.

<sup>16</sup> Linda van Buren, "Economy", in Katherine Murison (ed.), *Africa South of the Sahara*, London: Europa Publications 2004, p. 1232.

<sup>17</sup> On 18 January 2007, the Turnhalle building in Windhoek, which accommodated the court room burned down and was completely destroyed, with reconstruction starting in the fall, the same year.

<sup>18</sup> See "Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008]", *SADC Tribunal* 2, 28 November 2008.

<sup>19</sup> Amendment 17 removes Zimbabwean courts' jurisdiction to hear an any plea that contests expropriations conducted by government.

discrimination of the country's white population,<sup>20</sup> and violated the SADC Treaty principles on non-discrimination and the rule of law<sup>21</sup>.

Mugabe's government, however, refused to recognise the Tribunal's decision and vehemently opposed enforcing it. Zimbabwe pulled out of the SADC Tribunal in protest, as it had previously done from the Commonwealth of Nations.<sup>22</sup> These unilateral actions show a recurrent *modus operandi* of Mugabe, which, similarly to a child who clashes with others on the playground and can't bully the latter, picks up his toys and leaves whenever deemed suitable. Whereas in the Commonwealth, Harare's actions left Western powers unimpressed, inside the SADC, Mugabe's peers did their best to avoid taking action against Zimbabwe and accommodate at least part of its wishes. Arguably, inside African fora, Mugabe reputation and his statute of elder, made him untouchable. The denigration campaign against the Tribunal launched by Zimbabwe furthered "a stance amounting to non-compliance (with) enforceable rulings on human rights violations",<sup>23</sup> bringing about a "rule of power"<sup>24</sup> that replaced the rule of law. During a 2010 Summit in Windhoek, the SADC ordered a review of the Tribunal's functions, role, and terms of reference.<sup>25</sup> South Africa stood silent on the issue, despite being legitimately expected to oppose such a move and pull the Tribunal forward, rather than accept pushing it back in time and rendering it invalid. Given its progressive Constitution and the constant trumpeted devotion to both human rights and the rule of law, this move can only be understood by analysing the regional political environment of that time through the lens of Pretoria's aspirations. We will not go in detail but contend with saying that South Africa's Nkosazana Dlamini-Zuma<sup>26</sup> needed Mugabe's support to win AU Chairmanship – after she had failed to secure a first-ballot win.<sup>27</sup> Thus, upsetting Zimbabwe's President could have entailed sacrificing more significant foreign policy objectives for South Africa.

Coming back from our excursus, we note that in the lack of other options, the farmers addressed their case to the South African court system. South Africa's courts ruled that the defunct Tribunal's verdict could be applied locally, granted that their country was a member of SADC and that regulations permitted such a move. The separation of powers in South Africa was still standing, despite its executive's past predilections to side with Mugabe. As such, Zimbabwean farmers had every reason to believe that South African judges would remain impartial when hearing their case. There was also a belief that Jacob Zuma, South Africa's new President, would be different from his predecessor and have a tougher stance on Zimbabwe.

Zimbabwe took the case through the Supreme Court, to the Constitutional Court of South Africa. In a landmark judgement from 2013, the Constitutional Court ruled that dispossessed farmers could sue in South African courts for compensation and attack Zimbabwe's assets in South Africa for compensation. The above constitutes the first ruling in international legal history, whereby a country's assets could be sold within another country, in

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<sup>20</sup> Mike Campbell vs Republic of Zimbabwe, *op. cit.*

<sup>21</sup> *Ibid.*

<sup>22</sup> See Dan Petrica, "South Africa's involvement in the issue of Zimbabwe's suspension from the Commonwealth of Nations", in *Comentario Internacional. Journal of the Andean Andean Center of International Studies*, 20, 2020.

<sup>23</sup> Andre Dumon, "The SADC Tribunal: The rule of power versus the rule of law - The Tribunal Tragedy", *Helen Suzman Foundation*, 14 March 2013, Available at: [hsf.org.za/resource-centre/hsf-briefs/the-sadc-tribunal-the-rule-of-power-versus-the-rule-of-law-the-tribunal-tragedy](http://hsf.org.za/resource-centre/hsf-briefs/the-sadc-tribunal-the-rule-of-power-versus-the-rule-of-law-the-tribunal-tragedy).

<sup>24</sup> *Ibid.*

<sup>25</sup> "Communique of the 30th Jubilee Summit of the SADC Heads of State and Government", *SADC*, Republic of Namibia, 17 August 2010.

<sup>26</sup> Nkosazana Dlamini-Zuma, the former wife of South African President Jacob Zuma, was amongst the leaders of the country's ruling party, the African National Congress (ANC). She served at the time as South Africa's Minister of Home Affairs.

<sup>27</sup> "AU chooses Nkosazana Dlamini-Zuma as leader", *BBC News*, 15 July 2012, Available at: [www.bbc.com/news/world-africa-18846210](http://www.bbc.com/news/world-africa-18846210).

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settlement for human rights violations.<sup>28</sup> The Constitutional Court held that South Africa had obligations under a treaty, as a SADC member, to enforce the SADC Tribunal's decision against Zimbabwe in South African domestic courts.<sup>29</sup> This interpretation arose by developing the common-law doctrine of enforcement of foreign judgments to cover those pronounced by the SADC Tribunal. Despite contestation, the Court also held that no immunity could be granted to Zimbabwe in this specific case.<sup>30</sup>

The government in Harare felt the shockwave emanating from this ruling. But the decision also had entailed salient political implications for South Africa, where the land reform was not going as fast as planned, and voices calling for a Zimbabwe-like model began to multiply. We cannot stress the importance of this landmark case. It shows that the South African judiciary can resist the pressures that have made the SADC Tribunal crumble and capable of objectively judging human rights cases, which Zimbabwean Courts had refused to touch due to their sensitive nature. The situation presented above provides us with one instance in which South Africa's judicial branch demonstrates that it is free of the political constraints that keep the executive's hands tied. It does not hear nor decide cases based on foreign policy goals.

The decision reached by South Africa's court system signified that that rule of law could no longer be taken arbitrarily by Mugabe's government and that human rights, including that of property, must be sheltered. While Thabo Mbeki and, to some degree, Jacob Zuma needed to take into account several factors when dealing with Mugabe, such as the sometimes-unclear limits of (breaching) sovereignty, South Africa's independent judiciary gave a lesson to both the executive of Zimbabwe and to its judiciary, which was more or less attached to ZANU-PF. The principle of separation of power inherent in South Africa demonstrates that while the executive dictates foreign policy and how international relations are created and kept, the judiciary can also set the parameters when called upon to solve exceptional situations.

### CONCLUSIVE REMARKS

The SADC Tribunal took the issue of land distribution into its hands, and in a landmark decision of late-2008, decreed that the farm invasions occurring in Zimbabwe had been illegal. Mugabe's regime met the decision with anger and refused to enforce it, only to pull Zimbabwe out from the Tribunal and successfully denigrate the institution. As a result, the Tribunal went under review and was later disbanded. South Africa's implicitly approved both decisions, for it had foreign policy goals that needed Mugabe's support. Furthermore, Pretoria pursued Zimbabwe's objective to further land restitution on its own territory, albeit by different means. Finding themselves in the impossibility of obtaining domestic remedies, the said landmark case's plaintiffs sought to transfer the judgement to South Africa's courts, hoping for impartiality. The case reached the Constitutional Court of South Africa, which, decided that the plaintiffs could sue in South Africa and held that South Africa had obligations arising from treaties to enforce the SADC Tribunal's ruling against Zimbabwe. In South Africa, the judiciary was prompt to move from official governmental policy relating to its neighbour and prioritise human rights concerns and the sanctity of property rights. Thus, while not directly being a force of democratisation, South Africa's judiciary punished anti-democratic practices by compensating their victims through the sale of Zimbabwean assets.

The issue presented in this article is very relevant today, especially since in December 2018, South Africa's Constitutional Court ruled that President Zuma's participation in

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<sup>28</sup> See "Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC)", Constitutional Court of South Africa, 27 June 2013.

<sup>29</sup> *Ibid.*

<sup>30</sup> Immunity from civil jurisdiction and enforcement is usually accorded to foreign states by both international and South African domestic law.

abolishing the SADC Tribunal was unconstitutional. As such, South Africa withdrew its signature from the decision to disband the institution.

The SADC Tribunal is still suspended; nevertheless, prompted by its Constitutional Court, South Africa seems to have found a new impetus to revive the body, or, at the minimum, resuscitate the stalemated talks surrounding it.

This article's key takeaway is that even in the absence of political will to tackle the various problems threatening democracy in a neighbouring one country, the judicial branch of power can repair some of the harm inflicted by the executive's inaction or its counterproductive actions.

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