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Communication 477/14

Crawford Lindsay von Abo

v.

The Republic of Zimbabwe

Adopted by the
African Commission on Human and Peoples' Rights
during the 57th Ordinary Session, from the 4 to 18 November 2015
Banjul, The Gambia

H. Tlakula.

.....

Hon. Commissioner Pansy Tlakula
Chairperson of the African Commission on Human and Peoples' Rights

SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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Dr. Mary Maboreke
Secretary to the African Commission on Human and Peoples' Rights

Decision of the African Commission on Human and Peoples' Rights on Admissibility

Communication 477/14 – Crawford Lindsay von Abo v. the Republic of Zimbabwe

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a Complaint on 26 June 2014 from Crawford Lindsay von Abo (the Complainant), who is represented by Peter Hodes SC, Anton Katz SC, Max du Plessis, Andreas Coutsoudis and Wilhelm Herbst (the Representatives).
2. The Complaint is submitted against the Republic of Zimbabwe (the Respondent State), State Party to the African Charter on Human and Peoples' Rights (the Charter).[1]
3. The Complainant submits that he is a national of the Republic of South Africa (South Africa), who was issued a permanent resident permit by the Government of the Respondent State in 1980.
4. The Complainant submits that he is the sole director of Brecon Farm (Private) Ltd, Lin Abo Estate (Private) Ltd, Von Abo Estate (Private) Ltd, Dunbarton Estate (Private) Ltd and Lochnagar Farm (Private) Ltd. He states that he is also the sole Trustee and sole beneficiary of the Von Abo Trust (the Trust), which was created on 28 October 1985. He adds that with the exception of the Von Abo Estate, all the farming properties were acquired after the democratic governmental structure had been established in Zimbabwe.
5. The Complainant avers that he became the sole director of the above-stated Companies and the sole beneficiary of the Trust, following the resignation of one of the trustees, Mr Elliott in 2005 and the death of another Trustee, Mr Bell in 2012.
6. The Complainant states that he has worked hard for the success of his business venture in the Respondent State, which not only required

[1] The Republic of Zimbabwe ratified the African Charter on 30 May 1986.

substantial financial commitments, but also great personal sacrifices and business acumen.

7. The Complainant submits that his rights to equality and non-discrimination were violated by the Respondent State, as his lawfully acquired property was effectively expropriated or otherwise encroached upon, without compensation, on account of his race, through the implementation of the land resettlement policy, and/or through the Respondent State's act of encouraging, permitting and authorising the unlawful dispossession of his property.

8. The Complainant alleges that on 28 November 1997, the Respondent State published a preliminary notice of compulsory acquisition in the Government Gazette, by virtue of the provisions of the Zimbabwe Land Acquisition Act 3/1992, which indicated that the Government intended to compulsorily acquire properties belonging to the aforementioned Companies and the Trust.

9. The Complainant submits that he brought the matter to the attention of the relevant authorities, using judicial and/or administrative means, which ruled in his favour. He adds that the findings notwithstanding, the Respondent State continued to obtain the said farming properties, by publishing further notices and engineering further attachment of the properties.

10. The Complainant details how the Ministry of Lands, Agriculture and Rural Resettlement (the Ministry) issued acquisition of land orders, making use of the Land Acquisition Act, to acquire the properties of the Companies and the Trust. He further specifies how his then attorneys and legal advisors, Messrs Winterton, Holmes & Hill, attempted to lawfully over-turn the notices, by lodging formal objections, amongst other means. He describes how the Ministry issued multiple acquisition orders in respect of Fauna Ranch, property of the Von Abo Trust, which were successfully opposed by his attorneys between November 1997 and October 2006.

11. The Complainant avers that the Respondent State encouraged, aided and protected so-called "war veterans" in their action of infiltrating and settling on farms owned by the above Companies and the Trust. He adds that attempts to prevent the settlement led to physical abuse directed to the farm manager or person in charge and his relatives, as well as farm workers and their families. He states that the police or other governmental bodies offered no remedies, because they termed the situation "political", and claimed they were under orders not to interfere.

12. The Complainant alleges that from April 2004 onwards, large plots of land owned by the Fauna Ranch were allotted to businessmen, which they occupied and are still in occupation thereof. He argues that his experience in respect of all the other properties is substantially similar.

13. The Complainant submits that he and any representatives of the Companies and the Trust have very limited access, if any, to the properties, and only at the complete discretion of the unlawful occupants of the properties. He adds that all of the game and herd of cattle have been killed off, while loose assets on the property have simply been confiscated. The Complainant provides a breakdown of the movable and immovable property value of each of the aforementioned Companies as well as the Trust, and concludes that the Von Abo Group has incurred a total loss of US $ 107, 278, 508.

14. The Complainant further submits that on 19 August 2002, he was arrested on Fauna Ranch, but was released after posting bail of Zimbabwean $ 10, 000. He adds that he appeared in court on 13 occasions until 22 April 2005, when the charges were formally withdrawn, although he avers that he still does not know what he was charged for. He states that he incurred considerable expenses, as he had to travel from South Africa to Zimbabwe to appear in court to face the charges.

15. The Complainant contends that there are no effective and sufficient remedies in the Respondent State, and any remedies left to be pursued in Zimbabwe are futile. He states that Section 16B of the Zimbabwean

Constitution as amended by (Amendment No. 17 of 2005) legitimised land seizures under the Land Acquisition Act. The Complainant adds that he has attempted to attain relief in South African courts, but only received a declaration that the South African Government had violated his constitutional rights by failing to properly consider his application for diplomatic protection, without any consequential relief which requires the South African Government to take any steps to rectify the position.

Articles alleged to have been violated:

16. The Complainant alleges violation of Articles 1, 2, 3, 14 and 21 (1) and (2) of the African Charter.

Prayers:

17. The Complainant requests the African Commission on Human and Peoples' Rights (the African Commission) to:
    a. Declare a violation of his rights under Articles 1, 2, 3, 14 and 21 (1) and (2) of the African Charter;
    b. Declare that the Complainant has been discriminated against on the basis of race;
    c. Declare that the Complainant has had his property rights violated;
    d. Declare that the Respondent State award due reparation; and
    e. Refer the matter to the African Court on Human and Peoples' Rights (the African Court).

Procedure:

18. The Secretariat received the Complaint on 26 June 2014 and acknowledged receipt of the same on 8 July 2014.
19. The Commission considered the Communication from 20 to 29 July 2014, during its 16th Extra-Ordinary Session, and decided to be seized of it. By letter and *Note Verbale* dated 30 July 2014 the parties were informed of the seizure decision.

20. In the same decision, the Commission noted that the Respondent State has not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, and decided that the matter can therefore, not be referred to the African Court.

21. On 1 October 2014, the Secretariat received the Complainant's Submissions on the admissibility of the Communication, which were duly acknowledged and transmitted to the Respondent State by *Note Verbale* dated 1 October 2014.

22. On 12 December 2014, the Secretariat received the Observations of the Respondent State on the Admissibility Submissions of the Complainant, which were duly acknowledged and transmitted to the Complainant for his comments by letter dated 12 December 2014.

23. On 20 January 2015, the Secretariat received the Complainant's Response to the Submissions of the Respondent State on the admissibility of the Communication, which was duly acknowledged and transmitted to the Respondent State by *Note Verbale* dated 20 January 2015.

24. Consideration of the Communication's admissibility as earlier scheduled at the Commission's 17th Extra-Ordinary Session which took place from 19 to 28 February 2015 was deferred to a later Session, due to time constraints. The parties were informed of this decision by letter and *Note Verbale* dated 5 March 2015.

The Law on Admissibility

Submissions of the Complainant on Admissibility

25. The Complainant submits that he has fulfilled all the requirements of Admissibility provided under Article 56 of the Charter particularly because the Communication: indicates the author; is compatible with the African Union Constitutive Act and the Charter; is not written in disparaging or insulting language; is not based exclusively on news

disseminated through the mass media; and does not deal with a case that has been settled internationally or regionally.

26. Regarding exhaustion of local remedies, the Complainant submits that no purpose would be served in seeking further remedies in the Respondent State because there are no effective and sufficient remedies. He argues that given the Zimbabwean government's stance on issues to do with expropriation of white owned farms and what he calls the "almost absolute disregard that the government shows even for the orders of its own courts", there is no available remedy.

27. Further, the Complainant submits that the Respondent State through legislative measures, executive encouragement and the failure of the rule of law has placed him in a situation where any further steps to protect his property rights in Zimbabwe would be futile and contends that the same still subsists.

28. The Complainant avers that the SADC Tribunal, in the case of *Campbell and Others v Zimbabwe (Campbell Case) (2007)* SADC - (T) (Case No. 2/2007), where the circumstances constituting the facts were very similar to the Complainant's own, held that Section 16B of the Zimbabwean Constitution (as amended by Amendment No. 17 of 2005) to legitimate land seizures under the Land Acquisition Act ousted the jurisdiction of the Zimbabwean courts to consider such acquisitions[2].

29. In light of the foregoing, the Complainant submits that, given the history behind this matter, there is no reasonable prospect of securing damages or vindication of his rights in a Zimbabwean court.

30. With respect to the requirement to submit the Communication within a reasonable period from the time that local remedies are exhausted or from the date that the Commission is seized of the matter, the Complainant contends that the time he took to institute this Communication is reasonable.

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[2] *Campbell and Others v Zimbabwe (Campbell Case) (2007)* SADC - (T) (Case No. 2/2007), para 53.

31. The Complainant explains that upon realising that he had no effective local remedies open to him in Zimbabwe, he diligently pursued all alternative remedies prior to approaching the Commission. These alternative remedies consisted of attempts to get diplomatic protection from the South African government as a citizen. He states that he began by approaching the High Court of South Africa, seeking an order to compel the South African government to proffer the diplomatic protection.

32. The High Court of South Africa held that he had exhausted all local remedies in Zimbabwe, and that there was no purpose in seeking further remedies in Zimbabwe because to the extent that those remedies existed they were not effective, would be futile and the Complainant would not be able to vindicate his rights nor secure damages in a Zimbabwean court.[3] It also ordered the Government of South Africa to take all necessary steps to have the Complainant's rights violated by the Government of Zimbabwe remedied because they had a constitutional obligation to provide diplomatic protection. [4]

33. He submits that he also approached the Constitutional Court of South Africa to have certain aspects of the High Court order confirmed in line with the South African Constitution.[5] This application was turned down. However, an application to the High Court to have the first order enforced was granted. [6]

34. Upon the state's appeal to the South African Supreme Court of Appeal,[7] the Complainant avers, the decision of the High Court was overturned except to confirm that the Government of South Africa had violated his constitutional rights by failing to properly consider his application for diplomatic protection. He submits that his attempts to appeal this

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[3] *Von Abo v Government of the Republic of South Africa & Others* (2009) T paras 87-89.
[4] Ibid.
[5] *Von Abo v The President of the Republic of South Africa* (2009) CCT 67/08.
[6] *Von Abo v Government of the Republic of South Africa & Others* (2010) GNP.
[7] *Government of the Republic of South Africa and Others v Von Abo* (2011) SCA para 1.

decision in the Constitutional Court failed as the case was dismissed in May 2011.

35. The Complainant also contends that he considered applying for relief in the SADC Tribunal but waited for the outcome of political discussions among the SADC states. His lawyers had heard rumours that the SADC states would discontinue the work of the Tribunal. He states that the SADC Tribunal was in fact disbanded, as rumoured, in August 2012 before he had a chance to approach it.

36. Finally, the Complainant submits that the Commission should find that the time taken to institute this Communication is reasonable given that he diligently pursued "all alternative remedies" prior to approaching the Commission.

Submissions of the Respondent State on Admissibility

37. The Respondent State submits that the Communication meets the requirements under Article 56 (1), (2), (3), (4) and (7) but does not meet the requirements under Article 56(5) to exhaust local remedies and 56(6) to submit the communication within a reasonable period from the time that local remedies are exhausted or from the date the Commission is seized of the matter.

38. With regard to the exhaustion of local remedies, the Respondent State submits that the requirement of exhausting local remedies is founded on the principles that governments should have notice of the human rights violations in order to have the opportunity to remedy such violations prior to being called before an international body. The Respondent State avers that the complaint in this Communication was never brought to its notice which made it impossible for it to take measures to remedy the violations.

39. The Respondent State also submits that the Complainant's assertions that there was no purpose in "seeking further remedies in the courts of Zimbabwe given the Zimbabwean Government's stance regarding expropriation of white owned farms and the almost absolute disregard

that the government shows even for the orders of its own courts..."are not substantiated. It also submits that this lack of substance makes it unclear whether these assertions are fact or not.

40. Further to this, the Respondent State submits that the Complainant has not shown any court orders that the Zimbabwean Government did not comply with for him to come to the conclusion that any remedies left to be pursued in Zimbabwe are futile.

41. The Respondent State submits that the Complainant has indeed shown how between 1997 and 2001 he, through opposing preliminary notices (also known as Section 5 notices), attempted to stop the acquisition of the companies and Trusts prior to the promulgation of Amendment No. 17 of 2005 to the Constitution of Zimbabwe. However, the Respondent State, disputes that failing to enforce the decisions emanating from such oppositions meant that the Republic of Zimbabwe was disregarding its own court orders. It avers that instead, it was a case of the decisions being superseded by changes in the law.

42. The Respondent State explains that Constitutional Amendment No. 17[8] was promulgated to counter mounting legal challenges by previous owners of properties identified for land redistribution. According to the Respondent state, these legal challenges were slowing down the land reform and redistribution exercise which the Respondent State had begun to remedy historical injustices. The Respondent State explains that the Amendment introduced Section 16B to the Constitution of Zimbabwe. Its effect was to render as legally acquired all the land identified for redistribution, eliminating the previous requirement to have acquisition of such land confirmed by the Administrative Court. In the Respondent's words "Amendment No. 17 superseded all pre-existing laws and court decisions".

43. Although the Respondent State agrees with the Complainant in that Amendment No. 17 ousted the courts' jurisdiction with regard to land

[8] The Constitution of Zimbabwe Amendment (No. 17) Act, 2005, Sec 16B (3) (b).

dispossession, it however, dismisses the Complainant's claims that there are no reasonable prospects of securing damages in a Zimbabwean Court. It contends that Section 16B of the Constitution specifically provides for the right to compensation for "any improvements effected on such land before it was acquired[9]". The Respondent States contends that there is a clear right to compensation for improvements on the land which the Complainant has not tried to enforce.

44. It explains that a Compensation Committee was set up in terms of the law and those whose farms were acquired can put their claims for consideration and assessment before that Committee. Consequently, the Respondent State argues that without seeking remedies regarding compensation for improvements on all land acquired, the Complainant has not exhausted local remedies as set out in Section 56(5) of the Charter.

45. It further submits that the Complainant must provide concrete evidence to demonstrate that local remedies were ineffective and insufficient; arguing that merely casting aspersions on the effectiveness of local remedies is not enough to absolve the Complainant of the duty to exhaust local remedies. It cites the decision in Communication 308/05 - *Michael Majuru v Zimbabwe (Majuru Case)*[10] in which the Commission stated that the mere fact that a remedy is inconvenient or unattractive or does not produce a result favourable to the petitioner does not, in itself demonstrate the lack of effective remedies.

46. The Respondent State further submits that local remedies ought to be exhausted as stated in Communication 275/03 - *Article 19 v Eritrea* where the Commission held that it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies[11]. The Commission also stated that it is not sufficient for the

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[9] Ibid.

[10] Communication 308/05 - *Michael Majuru v Zimbabwe (Majuru Case)* (2008) ACHPR para 102.

[11] Communication 275/03 - *Article 19 v Eritrea* (2007) ACHPR para 67.

Complainant to cast aspersions on the ability of domestic remedies of the State due to isolated incidences[12].

47. The Respondent State posits that for one to have exhausted local remedies, he/she must have taken their case to the highest court of the land unless it is obvious the procedure in unduly prolonged. It argues that the Complainant has simply not done so and hence has not exercised his duty to exhaust local remedies.

48. With respect to the question of whether the Communication was submitted within a reasonable period from the time that local remedies were exhausted, the Respondent State contends that the present Communication was not submitted on time as required by the Charter. It submits that the Complainant does not give cogent reasons as to why he neither pursued local remedies nor sought remedies before the Commission within a reasonable time. The Respondent State notes that the complaint was received at the Commission in 2014, nine (9) years after the alleged violations occurred, during which the Complainant neither approached the local courts of the Respondent State nor lodged a complaint immediately with the Commission.

49. The Respondent State submits that domestic remedies are remedies in the jurisdiction where the act complained of took place and therefore does not understand why the Complainant chose to take the case to the South African Courts instead of approaching Zimbabwean courts. It also avers that the Complainant has only himself to blame for taking his case to the wrong forum thereby occasioning the inordinate delay.

50. It further submits that the Commission should be guided by other jurisdictions such as the Inter-American Commission which have fixed six months as constituting reasonable time. The Respondent State urges the Commission to follow its previous decision in the *Majuru Case* in which the Commission held that twenty-two months' delay was clearly beyond

[12] Ibid.

a reasonable man's understanding of a reasonable period of time and thus found the communication to be inadmissible. [13]

51. It concludes that the Communication does not comply with Article 56 (6) and in light of its submissions, calls on the Commission to declare the Communication inadmissible.

Additional submissions of the Complainant

52. In response to the Respondent's submissions, the Complainant takes note of the Respondent's admission that the Communication meets the requirements in terms of Section 56 (1), (2), (3), (4) and (7) of the Charter. He however posits that the bases upon which the Respondent State disputes the admissibility of the Communication with regard to Section 56 (5) and (6) are without merit. The Complainant states that, although the Respondent State raises some limited arguments regarding the admissibility of the Communication, it fails to raise any issues that would render the Communication inadmissible.

53. The Complainant submits that although the Respondent State argues that the Complainant failed to comply with the requirement to exhaust local remedies, the Respondent State's own submissions supporting this argument demonstrate the contrary. To this end, the Complainant points to the Respondent State's admission that Amendment No. 17 to the Zimbabwean Constitution eliminated the possibility of a complainant in cases of compulsory land acquisition, as is the case in this Communication, from challenging such acquisition in terms of the law in Zimbabwe.

54. The Complainant also highlights the Respondent State's admission that under Zimbabwean law the government has no obligation to pay compensation for land acquired under the Land Reform exercise.

55. He also points to the Respondent State's admission that if he had any court orders pertaining to properties referred to in the Communication

[13] *Majuru Case* n10 Above, para 110.

that were granted prior to Amendment No. 17, in 2005, then those court orders would have been rendered unenforceable by the Amendment under Zimbabwean law.

56. The Complainant submits that these admissions reinforce the unavailability of effective remedies in Zimbabwe in redressing dispossession of land and the compulsory acquisition of properties in terms of Zimbabwe's land redistribution policy and laws which are the subject of the Complainant's submissions.

57. The Complainant also contends that the Respondent State fails to effectively address, in its submissions, the issue of the decision passed by the SADC Tribunal in the *Campbell case*.[14] In particular, the Complainant draws the Commission's attention to the Tribunal's ruling that Section 16B of the Zimbabwean Constitution as amended by Amendment No. 17 of 2005 to legitimate land seizures under the Land Acquisition Act, ousted the jurisdiction of the Zimbabwean Courts to consider such acquisitions and amounted to unfair racial discrimination in so far as it purported to dispossess white landowners of their property.

58. Additionally, the Complainant argues that the Respondent State fails to address the fact that the South African Supreme Court of Appeal definitively found that "the Complainant exhausted all possible remedies available to him in Zimbabwe against the Zimbabwean government but to no avail." The Complainant further submits that the High Court of South Africa in reaching its conclusions in relation to the same facts set out in the Communication, stated that no purpose would be served seeking further remedies in the Courts of Zimbabwe given the almost absolute disregard of the government of Zimbabwe to the orders of its own courts in respect of expropriated land.

59. The Complainant submits that the only valid, but limited argument advanced by the Respondent State is that there are local remedies in

[14] n2 Above.

Zimbabwe for compensation for improvements on the acquired land, through an application by the Complainant to a Compensation Committee. The Complainant submits, however, that the Respondent State fails to show the legal framework subsequent to Section 16B of the Constitution setting up the Compensation Committee or give any evidence to the effectiveness of the Compensation Committee (if it exists).

60. The Complainant also submits that the possibility of getting compensation for improvements, only relates to a small portion of the violations of the rights complained of in the Communication and does not extend to the loss of possession of the properties themselves. To him, this means that there still are no effective local remedies for the vast majority of the violations complained of in the Communication.

61. Regarding the Respondent State's argument that the Complainant should not have pursued relief in South Africa, the Complainant contends that the Respondent State's arguments are misplaced. He argues that pursuing justice in South Africa was not only reasonable but diligent because he had reasonable prospects of success. He also contends that approaching the Commission should not be a complainant's first port of call and that he should not be faulted for seeking remedies in available "domestic forums".

62. In light of the foregoing submissions, the Complainant requests that this Communication should be declared admissible for consideration on the merits.

The African Commission's Analysis on Admissibility

63. Article 56 of the Charter sets out seven requirements that a Communication brought under Article 55 of the Charter must satisfy in order to be Admissible for consideration by the Commission.

64. The Commission has pronounced in its jurisprudence; that admissibility requirements set out in Article 56 of the Charter apply conjunctively and cumulatively, and must each be adequately satisfied for a Communication

to be declared admissible for consideration on the merits[15].Failure to satisfy any one or more of these requirements renders the Communication inadmissible entirely or in respect of those aspects that do not satisfy the relevant conditions[16].

65. The Commission observes that both parties do not raise issues with respect to Article 56(1), (2), (3), (4) and (7). Having considered the Communication, the Commission does not reckon any issues on the conditions under those paragraphs. Accordingly, the Commission is satisfied that the Communication is compliant with Article 56 (1), (2), (3), (4) and (7) of the Charter and will address the two contested grounds upon which the Respondent State argues that this Communication should be dismissed.

Exhaustion of local remedies, Article 56(5) of the Charter

66. Article 56(5) of the Charter demands that a Communication be 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. This rule is the cornerstone of the Commission's adjudicatory function deriving from the rationale that 'before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy the matter through its own system[17]".This safeguard prevents the Commission from acting as a court of first instance.

67. The Commission's jurisprudence regarding the exhaustion of local remedies is set out in Communication 147/95 *Sir Dawda K Jawara v The Gambia (Jawara Case)*[18]. The *Jawara Case* sets out a criterion that local remedies must be available, effective and sufficient. A remedy is "available" if the petitioner can pursue it without impediment, "effective"

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[15] Communication 338/07 - *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* (2010) ACHPR para 43 and Communication 284/03 - *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) ACHPR para 81.

[16] Communication 284/03- *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) ACHPR para 81.

[17] Communication 147/95-149/96 - *Sir Dawda K. Jawara v The Gambia* (2000) ACHPR (Jawara Case).

[18] *Id* paras 31- 32.

if it offers a reasonable prospect of success and "sufficient" if it is capable of redressing the complaint[19].

68. The duty to prove that local remedies have been exhausted is incumbent upon the Complainant, who is the author of the Communication[20]. The Complainant in this case relies on a number of arguments to support his claim that he has complied with the requirement under Article 56(5).

69. He first states that he formally filed objections to Notices of Acquisition of the properties gazetted by the Respondent State which are the subject matter of this Communication in line with the law in Zimbabwe through his then lawyers Messrs Winterton, Holmes and Hill.

70. He also argues that any judicial remedies, that were available prior to the Promulgation of Amendment No. 17, including opposing notices of acquisition, were rendered futile and ineffective in light of the fact that the Amendment ousted the jurisdiction of Zimbabwean courts to adjudicate complaints relating to the compulsory acquisition of designated farm land, and hence these remedies became unavailable.

71. Further, he asserts that any remedies that may have been available with respect to compensation for improvements on the land are insufficient as they only relate to a small portion of the violations raised in the Communication, meaning that there still are no effective local remedies for the vast majority of the violations raised in the Communication.

72. The Commission notes that the Complainant's contention is that local remedies were unavailable and insufficient and need not be exhausted as held in the *Jawara Case*[21] and in Communication 251/2002-*Lawyers for Human Rights v Swaziland.*[22]

73. The Respondent State submits that the Complainant has not exhausted local remedies because he did not seek compensation for improvements

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[19] Ibid.

[20] Frans Viljoen, Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997 in C. Heyns (Ed) Human Rights Law in Africa 1997 (1999) 71.

[21] *Jawara Case* n18 Above paras 38-39.

[22] Communication 251/2002-*Lawyers for Human Rights v Swaziland* (2005) ACHPR para 27.

made on the property in question in line with the provisions of Section 16B (3) (b) of the Constitution of Zimbabwe.

74. In order to satisfy itself as to whether or not local remedies have been exhausted, the Commission has had to analyse the relevant provisions in the Constitution of Zimbabwe. In so doing the Commission notes that this Communication was submitted to the Commission at a time when Zimbabwe was using its old Constitution[23]. Since then, Zimbabwe adopted a new Constitution[24]. However, the relevant provisions to this Communication, to a large extent, remain the same under both Constitutions[25]. To avoid any confusion that may arise, this decision will be based on the provision that existed at the time that the Communication was brought before the Commission as introduced by Amendment No. 17.

75. The provision is as follows: Section 16 B

> (3) Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)—
>
> (a).....
>
> (b) no person may apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application; and
>
> (c) the acquisition may not be challenged on the ground that it was discriminatory in contravention of Section 56.

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[23] Constitution of Zimbabwe published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom) and as amended by Amendment Act of 1981 (No. 2), Amendment (No. 2) Act of1981; Constitution of Zimbabwe Amendment (No. 3) Act of 1983; Constitution of Zimbabwe Amendment (No. 4) Act, 1984; Constitution of Zimbabwe Amendment (No. 5) Act, 1985; Constitution of Zimbabwe Amendment (No. 6) Act of1987; Constitution of Zimbabwe Amendment (No. 7) Act of1987; Constitution of Zimbabwe Amendment (No. 8) Act of 1989; Constitution of Zimbabwe Amendment (No. 9) Act of 1989; Constitution of Zimbabwe Amendment (No. 10) Act, 1990, Constitution of Zimbabwe Amendment (No. 11) Act, 1990, Constitution of Zimbabwe Amendment (No. 12) Act of 1993; Constitution of Zimbabwe Amendment (No. 13) Act of1993; Constitution of Zimbabwe Amendment (No. 14) Act of 1996; Constitution of Zimbabwe Amendment (No. 15) Act of 1998; Constitution of Zimbabwe Amendment (No. 16) Act, of 2000; Constitution of Zimbabwe Amendment (No. 17) Act of 2005; Constitution of Zimbabwe Amendment (No 18) Act of 2006 and Constitution of Zimbabwe Amendment (No 19) Act of 2012.

[24] Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

[25] The provisions in Section 16B (3) of the Old Constitution remain the same in Section 72 (3) of the new Constitution.

76. It is apparent in its wording that Amendment No. 17 does four things. In the first instance, it permits compulsory acquisition of agricultural land. It also prevents any person from whom the land is taken from approaching the courts seeking compensation for or repossession of the land. It further allows individuals from whom the land is taken to seek compensation for improvements on the land. Finally, it prohibits the courts from hearing any cases regarding dispossession of agricultural land. Amendment No. 17 effectively ousts the jurisdiction of the Courts with respect to acquisition of agricultural land except in relation to compensation for improvements.

77. The Commission will address the two issues raised with respect to exhaustion of local remedies separately. First; whether remedies were exhausted in relation to redress for the loss of land and other properties which did not constitute "improvements on the land" and second; whether remedies existed in lieu of compensation for improvements made on the land.

78. With respect to dispossession of land, the Commission recalls its decision in Communication 151/96 – *Civil Liberties Organisation v Nigeria* where it found that 'ouster clauses render local remedies non-existent, ineffective or illegal and they create a legal situation in which the judiciary can provide no checks on the executive branch of government[26]'.

79. Similarly, in Communication 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* the Commission noted that although Nigeria was under a democratically elected government, provisions in its Constitution (Section 6(6) (d)) which spelt out that no legal action could be brought to challenge 'any existing law made on or after 15th January 1966 for determining any issue or question as to the competence of any authority or person to make any

[26] Communication 151/96 – *Civil Liberties Organisation v Nigeria* (1996) ACHPR para 14.

such law' meant that there was no recourse within the Nigerian legal system for challenging the legality of any unjust laws[27].

80. Further, the Commission in Communication 444/13 - *Justice Thomas S. Masuku v Swaziland (Masuku Case)* ACHPR (2014) stated that the availability of a remedy entails both its *existence* in law and its *accessibility* in practice, namely that provisions for redressing complaints must exist in the municipal legal order both substantively and procedurally and be accessible to the victim without any unjustifiable obstructions[28]. A remedy thus cannot be considered to be available to a given victim if it does not exist at all, or if it does exist, but cannot be accessed or used by that particular victim[29].

81. Notably, prior to the promulgation of Amendment No. 17, the Complainant had access to the courts to seek remedies. He used this avenue to file objections to notices of acquisition lodged by the Respondent State. In many instances these objections were held as valid by the Administrative Court.

82. Remarkably, from the time that Amendment No. 17 to the Constitution came into effect, which ousted the jurisdiction of the courts of Zimbabwe with respect to acquisition of agricultural land, the Complainant had no recourse. He could not apply to any domestic court to challenge the acquisition by the State, and no domestic court could entertain any such challenge.

83. Given these circumstances and in light of its jurisprudence as explained above, the Commission finds that the Complainant had no remedy available to him to challenge the dispossession of the land.

84. With respect to compensation for improvements made on the land, the Commission notes the Respondent State's submission that the Complainant could have claimed compensation for improvements on the

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[27] Communication 218/98 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* (1998) ACHPR para 23.

[28] Communication 444/13 - *Justice Thomas S. Masuku v Swaziland (Masuku Case)* ACHPR (2014) para 58.

[29] Id para 59.

land from the Compensation Committee set up to do the same. The Commission also notes the Complainant's submission that the Respondent State does not state whether there is an enabling law setting up the Compensation Committee, whether it was set up and how it operates in practice. Further, the Commission notes the Complainant's submission that the Respondent State does not illustrate the effectiveness of the Compensation Committee or the sufficiency of the remedy it provides, which he submits would be insufficient to redress his claim.

85. In *Article 19 v Eritrea* the Commission stated that general statements are not enough and that whenever a State alleges the failure by the Complainant to exhaust domestic remedies, it has the burden of showing that the remedies are available, effective and sufficient to address the violation alleged, namely that the function of those remedies within the domestic legal system is suitable to address an infringement of a legal right and are effective[30].

86. Although the Compensation Committee exists, it is clear that it is incapable of giving the Complainant an effective and sufficient remedy. A remedy cannot be deemed sufficient when it meets parts of a claim as understood by the Respondent State, but rather the full claim as presented by the Complainant in his pleadings. The Complainant requests due reparation in respect of the losses that he incurred with regard to his movable and immovable property, including the land from which he was deposed to the value of US $ 107, 278, 508. The Commission finds that the Respondent State's submission that he can claim compensation for improvements on the land addresses a small aspect of his claim and hence does not constitute a sufficient remedy in respect of his complaint.

87. Accordingly, the Commission finds that the Communication meets the requirements of Article 56 (5).

Submission within reasonable time, Article 56(6)

[30] *Article 19 v Eritrea* n11 Above para 73.

88. Article 56(6) of the Charter requires that a Communication must be brought within a reasonable period from the time local remedies are exhausted or from the time that the Commission is seized of the matter.

89. Although, the Charter does not define what constitutes 'a reasonable period', the Commission, adopts the approach that 'each case must be treated on its own merit[31]'.

90. The Commission, in Communication 340/07 - *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*[32], held that the requirement for a Communication to be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, is tied to the requirement of exhaustion of local remedies so much so that the point of departure of the reasonable time is from the date of exhaustion of local remedies.

91. The Complainant submits a number of reasons to justify the delay in bringing his complaint before the Commission. He states that he pursued diplomatic protection in South Africa. He also argues that he waited for the outcome of political developments among the SADC States regarding the disbandment of the SADC Tribunal where he considered taking his Complaint. The Complainant states that in doing the former, he "diligently pursue[d] all alternative" remedies in a bid to ensure that the Commission was not his first port of call.

92. Three things must be made clear about the nature of the local remedies to be exhausted before bringing a complaint before the Commission. Remedies must be (1) local, (2) judicial in nature and (3) capable of giving the Complainant effective and sufficient redress.

93. The first thing is that, 'local' remedies in international law[33] are understood as 'legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or

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[31] *Majuru Case* n10 Above para 109.

[32] Communication 340/07 - *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* (2012) ACHPR Para 100.

[33] ILC Draft Articles on Diplomatic Protection Art 14 (2).

special, of the state alleged to be responsible for causing the injury'. In this case, acts constituting the violations presented to this Commission were committed in Zimbabwe, the Respondent State, hence the inquest into the exhaustion of local remedies must focus on the remedies that may have been available in Zimbabwe.

94. The second thing is that, the local remedy must be of a judicial nature as pronounced in Communication 221/98 - *Alfred B. Cudjoe v Ghana*"[34]. In Communication 306/05 - *Samuel T. Muzerengwa & 110 Others v Zimbabwe* the Commission held that an appeal to the President is **not** a judicial remedy as it is discretionary in nature and therefore complainants are not expected to pursue it[35]. Similarly, diplomatic protection, which the Complainant spent his time pursuing, is not a judicial remedy as it is discretionary. The mere fact that even the Supreme Court of Appeal in South Africa could not compel the President to grant him such protection buttresses this point.

95. The third thing is that, with regard to the availability, sufficiency and effectiveness of local remedies, the Commission's finding in Paragraphs 66-87 above, as informed by the Complainant's own submissions is that local remedies ceased to exist at the point that Amendment No. 17 to the Constitution of Zimbabwe came into effect in October 2005.

96. The Commission in Communication 332/06 – *Centre for Minority Rights Development (CEMIRIDE) and Truth be Told Network v. Republic of Kenya* held that in cases where local remedies are unavailable, the Communication must be brought within a reasonable period from the time the alleged violation occurs or in appropriate cases from the time the complainant becomes aware of the violation, or indeed when the Complainant becomes aware that local remedies are not available[36].

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[34] Communication 221/98 - *Alfred B. Cudjoe v Ghana* ACHPR (1999), para 14.

[35] *Communication 306/05 : Samuel T. Muzerengwa & 110 Others v Zimbabwe* ACHPR (2011) para 74.

[36] Communication 332/06 – *Centre for Minority Rights Development (CEMIRIDE) and Truth be Told Network v. Republic of Kenya* (2014) ACHPR para 103.

97. From the Commission's assessment, the Complainant was well aware that local remedies were exhausted in Zimbabwe in 2005 or at the very least on 27 October 2006 when he received a final notice of eviction. The requirement in Article 56(6) serves to inculcate due diligence and vigilance and to discourage tardiness from prospective complainants and the Complainant does not seem to have exercised due diligence. There was no requirement in terms of the Charter for the Complainant to pursue "alternative" remedies which are not domestic to the state in which the violations occurred. This is not a requirement under any other international body that observes principles of the UN Charter as recognised in Article 60 and 61 of the Charter and even if it were, such other instrument could import such requirement into the Charter or vary the preferred requirement that is "local".

98. Although the Commission has held that 'Where there is a good and compelling reason why a complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice[37]'waiting for eight/nine years before bringing a complaint without good or compelling reasons will not serve justice.

99. The Complainant erred when he spent his time, pursuing alternative remedies in a foreign jurisdiction. Further, his decision to 'wait and see' developments in another forum does not reflect due diligence. If anything, it appears, the Complainant merely contemplated a parallel judicial system to the Commission first and only chose to approach the Commission when all else had failed. The Commission is not and should not be the court of first instance in the determination of any case. However, this Rule does not mean that the Commission is a body of last resort among a variety of other judicial options available when local remedies have been exhausted. This subsidiary role is only relative to the

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[37] *Majuru Case n10Above para 109* and Communication 310/05: *Darfur Relief and Documentation Centre v Sudan* (2009) ACHPR *para 75-78.*

exercise of domestic jurisdiction and not all other "alternative" jurisdictions.

100. Previously, the Commission found 2 years and 5 months in *Darfur Relief and Documentation Centre v Sudan Case*[38] and 1 year and 3 months in Communication 386/10 - *Dr Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan* to be unreasonable delays without compelling reason or justification[39]. As the Commission previously pronounced, in Communication 305/05 - *Article 19 and Others v Zimbabwe*[40], once the Complainant knew that his efforts to secure a remedy at the domestic level 'had reached a dead end'; he should have seized the Commission with the matter.

101. The Commission finds that the reasons given by the Complainant for waiting for eight/nine years before bringing his case before this Commission are neither compelling nor do they justify the inordinate delay.

102. The Commission therefore finds that the Communication does not satisfy the requirements of Article 56 (6).

Decision of the Commission on Admissibility

In view of the above, the African Commission on Human and Peoples' Rights:

i. Declares this Communication inadmissible for lack of compliance with Article 56 (6) of the African Charter.

ii. Notifies the Parties of its decision in accordance with the provisions of Rule 107 (3) of its Rules of Procedure.

Adopted at the 18th Extraordinary Session of the African Commission on Human and Peoples' Rights, held from 29 July to 07 August, 2015 in Nairobi, Kenya

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[38] *Darfur Relief and Documentation Centre v Sudan Case* n37 Above para 80.

[39] Communication 386/10 *Dr Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan* (2013) ACHPR para 77.

[40] Communication 305/05 - *Article 19 and Others v Zimbabwe* (2010) ACHPR para 96.