



PROTOCOL ON THE TRIBUNAL

IN

**THE SOUTHERN AFRICAN DEVELOPMENT
COMMUNITY**

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PROTOCOL ON THE TRIBUNAL IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

PREAMBLE

WE, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of Congo
The Kingdom of Lesotho
The Republic of Madagascar
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

NOTING that a review of the role, responsibilities and terms of reference of the Southern African Development Community (SADC) Tribunal led to recommendations that require a new Protocol on Tribunal in the SADC;

DESIRING to establish a new Protocol on the Tribunal in the Southern African Development Community;

HEREBY AGREE as follows:

PART I PRELIMINARY

ARTICLE 1 DEFINITIONS

1. In this Protocol, terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires:

"Judge"	means a Member of the Tribunal appointed in terms of Article 4 of this Protocol;
"President"	means the President of the Tribunal as provided for under Article 15(1) of this Protocol;
"Protocol"	means this Protocol on the Tribunal in the Southern African Development Community;
"Rules"	means Rules of Procedure of the Tribunal referred to in Article 28 of this Protocol; and
"State Party"	means a Member State that is a Party to this Protocol.

PART II ORGANISATION SECTION A – THE SADC TRIBUNAL

ARTICLE 2 CONSTITUTION OF THE TRIBUNAL

The SADC Tribunal (hereinafter referred to as the "Tribunal"), is hereby constituted in terms of Article 16 of the Treaty and shall function in accordance with the provisions of the Treaty, this Protocol and the Rules.

SECTION B – JUDGES OF THE TRIBUNAL

ARTICLE 3 COMPOSITION

1. The Tribunal shall consist of not less than ten (10) Judges, appointed in terms of Article 4 of this Protocol from nationals of Member States who possess the qualifications required for appointment to the highest judicial offices in their respective Member States or who are jurists of recognised competence or expertise in international law.
2. The Council shall designate five (5) of the Judges as regular Judges who shall sit regularly on the Tribunal. The additional five (5) Judges shall constitute a pool from which the President may invite a Judge to sit on the Tribunal whenever a regular Judge is temporarily absent or is otherwise unable to carry out his or her functions.
3. The Tribunal shall be constituted by three (3) Judges; provided that the Tribunal may decide to constitute a full bench composed of five (5) Judges.
4. The President shall be responsible for selecting the Judges who shall constitute the Tribunal for the purpose of hearing any case brought before it.
5. On a proposal from the Tribunal, the Council may increase the number of Judges.
6. No two or more Judges may, at any time, be nationals of the same Member State.

ARTICLE 4 SELECTION AND APPOINTMENT OF JUDGES

1. Each Member State may nominate, as candidates, not more than two of its nationals having the qualifications prescribed in Article 3 (1) of this Protocol.
2. When nominating and appointing Judges, due consideration shall be given to fair gender representation and fair representation of the different SADC Member State legal systems.
3. The Judges shall be selected by the Council from the list of candidates so nominated by Member States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.

4. The Judges shall be appointed by the Summit upon recommendation of the Council in accordance with guidelines adopted by the Summit from time to time.
5. Notwithstanding the provisions of Article 6(1), where a Judge is appointed to replace a Judge whose term of office has not expired, the Judge so appointed shall serve for the remainder of his or her predecessor's term.
6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within six (6) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply *mutatis mutandis*.

ARTICLE 5 APPOINTMENT OF PRESIDENT

1. One of the Judges referred to in Article 4(4) shall be appointed President by the Summit for a term of three (3) years.
2. The Judges shall elect an Acting President in the event that:
 - (a) Summit has not appointed a President under paragraph 1;
 - (b) if the President is temporarily absent or otherwise unable to carry out his or her functions.

ARTICLE 6 SOLEMN DECLARATION

1. Every Judge shall, before taking up his or her office as a Judge, make a solemn declaration before the Chairperson of SADC that he or she will carry out his or her duties independently, impartially, conscientiously and preserve the confidentiality of the Tribunal's deliberations.
2. The solemn declaration shall be in accordance with the form prescribed in Annex 1 of this Protocol.

ARTICLE 7 TENURE OF OFFICE OF JUDGES

1. Subject to Article 8, the Judges shall be appointed for a term of five (5) years and may only be re-appointed for one (1) further term of five (5) years.
2. The term of office of each Judge of the Tribunal shall commence from the date upon which he or she is appointed.

**ARTICLE 8
INITIAL JUDGES**

1. Out of the Judges initially appointed, the terms of two (2) of the regular Judges and two (2) of the additional Judges shall expire at the end of three (3) years. The Judges whose term is to expire at the end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment. Judges will be eligible for reappointment for a further five (5) year term.
2. In the event that the draw of a lot is not done pursuant to paragraph 1, for Judges of the Tribunal whose term of office is to expire at the end of three (3) years, their term of office shall be deemed to be extended for a period that would have elapsed between the date of first appointment and the date of making the draw; provided that such period shall not exceed five (5) years.
3. In the event that there is a delay in drawing a lot under paragraph 1, the term of office of the Judge whose term is to expire at the end of five (5) years shall not be affected by the drawing of the lot.

**ARTICLE 9
PART TIME AND FULL TIME JUDGES**

1. Subject to paragraph 2, the Tribunal shall sit when required to consider a matter submitted to it. The Judges shall, therefore, not be appointed on a full-time basis.
2. On the recommendation of the President, the Council may at any time decide that the workload of the Tribunal requires that the Judges should serve on a full-time basis.
3. Judges appointed to serve on a full-time basis shall not hold any other office or employment.

**ARTICLE 10
RESIGNATION AND EXPIRATION OF TERM**

1. A Judge may at any time resign from his or her office by a letter delivered to the President for transmission to the Council through the Executive Secretary and upon delivery of the letter, a vacancy arises.
2. Notwithstanding the expiration of his or her term of office, a Judge shall continue to hear and to complete those cases partly heard by him or her.

**ARTICLE 11
REMOVAL OF JUDGE FROM OFFICE**

1. A Judge may be removed from office only if he or she has either become permanently incapacitated from exercising his or her functions, or has committed a serious breach of his or her duties or a serious act of misconduct.
2. A Judge shall only be removed from office under paragraph 1 if the question of his or her removal from office has been referred to an ad hoc independent tribunal appointed for this purpose by the Summit and the ad hoc tribunal has recommended that the Judge be removed from office following due process.

**ARTICLE 12
RECUSAL**

1. No Judge may exercise a political or administrative function, or hold a political office or an office in the service of a Member State, SADC or engage in a trade, vocation or profession or other occupation which might interfere with the proper exercise of his or her judicial functions, impartiality or independence.
2. No Judge may hear any matter in which he or she has previously taken part as an agent, a representative or an adviser, or as a Judge of a national or international court or tribunal or in any other capacity or in any matter in which a Member State of which he or she is a national is a party to a dispute before the Tribunal.
3. A Judge shall recuse himself or herself in any matter in which he or she might reasonably have a conflict of interest.
4. Conflict of interest includes without limitation, the possession by a Judge, or a close family member of a Judge or associate of a Judge, of any financial and property interests relevant to the dispute, and the affiliations or employment of a close family member of a Judge or associate of a Judge on interests relevant to the dispute.
5. Any dispute regarding the provisions of paragraphs 1, 2 and 3 of this Article shall be resolved by a decision of the Tribunal, sitting without the Judge concerned.

**ARTICLE 13
IMMUNITY FROM LEGAL PROCEEDINGS**

A Judge shall be immune from legal proceedings in respect of anything said or done by him or her in his or her judicial capacity. He or she shall continue to enjoy such immunity after he or she has ceased to hold office.

**ARTICLE 14
TERMS AND CONDITIONS OF SERVICE**

The terms and conditions of service, salaries and benefits of a Judge shall be determined by the Council and shall not be altered to the disadvantage of the Judge during his or her tenure of office.

**ARTICLE 15
DUTIES OF THE PRESIDENT**

1. The President shall be the Head of the Tribunal.
2. The President shall:
 - (a) be responsible for the administration and supervision of the Tribunal;
 - (b) direct the work of the Tribunal;
 - (c) represent the Tribunal;
 - (d) regulate the disposition of the matters brought before the Tribunal;
 - (e) appoint the Registrar of the Tribunal; and
 - (f) perform such acts and duties as may be incidental to the matters set out in paragraphs (a) to (e).

**SECTION C
THE REGISTRY**

**ARTICLE 16
REGISTRY**

There shall be a Registry consisting of the Registrar and such other staff as may be appointed pursuant to Article 26 of this Protocol.

**ARTICLE 17
THE REGISTRAR**

1. There shall be a Registrar who shall, subject to overall supervision of the President, be responsible for the day to day administration of the Tribunal.
2. Instructions for the running of the Registry shall be drawn up by the Registrar with the approval of the President.

**ARTICLE 18
DUTIES OF THE REGISTRAR**

The Registrar shall:

- (a) be a regular channel of communication to and from the Tribunal, and in particular effect all communications, notifications and transmission of documents required by this Protocol and ensure that the date of dispatch and receipt thereof is readily available;
- (b) keep in such form as may be laid down by the Tribunal, a general list of all cases, entered and numbered in the order in which the documents instituting proceedings are received in the Registry;
- (c) transmit to the parties copies of all pleadings and documents upon receipt thereof in the Registry;
- (d) communicate to the Government of a Member State in which the Tribunal is sitting and any other Governments which may be concerned, the necessary information as to the persons from time to time entitled to privileges, immunities or facilities;
- (e) be present in person or be represented by an assistant at meetings and sittings of the Tribunal and be responsible for the preparation of such minutes and records as necessary;
- (f) be responsible for the printing, publication and authentication of the Tribunal's, orders, decisions and of such other documents as the Tribunal may direct to be published;
- (g) be responsible for all administrative work and in particular for the accounts and financial administration in accordance with financial procedures prescribed by the Council;
- (h) deal with enquiries concerning the Tribunal and its work;
- (i) have custody of the seals, stamps and archives of the Tribunal;

- (j) carry out taxation of costs; and
- (k) perform such acts and duties as may be incidental to the matters set out in paragraphs (a) to (j).

**ARTICLE 19
ELECTION AND APPOINTMENT OF THE REGISTRAR**

1. The President shall give notice of a vacancy or impending vacancy to Member States and shall fix a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received by the Tribunal in sufficient time.
2. Nominations shall indicate the relevant information concerning the candidates and in particular information as to age, sex, nationality, present occupation, academic qualifications, knowledge of languages, any previous experience in law, or work in international organisations.
3. The Registrar shall be elected by the Tribunal by secret ballot from candidates nominated by Member States from nationals who are qualified to hold similar office in their respective States.
4. The person elected shall be appointed as Registrar by the President.

**ARTICLE 20
TENURE OF OFFICE OF THE REGISTRAR**

The Registrar shall serve for a term of five (5) years and will be eligible for reappointment for one further term.

**ARTICLE 21
OATH OR AFFIRMATION OF OFFICE**

1. Before taking up his or her duties, the Registrar shall take an oath or affirmation of office before the President immediately upon his or her appointment.
2. The oath or affirmation of office shall be taken in accordance with the form prescribed in Annex 2 of this Protocol.

**ARTICLE 22
REMOVAL OF THE REGISTRAR**

1. The Registrar may be removed from office only if he or she:

- (a) has become permanently incapacitated, whether arising from infirmity of body or mind, and can no longer perform the functions of the office of Registrar; or
 - (b) has committed a serious breach of the duties of Registrar, or a serious act of misconduct.
2. Where an allegation is made against the Registrar, he or she shall be presented with the full particulars of the allegation that has been made against him or her and any evidence thereof, and shall be accorded the right to be heard under the process provided for in paragraph 3.
3. If the President considers that the allegations against the Registrar ought to be investigated, the President shall select three (3) Judges from amongst the members of the Tribunal, who shall:
- (a) inquire into, and determine, the matter and report on the facts thereof to the President; and
 - (b) advise the President whether or not the person holding the office of Registrar should be removed from office on any of the grounds set out in paragraph 1 and the President shall act on the advice of the Judges.

ARTICLE 23
APPOINTMENT OF ASSISTANT REGISTRAR

1. The President shall appoint an Assistant Registrar and the provisions of Article 19 shall apply *mutatis mutandis* to such appointment.
2. Before taking up his or her duties, the Assistant Registrar shall take an oath or affirmation of office before the President immediately upon his or her appointment.
3. The oath or affirmation of office shall be taken in accordance with the form prescribed in Annex 2 of this Protocol.

ARTICLE 24
DUTIES OF THE ASSISTANT REGISTRAR

1. The Assistant Registrar shall assist the Registrar, act as Registrar in the latter's absence, and in the event of the office becoming vacant, exercise the functions of Registrar until the vacancy has been filled.

2. If the Registrar and Assistant Registrar are unable to carry out the duties of Registrar, the President shall appoint an official of the Registry to discharge those duties for a maximum period of six (6) months.

**ARTICLE 25
REMOVAL OF THE ASSISTANT REGISTRAR**

Article 22 shall apply *mutatis mutandis* to the removal of the Assistant Registrar.

**ARTICLE 26
APPOINTMENT OF OTHER STAFF**

On a proposal submitted by the Registrar and approved by the President, the Tribunal may employ such other staff as may be required to enable it to discharge its functions.

**ARTICLE 27
TERMS AND CONDITIONS OF SERVICE**

The terms and conditions of service, salaries and benefits of the Registrar, Assistant Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

**SECTION D
THE SEAT OF THE TRIBUNAL**

**ARTICLE 28
SEAT**

The Tribunal shall have its seat at Windhoek, Republic of Namibia; provided that it may in any particular case sit and exercise its functions anywhere within SADC if it considers it desirable.

**SECTION E
THE FUNCTIONING OF THE TRIBUNAL**

**ARTICLE 29
RULES OF PROCEDURE OF THE TRIBUNAL**

1. The Tribunal shall determine its own Rules.
2. The Judges shall adopt the Rules by a two-thirds majority.

**ARTICLE 30
VACATIONS**

1. Vacations of the Tribunal shall be determined by the President.
2. The President shall publish the days of vacation in each calendar year, as informed by the schedule of hearings.
3. During such vacations the President shall exercise his or her functions at the seat of the Tribunal either by himself or through any other Judge designated by the President to exercise such functions.
4. The President may, if he or she determines that a matter is urgent, convene the Tribunal during the vacations.
5. The Tribunal shall, during its sittings, observe the official public holidays of the Member State where it has its seat and those of any Member State where it is holding its sittings.
6. The President may, in appropriate cases, grant leave of absence to any Judge after consultation with other Judges.

**ARTICLE 31
WORKING LANGUAGES**

The working languages of the Tribunal shall be English, French and Portuguese and such other languages as Council may determine.

**SECTION F
REPRESENTATION BEFORE THE TRIBUNAL**

**ARTICLE 32
REPRESENTATION**

1. Parties competent to appear before the Tribunal shall be represented by an adviser, agent or representative of their choice.
2. As regards such advisers, agents and representatives who appear before it, the Tribunal shall have the powers normally accorded to courts of law, under conditions laid down in the Rules.
3. All advisers, agents and representatives shall, when they appear before the Tribunal, enjoy the rights, privileges and immunities necessary for the independent exercise of their duties, subject to conditions laid down in the Rules.

PART III JURISDICTION

ARTICLE 33 MATERIAL JURISDICTION

The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

ARTICLE 34 ADVISORY OPINIONS

The Tribunal shall give advisory opinions on such matters as the Summit or Council may refer to it.

ARTICLE 35 APPLICABLE LAW

The Tribunal shall apply the SADC Treaty and the applicable SADC Protocols.

PART IV SITTINGS AND DELIBERATIONS

ARTICLE 36 SITTINGS

1. The sittings shall be held in public unless the Tribunal otherwise directs either on its own motion or the application of any of the parties that the sittings are held in closed sessions. Such a decision may concern either the whole or part of the hearing and may be made at any time.
2. The proceedings shall be commenced and presided over by the President or an acting President who shall be responsible for the proper conduct of the hearing.

ARTICLE 37 DELIBERATIONS

1. All deliberations subsequent to the sittings of the Tribunal shall be conducted in closed sessions and shall remain confidential.
2. Only those Judges who were present at oral proceedings of a case may take part in the deliberations.

3. Every Judge taking part in the deliberations shall give his or her opinion in writing and the reasons for it.
4. The conclusions reached by the majority of the Judges after the final deliberations shall be the decision of the Tribunal.
5. Any differences of views on the substance or wording or order of questions shall be settled by the Tribunal.

PART V DECISIONS

ARTICLE 38 DECISIONS

1. Decisions of the Tribunal shall be in writing and delivered at a public sitting of the Tribunal.
2. Decisions of the Tribunal shall be made by a majority of the Judges.
3. Subject to Article 34, decisions and rulings of the Tribunal shall be final and binding.
4. One copy of the decision duly signed and sealed, shall be placed in the archives of the Tribunal and a copy shall be transmitted to each of the parties to the dispute.
5. The Registrar shall send copies of the decision to:
 - (a) the Council; and
 - (b) other Member States.

ARTICLE 39 DEFAULT DECISIONS

1. The Tribunal may give a decision in default when a respondent:
 - (a) on whom an application initiating proceedings has been duly served fails to file a defence to the application in the proper form within the time prescribed in the Rules; or
 - (b) fails to appear for a hearing of the application in accordance with the Rules.

2. A Party against whom a default decision has been made may apply to set it aside in accordance with the Rules.

ARTICLE 40 APPLICATION FOR REVIEW OF A DECISION

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application; provided always that such ignorance was not due to negligence.

ARTICLE 41 INTERIM MEASURES

The Tribunal may, on good cause, order the suspension of an act challenged before the Tribunal and may take such interim measures as may be necessary.

ARTICLE 42 APPLICATION FOR INTERVENTION

A Member State may, with leave of the Tribunal, intervene in a dispute before the Tribunal.

ARTICLE 43 CONSOLIDATION

The Tribunal may order the consolidation of proceedings involving substantially the same dispute and the same Member States.

ARTICLE 44 ENFORCEMENT AND EXECUTION

1. Member States and institutions of SADC shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
2. A decision of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and must be complied with.
3. Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any Member State affected by the decision.
4. If the Tribunal establishes the existence of such failure, it shall report its findings to the Summit for the latter to take appropriate action.

PART VI FINANCIAL MATTERS

ARTICLE 45 BUDGET

The budget of the Tribunal shall be funded through the regular annual budget of SADC and from such other sources as may be determined by the Council, based on a three (3) year work-plan prepared by the Registrar.

ARTICLE 46 COSTS

1. Unless the Tribunal decides otherwise, each State Party to a dispute shall pay its own legal costs.
2. Unless the Tribunal decides otherwise, proceedings before the Tribunal shall be free of charge.
3. Where a State Party to a dispute has caused the Tribunal to incur unnecessary considerable costs, the Tribunal may order that such State Party reimburse the expenses incurred by the Tribunal.
4. Where the copying or translation work is carried out at the request of a State Party to a dispute, the costs shall, in so far as the Registrar considers excessive, be paid for by that State Party.
5. Sums due to the Tribunal shall be paid in the currency of the State Party where the Tribunal has its seat.
6. Conversion of currency shall be made at the prevailing market exchange rate ruling on the day of payment in the State Party where the Tribunal has its seat.

ARTICLE 47 FEES

Fees payable by Member States within limits agreed by the budgetary authorities of SADC may be prescribed by the Rules.

PART VII FINAL PROVISIONS

ARTICLE 48 REPEAL OF THE 2000 PROTOCOL ON THE TRIBUNAL IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

The 2000 Protocol on the Tribunal in the Southern African Development Community is repealed with effect from the date of entry into force of this Protocol.

ARTICLE 49 SETTLEMENT OF DISPUTES

1. States Parties shall strive to resolve any dispute regarding application, interpretation or implementation of the provisions of this Protocol amicably.
2. Any dispute arising from the application, interpretation or implementation of this Protocol, which cannot be settled amicably, shall be referred to the SADC Tribunal.

ARTICLE 50 WITHDRAWAL

1. A State Party may withdraw from this Protocol upon the expiration of twelve (12) months from the date of giving written notice to that effect to the Executive Secretary.
2. Such State Party shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective.
3. Notwithstanding the provisions of paragraphs 1 and 2, such State Party shall continue to be bound by obligations that arise out of this Protocol and are outstanding on the date of the withdrawal until such obligations are discharged.

ARTICLE 51 SIGNATURE

This Protocol shall be signed by the Heads of State or Government of SADC Member States, or their duly authorised representatives.

**ARTICLE 52
RATIFICATION**

This Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures.

**ARTICLE 53
ENTRY INTO FORCE**

This Protocol shall enter into force thirty (30) days after the deposit of the Instruments of Ratification by two-thirds of the Member States.

**ARTICLE 54
ACCESSION**

This Protocol shall remain open for accession by any Member State.

**ARTICLE 55
DEPOSITARY**

1. The original texts of this Protocol and all Instruments of Ratification and Accession shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariat of the United Nations and the Commission of the African Union.

IN WITNESS WHEREOF WE, the Heads of State or Government, or duly authorised representatives, of SADC Member States have signed this Protocol.

Done at Victoria Falls, Republic of Zimbabwe, this 18TH day of August 2014, in three (3) original texts in the English, French and Portuguese languages, all texts being equally authentic.

.....
REPUBLIC OF ANGOLA

.....
DEMOCRATIC REPUBLIC OF CONGO

.....
REPUBLIC OF MADAGASCAR

.....
REPUBLIC OF MAURITIUS

.....
REPUBLIC OF NAMIBIA

.....
REPUBLIC OF SOUTH AFRICA

.....
UNITED REPUBLIC OF TANZANIA

.....
REPUBLIC OF ZIMBABWE

.....
REPUBLIC OF BOTSWANA

.....
KINGDOM OF LESOTHO

.....
REPUBLIC OF MALAWI

.....
REPUBLIC OF MOZAMBIQUE

.....
REPUBLIC OF SEYCHELLES

.....
KINGDOM OF SWAZILAND

.....
REPUBLIC OF ZAMBIA

ANNEXES

ANNEX 1

(IN TERMS OF ARTICLE 6)

"I _____(**Name**)_____solemnly declare that I shall perform my duties and exercise my powers as Judge of the Tribunal honourably, faithfully, impartially, independently and conscientiously".

SIGNATURE OF THE JUDGE

SIGNATURE OF THE CHAIRPERSON OF SADC

Done this.....day of.....at.....

ANNEX 2

(IN TERMS OF ARTICLE 21 OR ARTICLE 23)

"I (Name) solemnly declare that I shall perform the duties incumbent upon me as Registrar/Assistant Registrar of the Tribunal in all loyalty, discretion and good conscience and that I shall faithfully observe all the provisions of the Protocol and the Rules of the Tribunal".

SIGNATURE OF THE REGISTRAR/ASSISTANT REGISTRAR

SIGNATURE OF THE PRESIDENT

Done this.....day of.....at.....