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# EDITORIAL

The sixth volume of the *African Human Rights Law Reports* covers the period up to the end of 2005. The *Reports* cover cases decided by the United Nations Human Rights Committee, the African Commission on Human and Peoples' Rights and domestic judgments from different African countries. The *Reports* are a joint publication of the African Commission on Human and Peoples' Rights and the Centre for Human Rights, University of Pretoria, South Africa. From this volume Pretoria University Law Press (PULP) has taken over as publisher from JUTA. PULP also publishes the French version of these *Reports, Recueil Africain des Décisions des Droits Humains*.

The *Reports,* as well as other material of relevance to human rights law in Africa, may be found on the website of the Centre for Human Rights at www.chr.up.ac.za. Hard copies of the *Reports* can be obtained from the Centre for Human Rights.

Editorial changes have been kept to a minimum, and are confined to changes that are required to ensure consistency in style (with regard to abbreviations, capitalisation, punctuation and quotes) and to avoid obvious errors. Quotes and references have, where possible, been checked against the original. Corrections which may affect the meaning are indicated by square brackets.

We wish to thank the persons who helped us obtain cases published in the *Reports:* Mianko Ramaroson, Virginia Njeri Kamau, Polycarp Ngufor Forkum, Neldjingaye Kameldy, Victor Lando, Rosemary Sengendo, Douglas Singiza and Innocent Maja.

Cases from national courts that would be of interest to include in future issues of the *Reports* may be brought to the attention of the editors at:

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University of Pretoria, Pretoria 0002
South Africa
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# USER GUIDE

The cases and findings in the *Reports* are grouped togehter according to their origin, namely, the United Nations, the African Commission on Human and Peoples' Rights and domestic courts.

The *Subject index* is divided into two parts — general principles or procedural issues, and substantive rights. Decisions dealing with a specific article in an international instrument are to be found in the list of *International instruments referred to*. A table that lists *International case law considered* is also included. In these tables case references are followed by the numbers of the paragraphs in which the instruments or cases are cited.

A headnote, to be found at the top of each case, provides the full original title of the case as well as keywords noting the primary issues in the case. These are liked to the keywords in the *Subject index*. Keywords are followed by the numbers of the paragraphs in which a specific issue is dealt with. In instances where the original case contains no paragraph numbers these have been added in square brackets.

The date at the end of a case reference refers to the date the case was decided. The abbreviation before the date indicates the jurisdiction.

# ABBREVIATIONS

| | |
|---|---|
| ACHPR | African Commission on Human and Peoples' Rights |
| AHRLR | African Human Rights Law Reports |
| BeCC | Constitutional Court, Benin |
| BwIC | Industrial Court, Botswana |
| CaFI | Court of First Instance, Cameroon |
| CCPR | International Covenant on Civil and Political Rights |
| ChSC | Supreme Court, Chad |
| HRC | United Nations Human Rights Committee |
| KeCA | Court of Appeal, Kenya |
| KeHC | High Court, Kenya |
| LeCA | Court of Appeal, Lesotho |
| NgHC | High Court, Nigeria |
| SACC | Constitutional Court, South Africa |
| SASC | Supreme Court of Appeal, South Africa |
| UgCC | Constitutional Court, Uganda |
| ZwSC | Supreme Court, Zimbabwe |

# CASE LAW ON THE INTERNET

Case law concerning human rights in Africa may be found on the following sites:

United Nations High Commissioner for Human Rights
www.ohchr.org

African Commission on Human and Peoples' Rights
www.achpr.org

Centre for Human Rights, University of Pretoria
www.chr.up.ac.za

Interights
www.interights.org

Association des Cours Constitutionelles
www.accpuf.org

Commonwealth Legal Information Institute
www.commonlii.org

Southern African Legal Information Institute
www.saflii.org

High Court, Malawi
www.judiciary.mw

Court of Appeal, Nigeria
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www.constitutionalcourt.org.za

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# UNITED NATIONS HUMAN RIGHTS TREATY BODIES

# ANGOLA

## Marques de Morais v Angola

### (2004) AHRLR 3 (HRC 2005)

Communication 1128/2002, *Rafael Marques de Morais (represented by the Open Society Institute and Interights) v Angola*

Decided at the 83rd session, 29 March 2005, CCPR/C/83/D/1128/2002

*Journalist detained for articles critical of the President*

**Evidence** (failure of state party to respond to allegations, 4; local courts to judge facts, 5.9)
**Fair trial** (defence, access to legal counsel, 5.6, 5.7)
**Admissibility** (exhaustion of local remedies, 5.3, 5.4, 5.8, 5.12)
**Personal liberty and security** (arbitrary arrest and detention, 6.1; no reason given for arrest, 6.2; no opportunity given to challenge detention, 6.3, 6.5)
**Expression** (right to criticise government, 6.7; limitations, proportionality, 6.8)
**Movement** (confiscation of passport, 6.9)

**1.** The author of the communication is Rafael Marques de Morais, an Angolan citizen, born on 31 August 1971. He claims to be a victim of violations by Angola[1] of articles 9, 12, 14 and 19 of the International Covenant on Civil and Political Rights (the Covenant). The author is represented by counsel.

### Factual background

**2.1.** On 3 July, 28 August and 13 October 1999, the author, a journalist and the representative of the Open Society Institute in Angola, wrote several articles critical of Angolan President dos Santos in an independent Angolan newspaper, the *Agora*. In these articles, he stated, *inter alia*, that the President was responsible 'for the destruction of the country and the calamitous situation of state institutions' and was 'accountable for the promotion of incom-

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the state party on 10 April 1992.

petence, embezzlement and corruption as political and social values'.

**2.2.** On 13 October 1999, the author was summoned before an investigator at the National Criminal Investigation Division (DNIC) and questioned for approximately three hours before being released. In an interview later that day with the Catholic radio station, *Radio Ecclésia*, the author reiterated his criticism of the President and described his treatment by the DNIC.

**2.3.** On 16 October 1999, the author was arrested at gunpoint by 20 armed members of the Rapid Intervention Police and DNIC officers at his home in Luanda, without being informed about the reasons for his arrest. He was brought to the Operational Police Unit, where he was held for seven hours and questioned before being handed over to DNIC investigators, who questioned him for five hours. He was then formally arrested, though not charged, by the deputy public prosecutor of DNIC.

**2.4.** From 16 to 26 October 1999, the author was held *incommunicado* at the high security Central Forensic Laboratory (CFL) in Luanda, where he was denied access to his lawyer and family and was intimidated by prison officials, who asked him to sign documents disclaiming responsibility of the CFL or the Angolan government for eventual death or any injuries sustained by him during detention, which he refused to do. He was not informed of the reasons for his arrest. On arrival at the CFL, the chief investigator merely stated that he was being held as a UNITA (National Union for the Total Independence of Angola) prisoner.

**2.5.** On or about 29 October 1999, the author was transferred to Viana prison in Luanda and granted access to his lawyer. On the same day, his lawyer filed an application for *habeas corpus* with the Supreme Court, challenging the lawfulness of the author's arrest and detention, which was neither acknowledged, nor assigned to a judge or heard by the Angolan courts.

**2.6.** On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, AS, and the chief editor, AJF, of *Agora*, he was charged with 'materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic ... by arts 44, 46, all of Law 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code'. The terms of bail obliged the author 'not to leave the country' and 'not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated — art 270 of the Penal Code'.

Several requests by the author for clarification of these terms were unsuccessful.

**2.7.** The author's trial began on 21 March 2000. After thirty minutes, the judge ordered the proceedings to continue *in camera*, since a journalist had tried to photograph the proceedings.

**2.8.** With reference to article 46[2] of Press Law 22/91 of 15 June 1991, the Provincial Court ruled that evidence presented by the author to support his defence of the 'truth' of the allegations and the good faith basis upon which they were made, including the texts of speeches of the President, government resolutions and statements of foreign state officials, was inadmissible. In protest, the author's lawyer left the courtroom, stating that he could not represent his client in such circumstances. When he returned to the courtroom on 25 March, the trial judge prevented him from resuming his representation of the author and ordered that he be disbarred from practising as a lawyer in Angola for a period of six months. The Court then appointed as *ex officio* defence counsel an official of the Attorney-General's office working at the Provincial Court's labour tribunal, who allegedly was not qualified to practise as a lawyer.

**2.9.** On 28 March 2000, a witness testifying on behalf of the author was ordered to leave the court and to stop his testimony after asserting that the law under which the author had been charged was unconstitutional. The Court also refused to allow the author to call two other defence witnesses, without giving reasons.

**2.10.** On 31 March 2000, the Provincial Court convicted the author of abuse of the press[3] by defamation,[4] finding that his newspaper article of 3 July 1999, as well as the radio interview, contained 'offensive words and expressions' against the Angolan President and, albeit not raised by the accusation and therefore not punishable, against the Attorney-General in their official and personal capacities. The Court

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2 Art 46 of the Press Law reads: 'If the person defamed is the President of the Republic of Angola, or the head of a foreign state, or its representative in Angola, then proof of the veracity of the facts shall not be admitted'.

3 The crime of abuse of the press is defined as follows in art 43 of the Press Law: '(1) For purposes of this law, an abuse of the press shall be deemed to be any act or behaviour that injures the juridical values and interests protected by the criminal code, effected by publication of texts or images through the press, radio broadcasts or television. (2) The criminal code is applicable to the aforementioned crimes as follows: (a) The court shall apply the punishment set forth in the incriminating legislation, which punishment may be aggravated pursuant to general provisions. (b) If the agent of the crime has not previously been found guilty of any abuse of the press, then the punishment of imprisonment may be replaced by a fine of not less than NKz 20 000.00.'

4 Art 407 of the Criminal Code describes the crime of defamation as follows: 'If one person defames another publicly, *de viva voce*, in writing, in a published drawing, or in any public manner, imputing to him something offensive to his honour and dignity, or reproduces this, then he shall be condemned to a prison term of up to four months and a fine of up to one month'.

found that the author had 'acted with intention to injure' and based the conviction on the combined effect of articles 43, 44, 45 and 46 of Press Law 22/91, aggravated by item 1 of article 34 of the Penal Code (premeditation). It sentenced the author to six months' imprisonment and a fine of 1 000 000.00 Kwanzas (Nkz) to 'discourage' similar behaviour, at the same time ordering the payment of NKz 100 000.00 compensatory damages to 'the offended' and of a court tax of NKz 20 000.00.

**2.11.** On 4 April 2000, the author appealed to the Supreme Court of Angola. On 7 April 2000, the Supreme Court issued a public notice criticising the Bar Association for having qualified the trial judge's suspension of the author's lawyer as null and void for lack of jurisdiction, in a decision of its National Council adopted on 27 March 2000.[5]

**2.12.** On 26 October 2000, the Supreme Court quashed the trial court's judgment on the defamation count, but upheld the conviction for abuse of the press on the basis of injury[6] to the President, punishable by article 45(3)[7] of Press Law 22/91. The Court considered that the author's acts were not covered by his constitutional right to freedom of speech, since the exercise of that right was limited by other constitutionally recognised rights, such as one's honour and reputation, or by 'the respect that is due to the organs of sovereignty and to the symbols of the state, in this case the President of the Republic'. It affirmed the prison term of six-months, but suspended its application for a period of five years, and ordered the author to pay a court tax of NKz 20 000.00 and NKz 30 000.00 damages to the victim. The judgment did not refer to the pre-existing bail conditions imposed on the author.

5 The translation of the Supreme Court's public notice reads, in pertinent parts: 'It does not make sense, therefore, for a single courtroom incident, resulting from a decision handed down by the Judge in question in open court, a decision which may be cured by a higher court in the legal process, and which is subject to an inter-institutional decision, to have caused such an inflammatory and unnecessary public notice from the Bar Association, creating an unjustly suspicious climate and discrediting [the judiciary] both domestically and abroad, and causing distorted proclamations by individuals, institutions, and even governmental officials'.

6 The crime of injury is defined in art 410 of the Criminal Code: 'The crime of injury, without imputation of any determined fact, if committed against any person publicly, by gestures, *de viva voce*, by published drawing or text, or by any other means of publication, shall be punished with a prison term of up to two months and a fine ... In an accusation for injury, no proof whatsoever of the veracity of the facts to which the injury may refer shall be admissible'.

7 Art 45(3) reads: 'Providing the veracity of the facts of the offence, once admitted by the author, shall render it exempt from punishment. Otherwise, the violator would be punished as a slanderer and sentenced to a prison term of up to 2 years and the corresponding fine, in addition to damages to be determined by a court, but in no case less than NKz 50 000.00.'

**2.13.** On 11 November 2000, the author unsuccessfully sought to obtain a declaration confirming that his bail restrictions were no longer applicable.

**2.14.** On 12 December 2000, the author was prevented from leaving Angola for South Africa to participate in an Open Society Institute conference; his passport was confiscated. Despite repeated requests, his passport was not returned to him until 8 February 2001, following a court order of 2 February 2001 based on Amnesty Law 7/00 of 15 December 2000,[8] which was declared applicable to the author's case. Regardless of this amnesty, on 19 January 2002, the author was summoned to the Provincial Court and ordered to pay compensation of Nkz 30 000 to the President, which he refused to pay, and legal costs, for which he paid.

## The complaint

**3.1.** The author claims that his arrest and detention were not based on sufficiently defined provisions, in violation of article 9(1) of the Covenant. In particular, article 43 of the Press Law on 'abuse of the press' and article 410 of the Criminal Code on 'injury' lacked specificity and were overly broad, making it impossible to ascertain what sort of political speech remained permissible. Moreover, the authorities relied upon different legal bases for the author's arrest and throughout the course of his subsequent indictment, trial and appeal. Even assuming that his arrest was lawful, his continued detention for a period of 40 days was neither reasonable nor necessary in the circumstances of his case.[9]

**3.2.** The author claims a violation of article 9(2) as he was arrested without being informed of the reasons for his arrest or the charges against him. His 10-day *incommunicado* detention,[10] without access to his lawyer or family, the denial of his constitutional[11] right to be brought before a judge during the entire 40 days of his detention, and the authorities' failure to release him promptly pending trial, despite the absence of a risk of flight (as reflected by his cooperative attitude, eg when he reported to the DNIC on 13 October 1999), violated his rights under article 9(3). The fact that he was prevented from challenging the lawfulness of his detention while detained

8 Amnesty Law 7/00 applies to 'crimes against security which were committed ... within the sphere of the Angolan conflict, as long as its agents have presented themselves or may come to present themselves to the Angolan authorities ...'.

9 The author refers to communication 305/1988, *van Alphen v The Netherlands*, views adopted on 23 July 1990, para 5.8.

10 By reference to communication 277/1988, *Terán Jijón v Ecuador*, views adopted on 26 March 1992, para 3, the author submits that *incommunicado* detention as such gives rise to a violation of art 9(3) of the Covenant, since it negatively impacts on the exercise of the right to be brought before a judge.

11 Art 38 of the Constitution of Angola provides: 'Any citizen subjected to preventive detention shall be taken before a competent judge to legalise the detention and be tried within the period provided for by law or released'.

*incommunicado* also violated article 9(4), as did the Angolan courts' failure to address his *habeas corpus* application. Under article 9(5), the author claims compensation for his unlawful arrest and detention.

**3.3.** The author contends that the exclusion of the press and the public from his trial was not justified by any of the exceptional circumstances enumerated in article 14(1), since the disruptive photographer could have been deprived of his camera or excluded from the courtroom.[12]

**3.4.** The fact that the author did not receive the formal charges against him until 40 days after his arrest is said to violate his right under article 14(3)(a), to be informed promptly of the nature and cause of the charge against him. He argues that this delay was not justified by the complexity of the case. Moreover, his conviction of more serious crimes (articles 43 and 45 of the Press Law) than the ones for which he was originally charged (articles 44 and 46 of the Press Law) breached his right to adequate facilities for the preparation of his defence (article 14(3)(b), of the Covenant). His conviction on these additional charges should have been quashed by the Supreme Court, which instead held that a Provincial Court 'may sentence a defendant for an infraction different from the one that he was accused of, even if it is more serious, provided that the grounds are facts included in the indictment or similar ruling'.

**3.5.** The author claims that his right under article 14(3)(b), to communicate with counsel was violated, as he could not consult his lawyer during *incommunicado* detention, at a critical state of the proceedings, and because the trial judge did not adjourn the trial upon disbarring the author's lawyer and appointing an *ex officio* defence counsel on 23 March 2000, thereby denying him adequate time to communicate with his new counsel. His right to defend himself through legal assistance of his own choosing (article 14(3)(d)) was breached because his lawyer was unlawfully removed from the case, as confirmed by the Supreme Court's judgment of 26 October 2000. He claims that, despite his willingness to pay for a counsel of his own choosing, a new counsel was appointed *ex officio*, who was neither qualified nor competent to provide adequate defence, limiting his interventions during the remainder of the trial to requesting the Court to 'do justice' and to an expression of satisfaction with the proceedings.

**3.6.** For the author, the judge's decision to hear only one defence witness, a human rights activist who was expelled from court after claiming that article 46 of the Press Law was unconstitutional, and to reject documentary evidence of the truth of the author's statements, and the good faith basis on which they had been made, on the ground that article 46 of the Press Law precluded the presentation of

[12] It appears that this issue was not, however, raised in the Supreme Court.

evidence against the President, violated his rights under article 14(3)(e), and denied him an opportunity to produce evidence on whether or not all the elements of the offence had been met, in particular whether he had acted with the intention of offending the President.

**3.7.** The author claims a violation of article 14(5) because of the Supreme Court's lack of impartiality when it publicly criticised the Bar Association while his appeal was still pending, as well as by the lack of clarity as to the exact legal basis of his conviction, which prevented him from lodging a 'meaningful' appeal.

**3.8.** The author contends that his critical statements about President dos Santos were covered by his right to freedom of expression under article 19, which requires that citizens be allowed to criticise or openly and publicly evaluate their governments, as well as the ability of the press to express political opinion, including criticism of those who wield political power. His unlawful arrest and detention on the basis of his statements, the restrictions on his rights to free speech and movement pending trial, his conviction and sentence, and the threat that any expression of opinion may be punished by similar sanctions in the future constituted restrictions on his freedom of speech. He argues that these restrictions were not 'provided by law' within the meaning of article 19(3), given (a) that his unlawful detention and subsequent travel restrictions had no basis in Angolan law; (b) that his conviction was based on provisions such as article 43 of the Press Law ('abuse of the press') and article 410 of the Criminal Code ('injury'), which lacked the necessary clarity to qualify as 'adequately accessible' and 'sufficiently precise' norms, enabling an individual to foresee the consequences that his statements may entail; and (c) that the terms of his bail prohibiting him to 'engage in certain activities that ... create the risk that new violations may be perpetrated' were equally unclear and that he had unsuccessfully requested clarification of the meaning of this restrictions.

**3.9.** The author denies that the restrictions imposed on him pursued a legitimate aim under article 19(3)(a) and (b). In particular, respect of the rights or reputation of others could not be interpreted so as to protect a president from political, as opposed to personal, criticism, given that the aim of the Covenant is to promote political debate. Nor were the measures against him necessary or proportionate to achieve a legitimate purpose, considering (a) that the limits of acceptable criticism are wider regarding politicians as opposed to private individuals, who do not enjoy comparable access to effective channels of communication to counteract false statements; (b) that he was convicted for his statements without having had an opportunity to defend the factual basis of these statements or to establish the good faith basis on which they were made; and (c) that

the use of criminal rather than civil penalties against him, in any event, constitutes a disproportionate means of protecting the reputation of others.

**3.10.** Lastly, the author claims a violation of article 12, which includes a right to obtain the necessary travel documents for leaving one's country. His prevention from leaving Angola on 12 December 2000 and the confiscation, without any justification, of his passport, which was withheld until February 2001, despite his repeated attempts to recover it and to clarify his legal entitlement to travel, had no legal basis, as the bail restrictions no longer applied and since the Supreme Court's judgment did not include any penalty inhibiting free movement. He contends that, in addition to article 12, these measures also violated his freedom of expression by precluding his participation in the conference organised by the Open Society Institute in South Africa.

**3.11.** The author claims that the same matter is not being examined under another procedure of international investigation or settlement and that he has exhausted domestic remedies, as he unsuccessfully tried to initiate *habeas corpus* proceedings to challenge the lawfulness of his arrest and detention and also appealed his conviction and sentence to the Supreme Court, the highest judicial authority in Angola.

**3.12.** The author seeks compensation for the alleged violations and requests the Committee to recommend that his conviction be quashed, that the state party clarify that there are no impediments to his freedom of movement, and that articles 45 and 46 of the Press Law be repealed.

## State party's failure to cooperate

**4.** On 15 November 2002, 15 December 2003, 26 January 2004 and 23 July 2004, the state party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the state party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4(2) of the Optional Protocol that states parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the state party, due weight must be given to the author's allegations, to the extent that they are substantiated.

## Issues and proceedings before the Committee
## Consideration of admissibility

**5.1.** Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of

its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

**5.2.** The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5(2)(a) of the Optional Protocol.

**5.3.** With regard to the author's allegation that the press and the public were excluded from his trial, in violation of article 14(1), the Committee notes that the author did not raise this issue before the Supreme Court. It follows that this part of the communication is inadmissible under articles 2 and 5(2)(b) of the Optional Protocol.

**5.4.** Insofar as the author claims that he was not apprised of the formal charges against him until 40 days after his arrest, the Committee recalls that article 14(3)(a) of the Covenant does not apply to the period of remand in custody pending the result of police investigations,[13] but requires that an individual be informed promptly and in detail of the charge against him, as soon as the charge is first made by a competent authority. Although the author was formally charged on 25 November 1999, that is, one week after the indictment had been 'approved' by the prosecution, he did not raise this delay on appeal. The Committee therefore concludes that this part of the communication is inadmissible under article 5(2)(b) of the Optional Protocol.

**5.5.** As to the claim that the conviction of more serious crimes than the ones charged by the prosecution violated the author's right under article 14(3)(b), the Committee has noted the argument, in the Supreme Court's judgment of 26 October 2000, that a judge may convict a defendant of a more serious offence than the one that he was accused of, as long as the conviction is based on the facts described in the indictment. It recalls that it is generally for the national courts, and not for the Committee, to evaluate the facts and evidence in a particular case, or to review the interpretation of domestic legislation, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. The Committee considers that the author has not adequately substantiated that there was any absence of fair notice of the charges confronting him, nor has he otherwise substantiated any defects in relation to the Supreme Court's finding that a judge is not bound by the prosecution's legal evaluation of the facts as included in the indictment. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

**5.6.** As regards the author's claim that article 14(3)(b) was also violated because the trial judge did not adjourn the trial after having

[13] See communication 253/1987, *Kelly v Jamaica*, views adopted on 8 April 1991, para 5.8.

replaced his lawyer by an *ex officio* counsel, thereby denying him adequate time to consult with his new counsel to prepare his defence, the Committee notes that the material before it does not reveal that the author, or his new counsel, requested an adjournment on grounds of insufficient time to prepare the defence. If counsel felt that they were not properly prepared, it was incumbent on him to request the adjournment of the trial.[14] In this respect, the Committee refers to its jurisprudence that a state party cannot be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[15] It considers that the author has not substantiated, for purposes of admissibility, that failure to adjourn the trial was manifestly incompatible with the interests of justice. Accordingly, this part of the communication is inadmissible under article 2 of the Optional Protocol.

**5.7.** As to the author's claim that his right to defend himself through legal assistance of his own choosing (article 14(3)(d)) was breached, the Committee notes that the Supreme Court, while annulling the temporary suspension of the author's lawyer, did not pronounce itself on the legality of the lawyer's removal from the trial. On the contrary, it held that the abandonment of a client by a lawyer, outside situations specifically allowed by law, was subject to disciplinary sanctions under applicable regulations. In its public notice, the Supreme Court, instead of defending the judge's decision to debar the author's lawyer, expressed its concern about the effects of the Bar Association's criticism (causing 'an unjustly suspicious climate ... discrediting [the judiciary] both domestically and abroad'), while emphasising that the trial judge's decision 'may be cured by a higher court in the legal process'. The Supreme Court subsequently declared the author's lawyer's six-month suspension null and void. Similarly, it does not transpire from the trial transcript that counsel was appointed against the author's will or that he limited his interventions during the remainder of the trial to redundant pleadings. According to the transcript, the author, when asked whether he intended to designate a new legal representative, declared that he would leave such decision to the Court. The Committee concludes that the author has not substantiated, for purposes of admissibility, that the removal of his lawyer from the trial was unlawful or arbitrary, that counsel was appointed against the author's will, or that he was unqualified to provide effective legal representation. Accordingly, this part of the

[14] See communication 349/1989, *Wright v Jamaica*, views adopted on 27 July 1992, para 8.4.

[15] See communications 980/2001, *Hussain v Mauritius*, decision on admissibility adopted on 18 March 2002, para 6.3, and 618/1995, *Campbell v Jamaica*, views adopted on 20 October 1998, para 7.3.

communication is inadmissible under article 2 of the Optional Protocol.

**5.8.** With respect to the alleged violation of article 14(3)(e), by the trial judge's decision to admit only one defence witness, who was expelled from the court after criticising article 46 of the Press Law as unconstitutional, the Committee notes that it does not transpire from the Supreme Court's judgment of 26 October 2000, or from any other document at its disposal, that the author raised this claim on appeal. Consequently, this part of the communication is inadmissible under article 5(2)(b) of the Optional Protocol for failure to exhaust domestic remedies.

**5.9.** While noting that the author based his appeal, *inter alia*, on the fact that the trial judge had rejected the documentary evidence presented by him in defence of the truth of his statements, the Committee notes that it is in principle beyond its competence to determine whether national courts properly evaluate the admissibility of evidence, unless it is apparent that their decision is manifestly arbitrary or amounts to a denial of justice. In the instant case, the Committee notes that the Provincial Court and, in particular, the Supreme Court examined whether the Press Law lawfully precludes the defence of the truth in relation to statements concerning the Angolan President, and it finds no evidence that their findings suffered from the above defects. It therefore considers that the author has not substantiated this part of his claim under article 14(3)(e), for purposes of admissibility, and concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

**5.10.** As regards the author's claim that his right under article 14(5) was violated because of the lack of clarity about the legal basis for his conviction by the Provincial Court, and because the Supreme Court's impartiality was undermined by its public notice of 7 April 2000, the Committee observes that the crime of which the author was convicted (abuse of the press by defamation) is described with sufficient clarity in the Provincial Court's judgment. The Committee therefore concludes that the author has not sufficiently substantiated his claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

**5.11.** As to the remainder of the communication, the Committee considers that the author has sufficiently substantiated his claims for purposes of admissibility.

**5.12.** On the issue of exhaustion of domestic remedies, the Committee notes that the author raised the substance of his claims under article 9 in his application for *habeas corpus*, which, according to him, was never adjudicated by the Angolan courts. As regards the

author's claim under article 19 of the Covenant, the Committee notes that he invoked 'the right of political and social criticism and of the freedom of the press' on appeal. It furthermore notes the author's claim (in relation to article 12 of the Covenant) that he 'took repeated legal measures to recover his passport and [to] clarify, legally, his entitlement to travel but was hampered by complete lack of access to information regarding his travel documents' and observes that, in the circumstances, no domestic remedies were available to the author.

**5.13.** In the absence of any information from the state party to the contrary, the Committee concludes that the author has met the requirements of article 5(2)(b) of the Optional Protocol, and that the communication is admissible, insofar as it appears to raise issues under articles 9, paragraphs 1 to 5, 12, 14(3)(b) (inasmuch as author's inability to have access to counsel during his *incommunicado* detention is concerned) and 19 of the Covenant.

## Consideration of the merits

**6.1.** The first issue before the Committee is whether the author's arrest on 16 October 1999 and his subsequent detention until 25 November 1999 were arbitrary or otherwise in violation of article 9 of the Covenant. In accordance with the Committee's constant jurisprudence,[16] the notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. No such element has been invoked in the instant case. Irrespective of the applicable rules of criminal procedure, the Committee observes that the author was arrested on, albeit undisclosed, charges of defamation which, although qualifying as a crime under Angolan law, does not justify his arrest at gunpoint by 20 armed policemen, nor the length of his detention of 40 days, including 10 days of *incommunicado* detention. The Committee concludes that in the circumstances, the author's arrest and detention were neither reasonable nor necessary but, at least in part, of a punitive character and thus arbitrary, in violation of article 9(1).

**6.2.** The Committee notes the author's uncontested claim that he was not informed of the reasons for his arrest and that he was charged only on 25 November 1999, 40 days after his arrest on 16 October

[16] See communication 305/1988, *Van Alphen v The Netherlands*, views adopted on 23 July 1990, para 5.8; communication 458/1991, *Mukong v Cameroon*, views adopted on 21 July 1994, para 9.8; communication 560/1993, *A v Australia*, views adopted on 3 April 1997, para 9.2.

1999. It considers that the chief investigator's statement, on 16 October 1999, that the author was held as a UNITA prisoner, did not meet the requirements of article 9(2). In the circumstances, the Committee concludes that there has been a violation of article 9(2).

**6.3.** As regards the author's claim that he was not brought before a judge during the 40 days of detention, the Committee recalls that the right to be brought 'promptly' before a judicial authority implies that delays must not exceed a few days, and that *incommunicado* detention as such may violate article 9(3).[17] It takes note of the author's argument that his 10-day *incommunicado* detention, without access to a lawyer, adversely affected his right to be brought before a judge, and concludes that the facts before it disclose a violation of article 9(3). In view of this finding, the Committee need not pronounce itself on the alleged violation of article 14(3)(b).

**6.4.** As to the author's claim that, rather than being detained in custody for 40 days, he should have been released pending trial, in the absence of a risk of flight, the Committee notes that the author was not charged until 25 November 1999, when he was also released from custody. He was therefore not 'awaiting' trial within the meaning of article 9(3) before that date. Moreover, he was not brought before a judicial authority before that date, which could have determined whether there was a lawful reason to extend his detention. The Committee therefore considers that the illegality of the author's 40-day detention, without access to a judge, is subsumed by the violations of article 9, paragraphs 1 and 3, first sentence, and that no issue of prolonged pre-trial detention arises under article 9(3), second sentence.

**6.5.** As regards the alleged violation of article 9(4), the Committee recalls that the author had no access to counsel during his *incommunicado* detention, which prevented him from challenging the lawfulness of his detention during that period. Even though his lawyer subsequently, on 29 October 1999, applied for *habeas corpus* to the Supreme Court, this application was never adjudicated. In the absence of any information from the state party, the Committee finds that the author's right to judicial review of the lawfulness of his detention (article 9(4)) has been violated.

**6.6.** With respect to the author's claim under article 9(5), the Committee recalls that this provision governs the granting of compensation for arrest or detention that is 'unlawful' either under domestic law or within the meaning of the Covenant.[18] It recalls that the circumstances of the author's arrest and detention gave rise to violations of article 9, paragraphs 1 to 4, of the Covenant, and notes

[17] Communication 277/1988, *Terán Jijón v Ecuador*, views adopted on 26 March 1992, para 5.3.

[18] See communication 560/1993, *A v Australia*, views adopted on 3 April 1997, para 9.5.

the author's uncontested argument that the state party's failure to bring him before a judge during his 40-day detention also violated article 38 of the Angolan Constitution. Against this background, the Committee deems it appropriate to deal with the issue of compensation in the remedial paragraph.

**6.7.** The next issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19(2), includes the right of individuals to criticise or openly and publicly evaluate their governments without fear of interference or punishment.[19]

**6.8.** The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in article 19(3): it must be provided for by law, it must serve one of the aims enumerated in article 19(3)(a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on article 43 of the Press Law, in conjunction with section 410 of the Criminal Code. Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media,[20] the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

**6.9.** The last issue before the Committee is whether the author's prevention from leaving Angola on 12 December 2000 and the subsequent confiscation of his passport were in violation of article 12 of the Covenant. It notes the author's contention that his passport was confiscated without justification or legal basis, as his bail restrictions

[19] See communications 422/1990, 423/1990 and 424/1990, *Aduayom et al v Togo*, views adopted on 12 July 1996, para 7.4.

[20] See Human Rights Committee, General Comment 25, 12 July 1996, para 25.

no longer applied, and that he was denied access to information about his entitlement to travel. In the absence of any justification advanced by the state party, the Committee finds that the author's rights under article 12(1) have been violated.

**7.** The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of article 9(1), (2), (3) and (4), and of articles 12 and 19 of the Covenant.

**8.** In accordance with article 2(3) of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The state party is under an obligation to take measures to prevent similar violations in the future.

**9.** Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee’s views. The state party is also requested to publish the Committee’s views.

# CAMEROON

## Gorji-Dinka v Cameroon

**(2005) AHRLR 18 (HRC 2005)**

Communication 1134/2002, *Fongum Gorji-Dinka (represented by counsel, Ms Irene Schäfer) v Cameroon*
Decided at the 83rd session, 17 March 2005, CCPR/C/83/D/1134/2002

*Arbitrary detention of leader of separatist movement*

**Evidence** (failure of state party to respond to allegations, 4)
**Admissibility** (exhaustion of local remedies, 4.2, 4.11; people's right to self-determination, 4.4; non-retroactivity, 4.5; substantiation, 4.7, 4.8)
**Personal liberty and security** (arbitrary arrest and detention, 5.1; house arrest, 5.4; conditions of detention, 5.2; segregation of accused persons from convicted prisoners, 5.3)
**Movement** (house arrest, 5.5)
**Political participation** (removal from voters' register, 5.6)

**1.** The author of the communication is Mr Fongum Gorji-Dinka, a national of Cameroon, born on 22 June 1930, currently residing in the United Kingdom. He claims to be victim of violations by Cameroon[1] of articles 1(1), 7, 9 (1) and (5), 10(1) and 2(a), 12, 19, 24(3) and 25(b) of the Covenant. He is represented by counsel.[2]

### Facts as submitted by the author

**2.1.** The author is a former President of the Bar Association of Cameroon (1976-1981), the *Fon*, or traditional ruler, of Widikum in Cameroon's North-West province, and claims to be the head of the exiled government of 'Ambazonia'. His complaint is closely linked to events which occurred in British Southern Cameroon in the context of decolonisation.

**2.2.** After World War I, the League of Nations placed all former German colonies under international administration. Under a League

[1] The Covenant and the Optional Protocol entered into force for the state party on 27 September 1984.

[2] The communication was submitted by the author personally. However, by letter dated 4 August 2004, Ms Irene Schäfer presented an instrument executed by the author making her counsel of record.

of Nations mandate, Cameroon was partitioned between Great Britain and France. After World War II, the British and French Cameroons became United Nations trust territories, the British part being divided into the United Nations trust territory of British Southern Cameroon ('Ambazonia') and the United Nations trust territory of British Northern Cameroon. The 'Ambas' were a federation of sovereign but interdependent ethnocracies, each under a traditional ruler called 'Fon'. In 1954, they were unified in a modern parliamentary democracy, consisting of a House of Chiefs appointed from among the traditional leaders, a House of Assembly elected by universal suffrage, and a government led by a Prime Minister appointed and dismissed by the Queen of England.

**2.3.** French Cameroon achieved independence in 1960 as the Republic of Cameroon. While the largely Muslim British Northern Cameroon voted to join Nigeria, the largely Christian British Southern Cameroon, in a United Nations plebiscite held on 11 February 1961, voted in favour of joining a union with the Republic of Cameroon, within which Ambazonia would preserve its nationhood and a considerable degree of sovereignty. The United Kingdom allegedly refused to implement the plebiscite, fearing that the Ambazonian Prime Minister would come under communist influence and would nationalise the Cameroon Development Cooperation (CDC), in which Britain had invested £2 million. In exchange for a license to continue exploiting CDC, the United Kingdom allegedly 'sold' Ambazonia to the Republic of Cameroon which then became the Federal Republic of Cameroon.

**2.4.** On 8 October 1981, the author was asked to secure bail for five Nigerian missionaries accused of disseminating the teachings of a sect without a government permit. At the police station, he was arrested and detained together with the missionaries. A few months later, he was charged with the offence of fabricating a fake permit for the sect to operate in Cameroon. Although the trial judge found, on the facts, that the author had not been in Cameroon when the offence was committed, he sentenced him to 12 months' imprisonment. The author's appeal was delayed until after he had served his prison term. Just before the hearing of his appeal, Parliament enacted Amnesty Law 82/21, thereby expunging his conviction. The author subsequently abandoned his appeal and filed for compensation for unlawful detention, but he never received a reply from the authorities.

**2.5.** As a result of the 'subjugation' of Ambazonians, whose human rights were allegedly severely violated by members of the Franco-Cameroonian armed forces as well as militia groups, riots broke out in 1983, prompting Parliament to enact Restoration Law 84/01, which dissolved the union of the two countries. The author then became head of the 'Ambazonian Restoration Council' and published several

articles, which called on President Paul Biya of the Republic of Cameroon to comply with the Restoration Law and to withdraw from Ambazonia.

**2.6.** On 31 May 1985, the author was arrested and taken from Bamenda (Ambazonia) to Yaoundé, where he was detained in a wet and dirty cell without a bed, table or any sanitary facilities. He fell ill and was hospitalised. After having received information on plans to transfer him to a mental hospital, he escaped to the residence of the British Ambassador, who rejected his asylum request and handed him over to the police. On 9 June 1985, the author was re-detained at the headquarters of the *Brigade mixte mobile* (BMM), a paramilitary police force, where he initially shared a cell with 20 murder convicts.

**2.7.** Allegedly as a result of the physical and mental torture he was subjected to during detention, the author suffered a stroke which paralysed his left side.

**2.8.** The author's detention reportedly provoked the so-called 'Dinka riots', whereupon schools closed for several weeks. On 11 November 1985, Parliament adopted a resolution calling for a National Conference to address the Ambazonian question. In response, President Biya accused the President of Parliament of leading a 'pro-Dinka' parliamentary revolt against him; he had the author charged with high treason before a Military Tribunal, allegedly asking for the death penalty. The prosecution's case collapsed in the absence of any legal provision which would have criminalised the author's call on President Biya to comply with the Restoration Law by withdrawing from Ambazonia. On 3 February 1986, the author was acquitted of all charges and released from detention.

**2.9.** President Biya's intention to appeal the judgment, after having ordered the author's re-arrest, was frustrated because the law establishing the Military Tribunal did not provide for the possibility of appeal in cases involving high treason. The author was then placed under house arrest between 7 February 1986 and 28 March 1988. In a letter dated 15 May 1987, the Department of Political Affairs of the Ministry of Territorial Administration advised the author that his behaviour during house arrest was incompatible with his 'probationary release' by the Military Tribunal, since he continued to hold meetings at his palace, to attend customary court sessions, to invoke his prerogatives as *Fon*, to contempt and disregard the law enforcement and other authorities, and to continue the practice of the illegal *Olumba Olumba* religion. On 25 March 1988, the Sub-divisional Office of the Batibo Momo Division informed the author that because of his 'judicial antecedent', his name had been removed from the register of electors until such time he could produce a 'certificate of rehabilitation'.

**2.10.** On 28 March 1988, the author went into exile in Nigeria. In 1995, he went to Great Britain, where he was recognised as a refugee and became a barrister.

## The complaint

**3.1.** The author claims that the 'illegal annexation' of Ambazonia by the Republic of Cameroon denies the will of Ambazonians to preserve their nationhood and sovereign powers, as expressed in the 1961 plebiscite and confirmed by a 1992 judgment of the High Court of Bamenda, thereby violating his people's right to self-determination under article 1(1) of the Covenant. By reference to article 24(3) he also alleges a breach of the right to his own nationality.

**3.2.** The author claims that his detention from 8 October 1981 to 7 October 1982 and from 31 May 1985 to 3 February 1986, as well as his subsequent house arrest from 7 February 1986 to 28 March 1988, were arbitrary and in breach of article 9(1) of the Covenant. The conditions of detention and the ill-treatment suffered during the second detention period amounted to violations of articles 7 and 10(1), while the fact that he was initially kept with a group of murder convicts at the BMM headquarters, upon his re-arrest on 9 June 1985, violated article 10(2)(a). He further claims that the restriction on his movement during house arrest and his current *de facto* prohibition from leaving and entering his country amount to a breach of article 12 of the Covenant.

**3.3.** The author alleges that his deprivation of the right to vote and to be elected at elections violated article 25(b) of the Covenant.

**3.4.** Under article 19 of the Covenant, the author claims that his arrest on 31 May 1985 and his subsequent detention were punitive measures, designed to punish him for his regime-critical publications.

**3.5.** The author further alleges that his right, under article 9(5) to compensation for unlawful detention from 8 October 1981 to 7 October 1982 was violated, because the authorities never replied to his compensation claim.

**3.6.** The author claims that all his attempts to seek domestic judicial redress were futile, as the authorities did not respond to his compensation claim and did not comply with national laws or with the judgments of the Cameroon Military Tribunal and the High Court of Bamenda. Following his escape from house arrest in 1988, domestic remedies were no longer available to him as a fugitive. He contends that the only way to make his rights prevail would be through a Committee decision, since Cameroon's authorities never respect their own tribunals' decisions in human rights-related matters.

**3.7.** The author submits that the same matter is not being examined under another procedure of international investigation or settlement.

## Issues and proceedings before the Committee
## Consideration of admissibility

**4.1.** On 12 November 2002, 26 May 2003 and 30 July 2003, the state party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has still not been received. The Committee regrets the state party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4(2) of the Optional Protocol that states parties examine in good faith all the allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the state party, due weight must be given to the author's allegations, to the extent that they are substantiated.[3]

**4.2.** The Committee has noted that several years passed between the occurrence of the events at the basis of the author's communication, his attempts to avail himself of domestic remedies, and the time of submission of his case to the Committee. While such substantial delays might, in different circumstances, be characterised as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol, unless a convincing explanation on justification of this delay has been adduced,[4] the Committee also is mindful of the state party's failure to cooperate with it and to present to it its observations on the admissibility and merits of the case. In the circumstances, the Committee does not consider it necessary further to address this issue.

**4.3.** Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

**4.4.** Insofar as the author claims that his and his people's right to self-determination has been violated by the state party's failure to implement the 1961 plebiscite, Restoration Law 84/01, the 1992 judgment of the High Court of Bamenda, or by its 'subjugation' of the Ambazonians, the Committee recalls that it does not have competence under the Optional Protocol to consider claims alleging a violation of the right to self determination protected in article 1 of the Covenant.[5] The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III (articles 6 to 27) of the

3 See communication 912/2000, *Deolall v Guyana*, views adopted on 1 November 2004, para 4.1.

4 See communication 788/1997, *Gobin v Mauritius*, decision of inadmissibility adopted on 16 July 2001, para 6.3.

5 See communication 932/2000, *Gillot v France*, views adopted on 15 July 2002, para 13.4.

Covenant.[6] It follows that this part of the communication is inadmissible under article 1 of the Optional Protocol.

**4.5.** Regarding the author's claim that his incarceration from 8 October 1981 to 7 October 1982 was arbitrary, in violation of article 9(1) of the Covenant, given that his conviction was expunged by Amnesty Law 82/21, the Committee recalls that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the state party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[7] It notes that the author's incarceration in 1981-82 predates the entry into force of the Optional Protocol for the state party on 27 September 1984. The Committee observes that, while punishment suffered as a result of a criminal conviction that was subsequently reversed may continue to produce effects for as long as the victim of such punishment has not been compensated according to law, this is an issue which arises under article 14(6) rather than under article 9(1) of the Covenant. It does not therefore consider that the alleged arbitrary detention of the author continued to have effects beyond 27 September 1984, which would *in themselves* have constituted a violation of article 9(1) of the Covenant. The Committee concludes that this part of the communication is inadmissible *ratione temporis* under article 1 of the Optional Protocol.

**4.6.** As to the author's allegation that he was not compensated for his unlawful detention in 1981-82, the Committee considers that the author has not provided sufficient information to substantiate his claim, for purposes of admissibility. In particular, he did not provide copies, nor indicate the date or addressee of any letters to the competent authorities, claiming compensation. It follows that this claim is inadmissible under article 2 of the Optional Protocol.

**4.7.** Insofar as the author claims a violation of article 7 of the Covenant in that he was physically and mentally tortured in detention after his re-arrest on 9 June 1985 (and which allegedly resulted in a stroke which paralysed his left side), the Committee notes that he has not provided any details about the ill-treatment allegedly suffered, nor copies of any medical reports which would corroborate his allegation. Therefore, the Committee concludes that the author has not substantiated this claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

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6 See communication 167/1984, *Bernard Ominayak et al v Canada*, views adopted on 26 March 1990, para 32.1.

7 See communication 520/1992, *Könye and Könye v Hungary*, decision on admissibility adopted on 7 April 1994, para 6.4; communication 24/1977, *Sandra Lovelace v Canada*, views adopted on 30 July 1981, para 7.3.

**4.8.** With regard to the author's claim that his arrest on 31 May 1985 and his subsequent detention were measures designed to punish him for the publication of his regime-critical pamphlets, in violation of article 19 of the Covenant, the Committee finds that the author has not substantiated, for purposes of admissibility, that said detention was a direct consequence of such publications. It follows that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

**4.9.** As regards the author's claim under article 25(b) of the Covenant, the Committee is of the view that exercise of the right to vote and to stand for election is dependent on the name of the person concerned being included in the register of voters. If the author's name is not on the register of voters or is removed from the register, he cannot exercise his right to vote or stand for election. In the absence of any explanations from the state party, the Committee notes that the author's name was arbitrarily removed from the voters' list, without any motivation or court decision. The very fact of removal of the author's name from the register of voters may therefore constitute denial of his right to vote and to stand for election in accordance with article 25(b) of the Covenant. The Committee is accordingly of the view that the author has sufficiently substantiated this claim, for purposes of admissibility.

**4.10.** Insofar as the author claims that he is being denied his right to Ambazonian nationality, in violation of article 24(3) of the Covenant, the Committee recalls that this provision protects the right of every child to acquire a nationality. Its purpose is to prevent a child from being afforded less protection by society and the state because he or she is stateless,[8] rather than to afford an entitlement to a nationality of one's own choice. It follows that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

**4.11.** With regard to exhaustion of domestic remedies, the Committee takes note of the author's argument that, following his escape from house arrest in 1988, he was not in a position to seek redress at the domestic level, as a person who was wanted in Cameroon. In the light of its jurisprudence[9] that article 5(2)(b) of the Optional Protocol does not require resort to remedies which objectively have no prospect of success, and in the absence of any indication by the state party that the author could have availed himself of effective remedies, the Committee is satisfied that the author has sufficiently demonstrated the ineffectiveness and unavailability of domestic remedies in his particular case.

8 See General Comment 17 on art 24, para 8.

9 See, eg, communications 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan v Jamaica*, views adopted on 6 April 1989, para 12.3.

**4.12.** The Committee concludes that the communication is admissible, insofar as it raises issues under articles 7, 9(1), 10(1) and 2(a), 12 and 25(b) of the Covenant, and to the extent that it relates to the lawfulness and the conditions of detention following his arrest on 31 May 1985, his incarceration initially with a group of murder convicts at the BMM headquarters, the lawfulness of, as well as the restrictions on his liberty of movement during his house arrest from 7 February 1986 to 28 March 1988, and the removal of his name from the voters' register.

## Consideration of the merits

**5.1.** The first issue before the Committee is whether the author's detention from 31 May 1985 to 3 February 1986 was arbitrary. In accordance with the Committee's constant jurisprudence,[10] 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody must not only be lawful but reasonable and necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime.[11] The state party has not invoked any such elements in the instant case. The Committee further recalls the author's uncontested claim that it was only after his arrest on 31 May 1985 and his re-arrest on 9 June 1985 that President Biya filed criminal charges against him, allegedly without any legal basis and with the intention to influence the outcome of the trial before the Military Tribunal. Against this background, the Committee finds that the author's detention between 31 May 1985 and 3 February 1986 was neither reasonable nor necessary in the circumstances of the case, and thus in violation of article 9(1) of the Covenant.

**5.2.** With regard to the conditions of detention, the Committee takes note of the author's uncontested allegation that he was kept in a wet and dirty cell without a bed, table or any sanitary facilities. It reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners (1957).[12] In the absence of state party information on the conditions of the author's detention, the Committee concludes that the author's rights under article 10(1) were violated during his detention between 31 May 1985 and the day of his hospitalisation.

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10 See communication 305/1988, *Van Alphen v The Netherlands*, views adopted on 23 July 1990, para 5.8; communication 458/1991, *Mukong v Cameroon*, views adopted on 21 July 1994, para 9.8.

11 See above.

12 General Comment 21 on art 10, paras 3 and 5.

**5.3.** The Committee notes that the author's claim that he was initially kept in a cell with 20 murder convicts at the headquarters of the *Brigade mixte mobile* has not been challenged by the state party, which has not adduced any exceptional circumstances which would have justified its failure to segregate the author from such convicts in order to emphasise his status as an unconvicted person. The Committee therefore finds that the author's rights under article 10(2)(a), of the Covenant were breached during his detention at the BMM headquarters.

**5.4.** As to the author's claim that his house arrest between 7 February 1986 and 28 March 1988 was arbitrary, in violation of article 9(1) of the Covenant, the Committee takes note of the letter dated 15 May 1987 from the Department of Political Affairs of the Ministry of Territorial Administration, which criticised the author's behaviour during his house arrest. This confirms that the author was indeed under house arrest. The Committee further notes that this house arrest was imposed on him after his acquittal and release by virtue of a final judgment of the Military Tribunal. The Committee recalls that article 9(1) is applicable to all forms of deprivation of liberty[13] and observes that the author's house arrest was unlawful and therefore arbitrary in the circumstances of the case, and thus in violation of article 9(1).

**5.5.** In the absence of any exceptional circumstances adduced by the state party, which would have justified any restrictions on the author's right to liberty of movement, the Committee finds that the author's rights under article 12(1) of the Covenant were violated during his house arrest, which was itself unlawful and arbitrary.

**5.6.** As regards the author's claim that the removal of his name from the voters' register violates his rights under article 25(b) of the Covenant, the Committee observes that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds established by law which are objective and reasonable.[14] Although the letter dated 25 March 1998, which informed the author of the removal of his name from the register of voters, refers to the 'current electoral law', it justifies that measure with his 'judicial antecedent'. In this regard, the Committee reiterates that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote,[15] and recalls that the author was acquitted by the Military Tribunal in 1986 and that his conviction by another tribunal in 1981 was expunged by virtue of Amnesty Law 82/21. It also recalls that persons who are otherwise eligible to stand for election should not be excluded by reason of poli-

13 General Comment 8 on art 9, para 1.
14 General Comment 25 on art 25, para 4.
15 As above, para 14.

tical affiliation.[16] In the absence of any objective and reasonable grounds to justify the author's deprivation of his right to vote and to be elected, the Committee concludes, on the basis of the material before it, that the removal of the author's name from the voters' register amounts to a violation of his rights under article 25(b) of the Covenant.

**6.** The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of articles 9(1), 10(1) and (2)(a), 12(1) and 25(b) of the Covenant.

**7.** In accordance with article 2(3) of the Covenant, the author is entitled to an effective remedy, including compensation and assurance of the enjoyment of his civil and political rights. The state party is also under an obligation to take measures to prevent similar violations in the future.

**8.** Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

[16] As above, para 15.

# EQUATORIAL GUINEA

## Ndong Bee and Others v Equatorial Guinea

**(2005) AHRLR 28 (HRC 2005)**

Communications 1152/2003 and 1190/2003, *Patricio Ndong Bee (on behalf of himself and Felipe Ondó Obiang Alogo, Guillermo Nguema Elá, Donato Ondó Ondó, Emilio Ndong Biyongo and Plácido Micó Abogo) and María Jesús Bikene Obiang (on behalf of her husband Plácido Micó Abogo) v Equatorial Guinea*
Decided at the 85th session, 31 October 2005, CCPR/C/85/D/1152 & 1190/2003

*Arbitrary arrest and ill-treatment in detention of members of opposition party*

**Evidence** (failure of state party to respond to allegations, 4)
***Locus standi*** (representation of victims held *incommunicado*, 5.2)
**Admissibility** (exhaustion of local remedies, 5.4)
**Cruel, inhuman or degrading treatment** (6.1)
**Personal liberty and security** (no reasons given for arrest, 6.2)
**Fair trial** (insufficient time to prepare defence, forced confession, 6.3)

**1.1.** The two communications submitted refer to the same facts. The author of communication 1152/2003 (first communication) of 20 August 2002 is Patricio Ndong Bee, a citizen of Equatorial Guinea, currently a prisoner in Black Beach Prison, Malabo. He claims to be acting on behalf of himself and another four inmates of the same prison, Felipe Ondó Obiang, Guillermo Ngema Elá, Donato Ondó Ondó and Emilio Ndong Biyongo,[1] who are being held *incommunicado*. The author of communication 1190/2003 (second communication) of 25 April 2003 is María Jesús Bikene Obiang, a citizen of Equatorial Guinea. She is acting on behalf of her husband, Plácido Micó Abogo,

[1] On 15 October 2002, relatives of Felipe Ondó Obiang and Guillermo Ngema Elá confirmed the validity of the complaint submitted to the Committee on their behalf.

who is currently imprisoned *incommunicado* in the aforementioned prison.[2]

**1.2.** The authors allege that they are victims of violations by Equatorial Guinea of articles 2(3)(a) and (b), 7, 9, paragraphs 1 to 5, and 14(3)(a), (b), (c) and (d), of the Covenant. The communications also raise questions relating to article 14(1) and (3)(g) of the Covenant. The Optional Protocol to the Covenant entered into force for Equatorial Guinea on 25 December 1987. The authors are represented by counsel, Fernando-Micó Nsue Andeme.

**1.3.** Under rule 94 of its Rules of Procedure, the Committee has decided to consider the two communications jointly.

## Factual background

**2.1.** The five alleged victims of the first communication were supposedly linked to the *Fuerza Demócrata Republicana* (FDR), an unofficial political party in opposition to the government, and were detained in Malabo, along with another 150 persons, between the end of February and March 2002. The alleged victims were held in Black Beach Prison, Malabo, without being notified of the charges against them until 20 May 2002, that is, two days before their trial, when the indictment was read out to them.

**2.2.** Plácido Micó Abogo, the alleged victim in the second communication, was the secretary-general of the *Convergencia para la Democracia Social* (CPDS), a legal opposition party. After being questioned on several occasions in April and May 2002, he was kept under house arrest until the date of the trial.

**2.3.** The trial of 144 opponents of the regime, including the alleged victims of both communications, was held in Malabo from 23 May to 6 June 2002. The authors claim that the five members of the court included two high-ranking military officers, and that the alleged victims were not allowed to prepare their defence or appoint defence lawyers; the lawyers who defended them during the trial were officially assigned by the government through the person of the Prime Minister and had only a day to examine the charges. The authors also claim that the alleged victims were interrogated in Black Beach Prison, where the military prosecutor took note of their statements in the presence of the officers who had interrogated and allegedly tortured them, that some of the accused were sentenced without being given an opportunity to attend the trial, and that the proceedings had suffered undue delays.

**2.4.** The authors claim that the alleged victims, like the other detainees, were subjected to torture and ill-treatment during their

[2] Newspaper reports obtained subsequently by the Committee reveal that Plácido Micó Abogo, the alleged victim in the second communication, was released on 2 August 2003.

detention and trial, and that the majority were unable to stand on their feet or hold a pen to sign their names during the oral proceedings as a result of the ill-treatment they had received. Of all the individuals tried, 65 were convicted, allegedly solely on the basis of their confessions under torture. They further maintain that after sentencing they continued to be subjected to torture, for example, by being left for five consecutive days without food or drink; this caused the death of one of those convicted. It is also reported that two more alleged victims in the first communication, Guillermo Nguema Elá and Donato Ondó Ondó, may become paralysed in the near future as a result of the torture they have suffered and the lack of medical care.

**2.5.** The author of the first communication claims to have filed a petition for annulment of proceedings and an application for judicial review of the sentence. The author of the second communication for her part claims to have filed a petition for annulment of the sentence. Both authors allege that, when they submitted their communications, these remedies had not been allowed and that this meant that there was no possibility of their being allowed since the three-month deadline for acceptance established in the procedural laws of Equatorial Guinea had expired. The author of the first communication has supplied a copy of a petition for annulment of proceedings filed with the Supreme Court on 17 June 2002, alleging acts of torture and irregularities in the proceedings.

## The complaint

**3.1.** The authors claim a violation of article 7 of the Covenant, since the alleged victims were subjected to constant torture and ill-treatment both during their detention and trial and subsequently.

**3.2.** The authors claim that the alleged victims were arrested arbitrarily at the end of February 2002 without being informed of the reason for this until two days before the trial, which was held more than two months after the arrests, which they contend is a violation of article 9, paragraphs 1 to 5, of the Covenant.

**3.3.** The authors also consider that there was a violation of article 14(3)(a), (b), (c) and (d), of the Covenant because the alleged victims were not granted the minimum guarantees during proceedings; they were not notified of the charges until two days before the trial, they were not allowed to prepare their defence or choose their counsel, the court was partially composed of military personnel, they were forced to sign their confessions under torture, their statements were taken in the prison where they were held and there were undue delays during the proceedings.

**3.4.** The authors claim a violation of article 2(3)(a) and (b), of the Covenant, since the state party did not respect its commitment to

guarantee the right of the prisoners to file an effective remedy against the torture, the illegal detention and the ill-treatment to which they were and still are subjected.

**3.5.** The allegations in paragraph 3.3 above raise issues concerning article 14(3)(g) of the Covenant.

## Failure of the state party to cooperate

**4.** On 8 January and 26 June 2003 respectively the state party was requested to submit observations on the admissibility and the merits of the authors' allegations within six months. Since on neither occasion was a reply received, reminders were sent to the state party on 20 September and 18 November 2004. The Committee notes that the observations have not been received. The Committee regrets the lack of cooperation on the part of the state party and recalls that article 4(2) of the Optional Protocol requires the state party to consider in good faith all the accusations made against it and to submit all available information to the Committee in writing. In that the state party has not cooperated with the Committee on the matters brought to its attention, the authors' assertions must be given their due importance insofar as they appear justified.

## Issues and proceedings before the Committee
## Considerations as to admissibility

**5.1.** In accordance with rule 93 of its Rules of Procedure, before considering any claim contained in a communication, the Human Rights Committee must decide whether or not the communication is admissible under the Optional Protocol to the Covenant on Civil and Political Rights.

**5.2.** The Committee is of the view that the authors have justified their authority to act on behalf of the alleged victims in the *incommunicado* situation in which they are apparently being held. Consequently, the Committee concludes that the authors have *locus standi*, under article 1 of the Optional Protocol, to proceed with the communications.[3]

**5.3.** The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement, in compliance with the provisions of article 5(2)(a), of the Optional Protocol.

[3] See, *inter alia*, communications 5/1977, *Massera v Uruguay*, decision of 15 August 1979, para 5(a); 8/1977, *Perdomo v Uruguay*, decision of 3 April 1980, para 6(a); 161/1983, *Herrera Rubio v Colombia*, decision of 2 November 1987, para 5; 194/1985, *Miango v Zaire*, decision of 27 October 1987, para 3; 1138/2002, *Arenz v Germany*, decision of 26 September 2002, para 8.4. With regard to persons held in pre-trial detention, see 1090/2002, *Rameka v New Zealand*, decision of 15 December 2003, para 6.2.

**5.4.** With regard to the requirement that domestic remedies should be exhausted, the Committee reaffirms its established jurisprudence that it is only necessary to exhaust those remedies that have some prospect of success. The Committee takes note that the authors filed such remedies as the law permits against their conviction, but that these were not even allowed within the deadline established for the purpose under domestic procedural laws. In the absence of relevant information from the state party, the Committee considers that the authors have exhausted domestic resources and that there is nothing to prevent it, under article 5(2)(b) of the Optional Protocol from considering the communications.

**5.5.** With regard to the authors' contention that the proceedings suffered undue delays, the Committee observes that proceedings were initiated on 23 May 2002 and that the verdict was handed down on 6 June 2002. The Committee considers that the authors have not sufficiently substantiated this part of the communications and therefore decides that it is inadmissible under article 2 of the Optional Protocol.

**5.6.** The Committee consequently declares the communication admissible with regard to the alleged violations of articles 7, 9 and 14(3)(a), (b), (d) and (g), of the Covenant, and proceeds to consideration of the merits.

## Consideration of the merits

**6.1.** The Committee takes note of the authors' claims that the alleged victims were subjected to treatment incompatible with article 7 of the Covenant. The authors have described various instances of ill-treatment to which they were apparently subjected, such as being deprived of food and drink for five consecutive days. In the absence of a reply from the state party challenging these allegations, the Committee considers that they should be given their due weight and finds that there has been a violation of article 7 of the Covenant.

**6.2.** The Committee notes that the authors claim that the alleged victims were held for a period of two months without being notified of the reasons and without being brought before a court. In the absence of a reply from the state party contradicting these allegations, the Committee finds that they should be given their due weight, and that the facts described disclose a violation of the authors' right to liberty and security of person and specifically the right not to be arbitrarily detained and imprisoned. Consequently, the Committee finds that article 9 of the Covenant has been violated.

**6.3.** The Committee takes note of the authors' complaint that the alleged victims were not notified of the grounds for the charges against them until two days before the trial, depriving them of

sufficient time to prepare their defence and making it impossible for them to select their defence lawyers, that the court was partially composed of military personnel and that they were forcibly compelled to sign their confessions. In the absence of a reply from the state party contradicting these allegations, the Committee finds that the facts described disclose a violation of article 14(1) and (3)(a), (b), (d) and (g), in conjunction with article 2(3)(a) and (b) of the Covenant.

**7.** Accordingly, the Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 9, 14(3)(a), (b), (d) and (g), and article 2(3)(a) and (b), of the Covenant.

**8.** In accordance with article 2(3) of the Covenant, the state party is required to provide the victims with an effective remedy that entails their immediate release and includes adequate compensation, and also to make the same solution available to other detainees and convicted prisoners in the same situation as the authors and to take steps to ensure that the violations cease and that similar violations do not occur in future.

**9.** Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy if a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views.

# ZAMBIA

## Chisanga v Zambia

**(2005) AHRLR 34 (HRC 2005)**

Communication 1132/2002, *Mr Webby Chisanga v Zambia*
Decided at the 85th session, 18 October 2005, CCPR/C/85/D/1132/2002

*Prisoner sentenced to death had for two years reasons to believe his sentence had been commuted to imprisonment on appeal. Psychological impact on return to death row violates Covenant. Mandatory death penalty is a violation of Covenant*

**Interim measures** (request for stay of execution, 1.2)
**Admissibility** (exhaustion of local remedies, presidential pardon, 6.3)
**Evidence** (local courts to judge facts, 6.4)
**Fair trial** (effective remedy in relation to appeal, 7.2)
**Cruel, inhuman or degrading treatment** (psychological impact of belief death sentence commuted, 7.3)
**Life** (mandatory death penalty, 7.4; amnesty, 7.5)

**1.1.** The author of the communication dated 15 October 2002 is Webby Chisanga, a Zambian citizen currently on death row. Although he does not invoke any provisions of the International Covenant on Civil and Political Rights (the Covenant), his claims of human rights violations by Zambia[1] seem to raise issues under articles 14(1), (2), (3)(b), and (5) together with article 2, 7, 6(2) and (4) together with article 2 of the Covenant. He is not represented by counsel.

**1.2.** On 28 October 2002, the Human Rights Committee, through its Special Rapporteur on New Communications, requested the state party, pursuant to rule 92 (old rule 86) of its Rules of Procedure, not to carry out the death sentence against the author whilst his case was under consideration by the Committee. By letter of 22 March 2004, the state party informed the Committee that it would comply with the request.

[1] The Covenant and the Optional Protocol of the Covenant entered into force for the state party on 10 July 1984.

## Factual background

**2.1.** In the night of 15 November 1993, a grocery store was robbed by three men, one of whom was armed. The owner of the shop was shot in the thigh and brought to hospital. The author was identified as the armed man by the shop-owner, who knew Mr Chisanga. He was arrested on 17 November 1993 and identified by the shop-owner during the identification parade. The author denied being one of the robbers and claims to be innocent.

**2.2.** On 12 May 1995, the author was convicted by the Ndola High Court, for attempted murder (in violation of section 215 of the Zambian Penal Code), and aggravated robbery (in violation of section 294(2) of the Penal Code). He was sentenced to death on the second count, but was not sentenced on the first count, as the trial judge considered that the facts of the case supported the second count. The author appealed his death sentence to the Supreme Court, on the ground of mistaken identity.

**2.3.** In a submission to the Committee dated 5 December 2002, the author transmitted copy of a 'Notification of result of final appeal' of the Master (Registrar) of the Supreme Court dated 4 December 1997, informing him that his case had been heard on the same day by the Supreme Court, which had 'set aside the death sentence and imposed a sentence of 18 years with effect from the date of arrest'.

**2.4.** By further submission of 3 November 2003, the author informed the Committee that he had received another notification from the Master of the Supreme Court, attached to a letter from him, dated 1 October 2003, informing him that his appeal had been dismissed on 20 December 1999, that the death sentence was confirmed, and that he was sentenced to an additional 18 years of imprisonment. The author claims that the Supreme Court issued its judgment in his presence on 4 December 1997, and not on 20 December 1999.

**2.5.** According to the author, once his death sentence was commuted in 1997, he was moved from death row to the section of the prison for prisoners serving long-term sentences, where he performed carpentry work. He claims that this can be verified in the prison records. He recalls that death row prisoners do not work. After two years of service, he was put back on death row on 1 November 1999.

**2.6.** By letter of 28 March 2004, the author informed the Committee that death row prisoners were being moved to the long-term section of the prison. He indicates that only those who had been on death row for more than ten years were covered by a Presidential amnesty for death row inmates. The author, who had been in prison for eleven years, was kept on death row because he had served two years in the long-term section of the prison and thus only spent nine years on death row.

## The complaint

**3.1.** The author argues that his trial was not fair as he was convicted on the sole testimony of one witness, as the original of the medical report on the victim's wounds was never presented in Court, and because the weapon of the crime was not investigated with regard to finger prints. He contends that he was not presumed innocent, that his alibi witness was 'denied', and that he was not given the chance adequately to prepare his defence, as his counsel was prevented from seeing him.

**3.2.** The author claims that he suffered inhuman treatment in prison because of the contradictory notifications concerning the outcome of his appeal and the resulting uncertainty about his sentence.

**3.3.** He argues that the crime for which he was sentenced to death, ie aggravated robbery with use of a firearm, is not one of the 'most serious' crimes within the meaning of article 6(2).

**3.4.** The author contends that the method of execution in Zambia, death by hanging, constitutes inhuman, cruel and degrading punishment, as it inflicts severe pain.

**3.5.** Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 14(1), (2), (3)(b), (5) together with article 2, 6(2) and (4) together with article 2, and 7.

## The state party's submission on the admissibility and merits of the communication and author's comments

**4.1.** By letter of 31 March, and *note verbale* of 12 May 2004, the state party commented on the admissibility and merits of the communication. It considers that 'there is some confusion over the sentence that he [the author] has received'. It refers to a judgment of the Supreme Court at Ndola dated 5 June 1996, in which it appears that his death sentence was upheld on the second count of conviction (aggravated robbery), and that he received an additional sentence of 18 years on the first count of conviction (attempted murder), on which the High Court had failed to sentence him. The state party submits a copy of this judgment.

**4.2.** The state party further claims that the author has not 'completely' exhausted domestic remedies, as he is entitled to file a petition for Presidential mercy, under article 59 of the Zambian Constitution.

**4.3.** The state party underlines that although the death penalty still exists in law, its application has been restricted to the 'most serious' crimes, namely for murder, treason and aggravated robbery with use

of a firearm. A Constitutional Review Commission has been set up to facilitate the review of the current Constitution, and is hearing views from the public on various issues, including on the death penalty. The state party considers that 'an opportunity for the abolition of the death penalty exists'. As a result of this, the President has recently pardoned many death row prisoners or commuted their death sentences to long-term imprisonment.

**5.** By letters of 14 November 2004, 18 January and 3 April 2005, the author commented on the state party's submission. In reply to the state party's argument that he did not exhaust domestic remedies, he argues that he sent three petitions for clemency to the President in 2001, 2003 and 2004, but never received any reply. He acknowledges that his case was heard on 6 June 1996, but reaffirms that the judgment against him was issued on 4 December 1997, and that his death sentence was commuted to 18 years of imprisonment.

## Issues and proceedings before the Committee
## Admissibility considerations

**6.1.** Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

**6.2.** The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5(2)(a) of the Optional Protocol.

**6.3.** With respect to the state party's argument that the author did not exhaust domestic remedies in failing to request a Presidential pardon, the Committee notes that the author claims to have made three petitions for pardon which remained without reply and which claim is uncontested, and reiterates its jurisprudence[2] that presidential pardons are an extraordinary remedy and as such do not constitute an effective remedy for the purposes of article 5(2)(b) of the Optional Protocol.

**6.4.** With regard to the author's claim under article 14(1) in respect of the alleged unfairness of his trial, the Committee notes that this claim relates to the evaluation of facts and evidence by the domestic courts. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of states parties to the Covenant to evaluate facts and evidence in a particular case and that it is not for the Committee to review these issues, unless the appreciation of the domestic courts is manifestly arbitrary or amounts to a denial of justice.[3] The Committee considers that the

[2] See communication 1033/2001, *Nallaratnam Singarasa v Sri Lanka*, views adopted on 21 July 2004.

author has failed to substantiate, for the purposes of admissibility, any such exceptional element in his present case, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

**6.5.** With regard to the claims under article 14(2) that the author was not presumed innocent, and 14(3)(b) in respect of his lack of opportunity to prepare his defence and to communicate with his counsel, the Committee notes that the author has not submitted any explanation or evidence in support of these claims and finds that this part of the communication is inadmissible under article 2 of the Optional Protocol, for lack of substantiation.

**6.6.** The Committee considers that the remaining claims under articles 14(5) together with article 2; 7; 6(2) and (4) together with article 2 of the Covenant are admissible and proceeds to the consideration of the merits.

## Consideration of the merits

**7.1.** The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5(1) of the Optional Protocol.

**7.2.** With regard to the contradictory notifications about the outcome of the author's appeal to the Supreme Court, the Committee notes that the author and the state party have provided conflicting versions of the facts. According to the author, he was handed two verdicts on appeal, one commuting his death sentence to 18 years of imprisonment, the subsequent one upholding his death penalty and sentencing him to an additional 18 years of imprisonment. According to the state party, this is incorrect, as there is only one judgment, which upheld the death sentence and sentenced him to an additional 18 years imprisonment. It appears from the file that the author was informed by official notification of 4 December 1997 with the seal of the registry of the Supreme Court of Ndola, that his death sentence had been commuted. That the author was thereupon transferred from death row to the long term section of the prison and put to work has not been challenged by the state party. This comforted the author in his belief that his death sentence had indeed been commuted. In the light of the state party's failure to provide any explanation or comments clarifying this matter, due weight must be given to the author's allegations in this respect. The Committee considers that the state party has failed to explain how the author came to be notified that the death penalty had been set aside. It is insufficient to dismiss it as a matter of the author's confusion. Transferring him to the long-term section of the prison only shows that the confusion was not a

[3] See communication 541/1993, *Errol Simms v Jamaica*, views adopted on 3 April 1995, para 6.2 and Communication 1169/2003, *Antonio Hom v Philippines*, inadmissibility decision of 30 July 2003, para 4.3.

matter of the author's misunderstanding. To act inconsistently with the notification document transmitted to the author, without further explanation, calls into question the manner in which the right of appeal guaranteed by article 14(5) is executed, which in turn calls into question the nature of the remedy. The Committee finds that in acting in this manner, the state party has violated the author's right to an effective remedy in relation to his right to appeal, under article 14(5) taken together with article 2.

**7.3.** The Committee further considers that to keep the author in doubt as to the result of his appeal, in particular by making him believe that his sentence had been commuted, only to inform him later that it was not, and by returning him to death row after two years in the long-term section, without an explanation on the part of the state, had such a negative psychological impact and left him in such continuing uncertainty, anguish and mental distress as to amount to cruel and inhuman treatment. The Committee finds that the state party violated the author's rights protected by article 7 of the Covenant in this context.

**7.4.** As to the author's claim that the crime for which he was sentenced to death, namely aggravated robbery in which a firearm was used, is not one of the 'most serious crimes' within the meaning of article 6(2) of the Covenant, the Committee recalls that the expression 'most serious crimes' must be read restrictively and that death penalty should be an exceptional measure.[4] It refers to its jurisprudence in another case concerning the state party,[5] where it found that the mandatory imposition of the death penalty for aggravated robbery with use of firearms violated article 6(2) of the Covenant. The Committee notes that the mandatory imposition of the death penalty under the laws of the state party is based solely upon the category of crime for which the offender is found guilty, without giving the judge any margin to evaluate the circumstances of the particular offence. The death penalty is mandatory for all cases of aggravated robbery with the use of firearms. The Committee considers that this mechanism of mandatory capital punishment would deprive the author of the benefit of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment could be appropriate in the circumstances of his case.[6] In the present case, the Committee notes that, although the victim of the crime was shot in the thigh, it did not result in loss of life and finds that the imposition of death penalty in this case violated the author's right to life protected by article 6 of the Covenant.

4 See General Comment 6, para 7.

5 See communication 390/1990, *Lubuto v Zambia*, views adopted on 31 October 1995, para 7.2.

6 See communication 806/1998, *Eversley Thompson v St Vincent & the Grenadines*, views adopted on 18 October 2000, para 8.2.

**7.5.** The Committee notes the author's allegations that he was transferred from death row to the long-term section of the prison for two years. After he had been transferred back to death row, the President issued an amnesty or commutation applicable to prisoners who had been on death row for more than ten years. The sentence imposed on the author, who had been in detention for 11 years, two of which he had served in the long-term section, was not commuted. In the absence of any clarifications of the state party in this regard, due weight must be given to the author's allegations. The Committee considers that taking him from death row and then refusing to apply to him the amnesty applicable to those who had been on death row for ten years, deprived the author of an effective remedy in relation to his right to seek amnesty or commutation as protected by article 6(4) together with article 2 of the Covenant.

**7.6.** In the light of the finding that the death penalty imposed on the author is in violation of article 6 in respect of his right to life, the Committee considers that it is not necessary to address the issue of the method of execution in use in the state party in relation to article 7 of the Covenant.

**8.** The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 14(5) together with article 2; 7; 6(2) and (6), 6(4) together with article 2 of the International Covenant on Civil and Political Rights.

**9.** In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide the author with a remedy, including as one necessary prerequisite in the particular circumstances, the commutation of the author's death sentence.

**10.** Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee’s views.

# AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

# BENIN

## Association Que Choisir Benin v Benin

**2005 AHRLR 43 (ACHPR 2005)**

Communication 264/2002, *Association Que Choisir Benin v Benin*
Decided at the 37th ordinary session, April 2005, 18th Annual Activity Report
Rapporteur: Sawadogo

*Local remedies not exhausted since case still pending before local courts*

**Admissibility** (exhaustion of local remedies, 29, 30)

### Summary of facts

**1.** On 6 November 2002, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr Dossou Dossa Bernard, chairperson of the NGO *Que Choisir Benin*,[1] a communication submitted on behalf of Beninese magistrates, in accordance with the provisions of articles 55 and 56 of the African Charter on Human and Peoples' Rights (the African Charter).

**2.** The communication was instituted against the Republic of Benin (state party[2] to the African Charter and hereafter referred to as Benin) and in it the NGO *Que Choisir Benin* alleges that the report prepared by a Commission of Inquiry of the Ministry of Finance of Benin set up to investigate disbursements effected between 1996 and 2000 concluded that 'all sorts of irregularities and fraudulent dealings in the collection and issue of taxes and memoranda falling under the jurisdiction of magistrates', had been committed and as a result several magistrates, court clerks and tax collectors of the Beninese treasury were brought before the judicial chamber of the Supreme Court accused of falsification of public accounts, complicity in embezzlement and fraud.

**3.** *Que Choisir Benin* furthermore declares that the Constitutional Court of Benin, by its ruling DCC 02-097, dismissed, on unconstitutional grounds, the appeal lodged by the magistrates imprisoned since December 2001.

1 *Que Choisir Benin* is an NGO based in Benin and has had observer status with the African Commission on Human and Peoples' Rights since May 2001 (29th ordinary session).

2 Benin ratified the African Charter on 20 January 1986.

## The complaint

**4.** The NGO *Que Choisir Benin* contends that the provisions of articles 547, 548 and 549 of the ruling 25/PR/MJL of 7 August 1967 governing the criminal procedure code in Benin and by virtue of which the proceedings were brought (against those accused), violate the principles of equality and the right to defence provided for under the provisions of article 26 of the Constitution of Benin and article 7(1)(C) of the African Charter on Human and Peoples' Rights.

**5.** *Que Choisir Benin* consequently requests the African Commission to 'consider this communication at one of its future sessions'.

## Procedure

**6.** The Secretariat of the African Commission, by letter ref ACHPR/COMM/2 of 11 February 2003, addressed to *Que Choisir Benin*, acknowledged receipt of the communication, specifying the reference of the communication and further informing it that the communication would be registered on the African Commission's roll for examination on seizure at its 33rd ordinary session scheduled from 15 to 19 May 2003 in Niamey, Niger.

**7.** At the 33rd session, the African Commission considered the complaint, decided to be seized of it and deferred consideration on its admissibility to the 34th ordinary session of the Commission.

**8.** The Secretariat of the African Commission, by *note verbale* and letter dated 23 June informed the parties of the decision on seizure taken by the African Commission with regard to the communication and requested them to convey, as early as possible, their submissions on admissibility of the communication.

**9.** The plaintiff transmitted by electronic mail its submission on the admissibility of the communication to the Secretariat on the 18 August 2003.

**10.** The Secretariat of the African Commission, by letter dated 19 September 2003, acknowledged receipt of the plaintiff's letters requesting some documents mentioned but which were absent from the file.

**11.** The Secretariat of the African Commission, by *note verbale* dated 24 September 2003 transmitted the complaint's submission and attachments to the respondent state reminding it that the African Commission still awaited its submission.

**12.** The African Commission considered the case during its 34th ordinary session and deferred consideration on its admissibility to the 35th session. During the meetings of the 34th ordinary session, the respondent state delivered its submission on the admissibility of the communication to the Secretariat of the African Commission.

**13.** The Secretariat of the African Commission, by *note verbale* and letter dated 15 December 2003, informed the parties of developments on the file, forwarding to the complainant a copy of the respondent state's statement of case.

**14.** The respondent state was also notified that its delegation to the 34th session had pledged to provide the African Commission with copies of the Constitution and the Criminal Procedure Code of Benin.

**15.** Following a reminder by *note verbale* dated 5 March 2004, the Ministry of Foreign Affairs of the Republic of Benin forwarded the above-mentioned documents under cover of a letter dated 19 March 2004 to the Secretariat of the African Commission.

**16.** The Secretariat of the Commission, by letter dated 12 May 2004 also reminded it to forward its response to the complainant.

**17.** During the 35th ordinary session which was held in May/June 2004 in Banjul, The Gambia, the African Commission considered the complaint and heard the delegate from the respondent state.

**18.** During the 36th session, the Commission decided to defer its decision on admissibility to its 37th ordinary session and notified the state accordingly by *note verbale* dated 20 December 2004.

**19.** The Secretariat also notified the complainant of the decision taken by Commission at its 36th session and reminded him, by letter dated 20 December 2004, to convey his conclusions on the admissibility of the communication as early as possible.

**20.** On 15 February 2005, the complainant finally submitted his memorandum on admissibility and a letter acknowledging receipt was sent to him on 22 March 2005. The complainant's memo was also sent to the respondent state by *note verbale* dated 22 March 2005.

## Law

### Admissibility

**21.** The African Charter on Human and Peoples' Rights provides under its article 56 that for communications covered by the provisions of article 55, to be considered, they should necessarily have exhausted all local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

**22.** ln the case at hand, the numerous letters from the Secretariat requesting the complainant for evidence that the said requirement had been satisfied remained, for a long time without response. In fact, the Secretariat of the Commission lost contact with the complainant from October 2003.

**23.** However, on 15 February 2005, the complainant finally re-established contact with the Secretariat and conveyed his memorandum on admissibility through electronic mail. In this

memorandum the complainant contends that the state of Benin has violated two fundamental principles of human rights, namely: the principle of equality of all citizens before the law and in consequence before justice and the principle of the legality of the criminal act.

**24.** The complainant recalls that articles 547, 548 and 549 of the Benin Criminal Code which form the basis of the procedure thus submitted before the Supreme Court blatantly violate the magistrates' right to defence as they eliminate the right to appeal in refusing to allow any appeal against the rulings of the reporting judge acting as examining judge.

**25.** The complainant argues that to defend themselves against the abuse of power and arbitrary rulings by the examining judge, the magistrates found no other means than to bring the said articles before the Constitutional Court which, evidently, are contrary to the provisions of article 26 of the Benin Constitution which stipulates that 'the state guarantees the equality of all citizens before the law without discrimination ... of social position' and that of article 3 of the African Charter on Human and Peoples' Rights which stipulates: '(1) Every individual shall be equal before the law; (2) Every individual shall be entitled to equal protection of the law'.

**26.** The complainant contends that the complaint should be declared admissible by the African Commission in conformity with article 50 of the African Charter.

**27.** The respondent state for its part, argues that the complaint should be declared inadmissible since the matter at issue is still pending before the courts in Benin and if need be, the concerned parties shall have the possibility of appealing after the Court of Appeal's ruling to which the Supreme Court's judicial chamber had referred the case in April 2003.

**28.** This argument, posited by the respondent state in its statement of case of the 13 November 2003, was reaffirmed by its delegate at the hearing granted by the African Commission during its 35th ordinary session (May/June 2004).

**29.** Whilst the respondent state contends that the complaint is still pending before the local courts, the complainant has not answered the fundamental question which is whether local remedies have been exhausted in this particular case.

**30.** Since the complainant has not proven, contrary to the claims of the respondent state, that the case has been settled by the Benin courts and that local remedies have been exhausted, the African Commission is compelled to accept the position of the respondent state which contends that the case is still pending before the local courts.

**31.** Whereas the established jurisprudence of the African Commission, which is in conformity with the provisions of article 56(5) of the African Charter, requires that the communications governed by article 55 of the said Charter can only be examined after local remedies, if they exist, are exhausted, 'unless it is obvious that this procedure is unduly prolonged'.

**32.** Such a position which is also contained in the established precedents of other human rights institutions is based on the principle that the respondent state should first of all have the means of rectifying, through its own means and within the framework of its own national legal system, the alleged violation by future complainants.

**33.** On these grounds, the African Commission declares the communication inadmissible for non-exhaustion of all local remedies.

# NIGERIA

## Ilesanmi v Nigeria

### (2005) AHRLR 48 (ACHPR 2005)

Communication 268/2003, *Ilesanmi v Nigeria*
Decided at the 37th ordinary session, April 2005, 18th Annual Activity Report
Rapporteur: Johm

*Commission finds that complainant used insulting language and had not given indication that he had tried to exhaust local remedies*

**Admissibility** (insulting language, 37-40; exhaustion of local remedies, 43-47, non-judicial remedies, 42)

### Summary of facts

**1.** The complainant is an individual, a consultant with the Economic Help Project based in Abuja, Nigeria.

**2.** The complaint was received at the Secretariat of the African Commission on 3 April 2002 and is against the Federal Republic of Nigeria which is a party to the African Charter on Human and Peoples' Rights.

**3.** The complainant states that in 1999, he exposed the smuggling activities of several companies and individuals, and officials of the customs and excise, police and various other officials to President Obasanjo of Nigeria and the Inspector-General of Police.

**4.** The complainant states that the smuggling activities include: smuggling of narcotics and their modified forms, minerals, illegal arms, carcinogen bearing foods, expired, fake and counterfeit pharmaceuticals, tyres, textiles, steel products, electronic, electrical products, spare parts, foods, cars and other products.

**5.** The complainant also claims that the smugglers are responsible for the assassinations of several persons including Chief Bola Ige, Nigeria's Attorney-General and the Confidential Secretary to the Chief Justice of Nigeria.

**6.** The complainant alleges that the activities of the smuggling syndicate have resulted into the shutting down of 41 textile mills, eight auto-assembly and other manufacturing plants, resulting in the dismissal of millions of workers and thereby impoverishing them. The

smuggling activities have also resulted into the deaths of many people as a result of use of fake or expired drugs.

**7.** He claims that through their smuggling activities the said smugglers deprive Nigeria of about 101 trillion naira annually.

**8.** As a result of his actions to expose the smuggling syndicate, the complainant claims that his pregnant wife was assassinated on 8 July 1999. Furthermore, he was abducted and imprisoned and held at SCID, Panti, Yaba, Lagos under inhuman conditions between 31 August and 4 September 1999.

**9.** The complainant also claims that whilst in detention he was served with poisoned food by Inspector Okoye under the order of CSP Bose Dawodu, who both demanded for 10,000 Naira for bail.

**10.** The complainant further alleges that between 21 and 23 June 2000 he was abducted again by Police Commissioner Aniniru, Sergeant Joseph Akinola and Inspector Paul Ajayi of FCIBs who he claims were acting on behalf of the smugglers. He was imprisoned at the Divisional Police Headquarters in Lagos, Nigeria where he was denied water and food.

## Complaint

**11.** The complainant alleges that the following articles of the African Charter have been violated: Articles 2, 3, 4, 5, 12, 15, 20, 21, 27 and 29.

## Procedure

**12.** On 8 April 2002, the Secretariat of the African Commission acknowledged receipt of the complaint and requesting additional information from the complainant.

**13.** At its 33rd ordinary session held from 15 to 29 May in Niamey, Niger, the African Commission considered the complaint and decided to be seized of the matter.

**14.** On 10 June 2003, the Secretariat of the African Commission wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within three months.

**15.** At its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission examined this communication and decided to defer further consideration on the admissibility of the matter to the 35th ordinary session.

**16.** On 4 December 2003, the Secretariat wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on admissibility within two months.

**17.** At its 35th ordinary session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the communication, heard submissions from the state and decided to defer further consideration on admissibility of the matter to its 36th ordinary session.

**18.** By *note verbale* dated 15 June 2004 addressed to the state and by letter bearing the same date addressed to the complainant, both parties were informed of the African Commission's decision.

**19.** At the 36th ordinary session of the African Commission held from 23 November to 7 December 2004 in Dakar Senegal, the African Commission considered the communication and deferred its decision to the 37th ordinary session

**20.** By *note verbale* of 13 December 2004 and letter of the same date the respondent state and the complainant respectively, were notified of the decision of the African Commission.

**21.** At its 37th ordinary session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and declared it inadmissible.

## Complainant's submission on admissibility

**22.** The complainant submits that all legal, legislative and logical local remedies have been exhausted, and without explaining, claims further that the procedure adopted by President Obasanjo and the government has been 'unduly prolonged, apparently unfruitful and grossly ineffective' and that President Obasanjo is constantly being fooled by false intelligence and security reports. He noted that only those who cannot handsomely bribe [or] 'settle' corrupt officials get caught — [and are made] scape goats! He states that this gives the impression that those indicted are the sacred cows of Obasanjo's regime, the un-touchable merchants of death, whose activities have crippled the economy of Nigeria, even though they are close to the corridors of power.

**23.** He noted that this has led to an unprecedented increase in illicit arms smuggling, armed robberies, abduction, drug abuse and smuggling, miscellaneous consumer goods smuggling, petroleum products smuggling, drug money laundering politics, systematic de-industrialisation of Nigeria, mass unemployment, a constantly devalued Naira, hyper-inflation, infectious poverty levels, poor healthcare delivery, very poor and dilapidated infrastructure, infectious official and informal corruption levels, low life expectancy, poor per capita income, low GDP, uncertainty, political/ religious tension and relative insecurity of life and property in Nigeria.

**24.** He notes further that the efforts of the customs and the police are cosmetic. That they advertise very attractive adverts or

programmes on TV that deceive Nigerians that they are working. The culprits are not apprehended or prosecuted, [as long as] they 'settle' well. The police wildly extort money from commercial motorists. Bosses of the police, customs, NAFDAC and the NDLEA do this so as to attract more budgetary allocations. The President appears content with very attractive security reports. Officers lobby and bribe to get lucrative postings and for sure - they pay returns.

**25.** The complainant notes further that the President has 'not made good his promise since 1999 that there shall be no sacred cows and that he shall investigate and prosecute all the economic saboteurs, once he was notified'. Apparently, the President is afraid to prosecute smugglers, drug barons and all those indicted.

**26.** He states that his late wife was assassinated to stop him in 1999 and he sued the suspects at the Lagos High Court in 1999 and he was frustrated out of court by Justices Ashiyanbi and Olugbani who corrupted judges by suspiciously adjourning the matter for years without the suspects showing up in court. The Police illegally abducted him twice, first between 31 August and 4 September 1999 and served him poisoned food at Panti, Lagos. He was abducted again by the police between 21 and 23 June 2000 and starved for the period.

**27.** The complainant claims further that the customs and police collude with smugglers to defraud Nigeria. This sufficiently explains why they want him dead. In fact, they openly mock the effectiveness of President Obasanjo's approach to smuggling control. They claim that they 'settle all the security chiefs, who they claim, settled the President too'. Settlement day, according to them is every Friday. This gives an impression that Mr President's anti-corruption and anti-smuggling crusades constitute a mere farce. He adds that those in Aso Rock patronise smugglers.

**28.** He notes further that the security and democracy of Nigeria are undoubtedly seriously undermined by smuggling, which in effect constitutes an absurd infringement upon the socio-economic and security rights of the peoples of the Federal Republic of Nigeria. This constitutes an infringement on articles 2, 3, 4, 5, 6, 12, 15, 19, 20, 22, 23, 24, 27 and 29 of the African Charter of Human and Peoples' Rights.

**29.** He concludes by stating that in view of the strategic security and economic importance of Nigeria to Africa and the world, and the urgent need to avert an imminent state of anarchy in Nigeria, to be occasioned by a kind of impromptu anti-democratic chain of fission from aggrieved stakeholders within the Federation, the ACHPR should, without delay, 'save our souls by taking urgent action, which would force President Obasanjo to prosecute all those indicted'.

## Respondent state's submissions on admissibility

**30.** The respondent state submitted its arguments on admissibility at the 35th ordinary session of the Commission held in Banjul, The Gambia. The state noted that the author of the communication is seemingly in quest for attention, noting that the communication is an 'episodic compilation of issues, lacking focus, depth and substantiation'.

**31.** The state argued that it would be misleading to attempt to dwell on the issues in the communication as such will convey a wrong and perhaps unintended signal to the author and others of his persuasion and inclination to unduly attempt taking advantage of situations, including the procedural provisions of well-meaning bodies like the African Commission.

**32.** The state noted that for a communication to pass the admissibility test under article 56 of the African Charter it must meet the specific conditions, failure which the communication should be declared inadmissible. The state argues further that it is clear from the communication that the author has not exhausted local remedies as required under article 56(5). That the author merely asserts without evidence that he has availed himself of all available remedies.

**33.** The state notes that the communication lacks evidence of the involvement of the legal institutions as there is no indication that the courts of appellate jurisdiction in Nigeria have been seized of the matter, adding that to come to equity, the author must be 'clean'. The state also notes that the author fails to demonstrate whether the 'so called' human rights matters have gone before the Nigeria National Human Rights Commission. The state noted further that the Independent Corruption Practices Commission (ICPC) and the Economic and Financial Crimes Commission were also not seized by the author, stating that the author should be encouraged to take the 'right and adequate steps for intervention in Nigeria'.

**34.** The respondent state argues that the author's penchant to malign the Nigerian criminal justice system is a deliberate ploy to mislead the African Commission and take undue advantage of the procedures, noting that to say individuals are above the law is self-serving but totally unrealistic and unfounded. The state also argues that the communication is derogatory and insulting, noting that the state takes strong exception to the characterisation of the Nigerian public functionaries and institutions as immoral, duplicitous, inept and corrupt and that the author is uncharitable and discourteous in claiming the President was bribed.

**35.** The respondent state finally requested the African Commission not to waste its valuable time on the communication, that it is unworthy of the efforts nor does it justify the resources that is

invested in determining which human rights are in contention. That the author fails to invoke any provision of the Charter alleged to have been violated. The state submitted that the communication is seriously flawed and glaringly incompatible with the admissibility criteria in the African Charter

## African Commission's decision on admissibility

**36.** ln the present communication, the complainant submits that he has complied with article 56 of the African Charter that prescribes conditions dealing with admissibility. The responding state however argues that the complaint does not meet two of the conditions set out in article 56 of the African Charter, namely article 56(3) and article 56(5).

**37.** Article 56(3) provides that communications relating to human and peoples' rights referred to in article 55 received by the Commission shall be considered if 'they are not written is disparaging or insulting language directed against the state concerned and its institutions or to the [African Union]'.

**38.** The author submitted in his complaint that the police and customs officials are corrupt, that they deal with drug smugglers, that they extort money from motorists and added that the President himself was corrupt and had been bribed by the drug smugglers. The respondent state claims such language is insulting to the institutions of the state including the presidency and provocative, and questions whether the African Commission would allow itself to be used by authors like this to use 'unbecoming language to unjustly and baselessly vilify leaders'.

**39.** The operative words in sub paragraph 3 in article 56 are 'disparaging' and 'insulting' and these words must be directed against the state party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, disparaging means 'to speak slightingly of ... or to belittle' and insulting means to 'abuse scornfully or to offend the self respect or modesty of ...'. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.

**40.** To say that an institution or person is corrupt or that he/she has received bribes from drug dealers, [could cause] every reasonable person to lose respect for that institution or person. In an open and democratic society individuals must be allowed to express their views freely. However, in expressing these views due regard should be taken not to injure the reputation of others or impair the enjoyment of the rights of others. While the Commission strives to protect the rights of individuals it must strike a balance to ensure that those institutions established within states parties to facilitate the enjoyment of these rights are also respected by individuals. To

expose vital state institutions to insults and disparaging comments like those expressed in the communication brings the institution to disrepute and renders its effectiveness wanting. In the light of the above, the African Commission finds that the language used in the communication as intended to bring the institution of the President into ridicule and disrepute and thus insulting.

**41.** The respondent state also argues that the complainant has not exhausted local remedies as required under article 56(5) of the African Charter. The state submits that apart from not seizing the local courts, the complainant has not indicated that it brought the complaint to the National Human Rights Commission or to the Independent Corruption Practices Commission. Article 56(5) provides that communications relating to human and peoples' rights referred to in article 55 received by the Commission shall be considered if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

**42.** The African Commission would like to deal with the submission of communications to bodies such as a national human rights commission or the Independent Corruption Practices Commission as indicated by the state. The two institutions mentioned by the respondent state are non-judicial institutions even though they can grant remedies. They are not part of the judicial structure of the respondent state. While the African Commission would encourage complainants to seek redress from non-judicial bodies as well, they are not obliged to do so. The remedies required under article 56(5) are legal remedies and not administrative or executive remedies.

**43.** Regarding the non-exhaustion of legal remedies the complainant simply states that he has exhausted 'local, legislative and logical remedies' without informing the African Commission how. The only time he mentioned having gone to court is when he said his wife was killed and the case was adjourned several times. The respondent state argues that the matters raised in the communication have never been brought before the local courts.

**44.** The principle that a person who has suffered a human rights violation must first exhaust his or her domestic remedies can be found in most international human rights treaties. International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the state was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that states are not considered to have violated their human rights

obligations if they provide genuine and effective remedies for the victims of human rights violations.

**45.** International bodies do recognise however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted and special circumstances where it might not be necessary to exhaust them. The African Commission has held that the local remedies to be exhausted must be available, effective and sufficient. If the existing domestic remedies do not fulfil these criteria, a victim may not have to exhaust them before complaining to an international body. However, the complainant needs to be able to show that the remedies do not fulfil these criteria in practice, not merely in the opinion of the victim or that of his or her legal representative.

**46.** If a complainant wishes to argue that a particular remedy did not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows: (a) the complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) — this does not yet have to be proven; (b) the respondent state must then show that the remedy is available, effective and sufficient; and (c) if the respondent state is able to establish this, then the complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective in the specific case, even if it may be effective in general.

**47.** In the present communication, the complainant has failed to demonstrate that he attempted local remedies or that he was prevented from doing so by the respondent state or that the local remedies are not available or are ineffective or have been unduly prolonged. The exceptions under article 56(5) can therefore not apply to this communication.

## For the above reasons, the African Commission:

Declares the communication inadmissible.

# Interights (on behalf of Husaini and Others) v Nigeria

## (2005) AHRLR 56 (ACHPR 2005)

Communication 269/2003, *Interights (on behalf of Safia Yakubu Husaini and Others) v Nigeria*
Decided at the 37th ordinary session, April 2005, 18th Annual Activity Report
Rapporteur: Johm

*Complaint about the application of Islamic penal legislation withdrawn*

**Interim measures** (10, 14, 15)
**Admissibility** (withdrawal of complaint, 42)

### Summary of facts

**1.** The complaint is filed by Interights on behalf of Safiya Yakubu Husaini and others who have been allegedly subjected to gross and systematic violations of fair trial and due process rights in the *Sharia* courts in Nigeria.

**2.** The complainant alleges that Ms Safiya Hussaini, a Nigerian woman and nursing mother, was sentenced to death by stoning by a *Sharia* court in Gwadabawa, Sokoto state Nigeria, for an alleged crime of adultery, which sentence was the latest in a series of serious and massive violations of the right to fair trial and associated guarantees.

**3.** The complainant alleges that Safiya's case is only one of the many cases to be decided under the recently introduced pieces of *Sharia* penal legislation in northern Nigerian states. All laws in Nigeria, at both federal and state levels, ought to be compatible with both the Constitution of 1999 and international (including regional) treaties ratified by Nigeria, and are required to particularly comply with the African Charter on Human and Peoples' Rights which is domestic law in the country.

**4.** In its complaints, the complainant also enumerates other similar instances of alleged violations of fair trial, personal dignity and the right to life. It alleged that in December 2002, a Ms Hafsatu Abubakar from Sokoto state was charged with 'Zina' which is either voluntary premarital sexual intercourse or, if the person is married, adultery.

**5.** On 19 January 2001, an unmarried woman called Bariya Magazu received 100 lashes in Zamfara state for having committed the offence of *Zina*. Ms Magazu was also initially convicted of false accusation for failing to prove her declaration that three particular men had coerced her into having sexual intercourse, which men were not prosecuted. By an order of an Islamic court in the same state, a Mr Umaru Bubeh received 80 strokes of the cane on 9 March 2001 for drinking alcohol. On 4 May 2001, a Mr Lawal Incitara's hand was amputated after a *Sharia* court in same state found him guilty of stealing bicycles.

**6.** In Sokoto state, Sani Shehu and Garga Dandare were sentenced to have their right hands and left feet amputated after being convicted by a *Sharia* court in Sokoto state on 20 December 2001. On 27 December 2001, the Upper Sharia Court in the same state convicted a Mr Aminu Bello of theft and sentenced him to have his right hand amputated.

**7.** The complainant alleges that in none of these cases did the victims/accused persons receive nor were they offered competent or any legal representation. The right of legal representation in the *Sharia* courts are very limited and, even where they allow legal representation, only lawyers who are Muslims can practice in them.

**8.** It is further alleged that the new *Sharia* penal laws that are adopted in the various Nigeria states contain specifications that limit their application to people of Muslim faith but they dispense with all the fair trial safeguards recognised in the African Charter. Moreover, unlike in other criminal cases where accused persons are able to appeal to the Nigerian Supreme Court, which is the highest court in the country, appeals in the *Sharia* criminal cases end before the special *Sharia* courts of appeal. In effect, the *Sharia* penal legislation subject persons of Muslim faith to lower standards of fair trial merely by reason of their faith. In all the cases regarding the application of *Sharia* law for criminal cases, there is discrimination on grounds of the faith of the accused.

**9.** The complaint also alleges that the rights of those tried under *Sharia* law are protected to a lesser extent than in the Penal Code for Northern Nigeria, valid for non-Muslim people, particularly concerning the right of representation, the right of appeal and the lack of knowledge of criminal procedure by the court. Under *Sharia* law, the death penalty is applied for offences that are not punishable with the death penalty under the Penal Code for Northern Nigeria. The criteria for appointing judges to the same court also fall short of international standards of training judicial personnel, and there is no requirement for judges to be legally qualified in law.

**10.** Together with its complaint, the complainant submitted a request for provisional measures to the African Commission in

accordance with rule 111 of the Rules of Procedure of the African Commission.

## Complaint

**11.** The complainant alleges serious and massive violations of articles 2, 3, 4, 5, 6, 7, and 26 of the African Charter on Human and Peoples' Rights.

## Procedure

**12.** The complaint was dated 30 January 2002 and received at the Secretariat on 31 January 2002.

**13.** On 5 February 2002, the Secretariat of the African Commission wrote to the complainant acknowledging receipt of the complaint, and requesting the latter to forward the relevant information and evidentiary materials on the developments surrounding the application of the penal provisions of *Sharia* religious law before Nigerian *Sharia* courts, and to forward to it complete and specific cases of alleged irregularities supported by relevant documentations. The complainant was also asked to indicate to the Commission which of the specific decisions of the *Sharia* courts had been executed, and which were pending.

**14.** On 6 February 2002, the Chairman of the African Commission addressed an urgent appeal to His Excellency, President Olusegun Obasanjo of the Federal Republic of Nigeria, respectfully urging him to suspend further implementation of the *Sharia* penal statutes and decisions as well as convictions thereof, including the case of Ms Safiya Yakubu, pending the outcome of the consideration of the complaints before the African Commission.

**15.** On the same date, the Chairman of the African Commission addressed a similar urgent appeal to His Excellency Amara Essy of the African Union, respectfully urging him to draw the attention of the President of the Federal Republic of Nigeria to the Commission's requests and to positively respond thereof.

**16.** On 8 February 2002, the Secretariat of the African Commission faxed a copy of the Chairman's urgent appeal to the High Commission of the Federal Republic of Nigeria in Banjul, The Gambia for onward transmission of the same to His Excellency, President Olusegun Obasanjo of the Federal Republic of Nigeria.

**17.** On 3 March 2002, the complainant wrote to the Secretariat informing the latter that it will assemble as many of the documents as exist and would get back to the Secretariat on its progress.

**18.** On 7 March 2002, the Secretariat of the African Commission wrote to the complainant confirming receipt of the same and

reminding the latter that it would be awaiting the relevant information.

**19.** On 19 March 2002, the Director of the Political Affairs Department of the African Union wrote to the Chairman of the African Commission that the Secretary General of the AU had formally taken up the matter at the level of HE Chief Olusegun Obasanjo, President of the Federal Republic of Nigeria. The Secretariat of the African Commission brought the same to the attention of the Chairman.

**20.** On 21 March 2002, the Chief of Staff to the President of the Federal Republic of Nigeria wrote, on behalf of His Excellency President Olusegun Obasanjo, to the Chairman of the African Commission acknowledging receipt of the urgent appeal and assuring him that the administration and many Nigerians equally shared his concern. The letter further expressed his optimism that, in the long run, justice would be done and Safiya's life would be spared. While noting that the federal government could not unilaterally suspend the *Sharia* penal statutes and decisions which were within the prerogative of the state government in accordance with the Nigerian Constitution, the letter assured the Chairman that the administration would leave no stone unturned in ensuring that the right to life and human dignity of Safiya, and that of all other Nigerians that may be affected in future, were adequately protected.

**21.** On 2 April 2002, the Secretariat of the African Commission wrote to the complainant reminding it of the need for further information on Ms Amina Lawal who was alleged to have been sentenced to a similar punishment by a *Sharia* court in Katsina state. While informing the same of the pledge by the Nigerian administration regarding the case of Safiya and the follow up by the AU Secretary-General, the Secretariat reminded the complainant that it still awaited the submission of the documentation and information as requested in its previous letters.

**22.** On 19 April 2002, the Political Affairs Department of the AU wrote to the Secretariat of the African Commission informing the latter of the decision by the Federal Court of Appeal in Nigeria overturning the death sentence imposed on Safiya by a lower court in Sokoto state, thereby making the need to make further presidential intervention unnecessary.

**23.** During the 31st ordinary session held in Pretoria, South Africa in May 2002, the complainant orally informed the Secretariat that it was trying to compile the relevant information on the complaint and that it would be best if the Secretariat waited for the same before further action on complaint.

**24.** On 27 August 2002, the Secretariat received a letter from the International Commission of Jurists expressing its concern about the fate of Ms Amina Lawal and her child.

**25.** By letter of 27 August 2002, the Secretariat informed the ICJ that the African Commission was following the developments in Nigeria regarding the application of *Sharia* penal statutes in the country, including and particularly, the case of Ms Lawal, through the appropriate channels.

**26.** During the 32nd ordinary session held in Banjul, The Gambia in October 2002, the complainant orally informed the Secretariat that it was unable to compile the requested information in time and that it was in touch with its local partners in Nigeria on the case and suggested the Commission went ahead in dealing with the complaint.

**27.** During the intersession period before the 33rd ordinary session, the Secretariat called the complainant to inquire about the progress it made and on the status of the cases pending before national courts.

**28.** At its 33rd ordinary session held in Niamey, Niger from 15 to 29 May 2003, the African Commission examined the complaint and decided to be seized thereof.

**29.** On 12 June 2003, the Secretariat wrote to the complainants and respondent state informing them of this decision and requested them to forward their written submissions on admissibility before the 34th ordinary session of the Commission.

**30.** A similar letter of reminder was sent out to the parties on 6 August 2003 and on 17 October 2003.

**31.** At its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 35th ordinary session.

**32.** On 9 December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the African Commission their written submissions on the admissibility of the communication before the 35th ordinary session. The same was copied to the respondent state's High Commission in Banjul, The Gambia.

**33.** The Secretariat sent a similar reminder to both parties on 29 April 2004 to send their written submissions on the admissibility of the communication before the 35th ordinary session.

**34.** At its 35th ordinary session held in Banjul, The Gambia from 21 May to 4 June 2004, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 36th ordinary session.

**35.** At the same ordinary session, a copy of the complaint was handed over the Nigerian delegation.

**36.** On 17 June 2004, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward to the

African Commission their written submissions on the admissibility of the communication before the 36th ordinary session. The same was copied to the respondent state's High Commission in Banjul, The Gambia.

**37.** The Secretariat sent a similar reminder to both parties on 7 September 2004 to send their written submissions on the admissibility of the communication before the 36th ordinary session.

**38.** During the 36th ordinary session held in Dakar Senegal from 23 November to 7 December 2004, the complainant orally informed the *rapporteur* of the Communication of his wish to withdraw the case.

**39.** At the same ordinary session, the African Commission decided to defer its decision on the request for withdrawal to the 37th ordinary session, pending a written confirmation of the same by the complainant.

**40.** On 23 December 2004, the Secretariat wrote to the complainant and respondent state informing them of this decision and requesting the former to forward its written request for withdrawal before the 37th ordinary session of the Commission.

**41.** A similar reminder was sent to the complainant on 2 February and 4 April 2005.

**42.** During its 37th ordinary session held from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission received a written request for withdrawal, dated 2 May 2005, from the complainant.

## For the abovementioned reason the African Commission:

Takes note of the withdrawal of the communication by the complainant and decides to close the file.

# Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria

## (2005) AHRLR 62 (ACHPR 2005)

Communication 273/2003, *Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria*
Decided at the 37th ordinary session, April 2005, 18th Annual Activity Report
Rapporteur: Johm

*Complaint about the application of Islamic penal legislation withdrawn*

**Admissibility** (withdrawal, loss of contact with complainant, 23, 24)

### Summary of facts

**1.** On 17 March 2003, the Secretariat of the African Commission on Human and Peoples' Rights (the African Commission) received a communication from the Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare, an NGO based in Nigeria, relative to article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

**2.** The Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare submitted the communication for and on behalf of Mr Abuoma Excellence Emmanuel, 30 years old and Member of the Movement for the Actualisation of the Sovereign State of Biafra (MASSOB).

**3.** The communication was submitted against Nigeria (a state party to the African Charter).[1] The communication alleged that in December 2000, the Nigerian Police Force (NPF) arrested Mr Abuoma Excellence Emmanuel during a raid at the MASSOS Headquarters at Okigwe, Imo state, Nigeria.

**4.** The communication further alleged that since the arrest of Mr Abuoma Excellence Emmanuel (more than two years now), no charges had been brought against him and attempts to have him released on bail had failed.

[1] Nigeria ratified the African Charter on 22 June 1983.

## The complaint

**5.** The Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare contends that the above-described facts constitute a violation by Nigeria of articles 2, 3, 4, 5, 6, 7, 8, 10 and 20(1) of the African Charter on Human and Peoples' Rights and therefore, prays that the African Commission addresses the violations.

## The procedure

**6.** By a letter referenced ACHPR/COMM/274/2003 and dated 17 April 2003, the Secretariat of the African Commission acknowledged receipt of the communication to the author (Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare) and indicated that the communication would be considered on seizure at the 33rd ordinary session of the Commission scheduled for the 15 to 29 May 2003 in Niamey, Niger.

**7.** During its 33rd session held from the 15 to 29 May 2003, in Niamey, Niger, the African Commission considered the communication and decided to be seized thereof.

**8.** By a *note verbale* referenced ACHPR/COMM/273/2002 and dated 12 June 2003, the Secretariat of the African Commission notified the Republic of Nigeria of the decision on seizure and requested it to furnish the Commission with its arguments on the admissibility of the case within three months from the date of notification for possible consideration during its 34th ordinary session.

**9.** By a letter referenced ACHPR/COMM/273/2002 and dated 12 June 2003, the Secretariat of the Commission also notified the complainant of the decision on seizure and requested arguments on admissibility within three months from the date of notification for possible consideration during its 34th ordinary session

**10.** The parties to the communication neither responded to the notifications nor submitted arguments on admissibility. During its 34th ordinary session held in November 2004 in Banjul, the Gambia, the African Commission requested the Secretariat to give the parties more time to submit their submissions.

**11.** The Secretariat of the African Commission tried to contact the complainant by telephone and by fax for more information, but in vain, since the contact details provided by the latter at the time of depositing the communication were invalid.

**12.** On 2 December 2003, the Secretariat of the Commission sent by fax a *note verbale* referenced (ACHPR/COMM 273/2002/RK) to the respondent state through its embassy in Banjul, informing it that the African Commission awaited its comments on the admissibility of the

complaint, attaching a new copy of the communication to the *note* for ease of reference.

**13.** The Secretariat also sent a letter referenced ACHPR/COMM 273/2002 by electronic mail and by post on 3 December 2003, reminding the complainant to submit his arguments on admissibility. The Secretariat further informed the complainant of the difficulties encountered in contacting him and requested information as to whether the victim was still being detained and about the conditions of his detention.

**14.** On 19 April 2004, the Secretariat of the Commission sent a letter to the complainant again by post informing him that since it had not received any information despite constant reminders, the African Commission had decided to postpone the case for consideration to its 36th session. The letter further pointed out that if by the end of July 2004 it did not receive any information enabling it to rule on the admissibility of the complaint it would be compelled to strike the complaint from its register for lack of interest by the complainant.

**15.** On 20 April 2004, a copy of the letter to the complainant was sent to the complainant through the Nigerian National Human Rights Commission, which, some weeks later, informed the Secretariat of its inability to trace the complainant at the indicated address.

**16.** On 25 May 2004, the Secretariat of the African Commission received an electronic message from the complainant, through one Mr Gerald Abonyi, informing the African Commission that the organisation was withdrawing its complaint. He specified that his organisation would, from then onwards, stop all correspondence on the subject.

**17.** At its 35th ordinary session, which was held in May/June 2004 in Banjul, The Gambia, the African Commission realised that the request for withdrawal of the complaint came from the email address of the complainant but not from the usual correspondent in this case (Mr Ekene Chukwu, Secretary-General of CADSJCRHW). The Commission requested the Secretariat to send him a note for confirmation on whether the request for withdrawal was genuine.

**18.** On the 21 June 2004, the Secretariat sent a letter requesting clarifications and confirmation of the request for withdrawal of the complaint from the CADSJCRHW. However, no response was received from the complainant.

**19.** During its 36th ordinary session held in Dakar, Senegal from 22 November to 7 December 2004 the African Commission decided to give the complainant one last chance to confirm withdrawal of his complaint.

**20.** The Secretariat vide a letter dated 23 December 2004 requested the complainant to confirm withdrawal of the complaint. However to date no response to the request has been received by the Secretariat.

## Law
## Admissibility

**21.** Article 56 of the African Charter on Human and Peoples' Rights provides that communications referred to in article 55, in order for them to be considered, must necessarily be sent to the African Commission after exhaustion of local remedies if any, unless it is obvious that this procedure is unduly prolonged.

**22.** It is worth noting in the case, that from the date the complaint was submitted to the Secretariat of the African Commission (17 March 2003) and in spite of several letters sent to request the complainant and the respondent state to submit on admissibility, there was no response.

**23.** The complainant in May 2004 requested the withdrawal of the complaint via email and again despite various efforts to get a written confirmation of the withdrawal the same was not forthcoming to date.

**24.** Consequently, the African Commission decides to close the file for lack of further interest in the communication by the complainant.

# SWAZILAND

## Lawyers for Human Rights v Swaziland

### (2005) AHRLR 66 (ACHPR 2005)

Communication 251/2002, *Lawyers for Human Rights v Swaziland*
Decided at the 37th ordinary session, April 2005, 18th Annual Activity Report
Rapporteur: 32nd-33rd sessions: Pityana; 34th-37th sessions: Chigovera

*Effect of proclamation revoking Constitution*

**Evidence** (failure of state to respond to allegations, 19, 41, 42)
**Admissibility** (domestic remedies unavailable, 27; continuing violation, 43-46)
**State responsibility** (duty to give effect to rights in Charter in national law, 50, 51)
**Fair trial** (independence of courts, jurisdiction of courts ousted, 54, 56; dismissal of judges, judicial powers exercised by executive, 58)
**Interpretation** (international standards, 55)
**Association** (prohibition of political parties, 60, 61)
**Assembly** (prohibition of political parties, 60, 61)
**Political participation** (prohibition of political parties, 63)

### Summary of facts

**1.** The complainant is Lawyers for Human Rights, a human rights NGO based in Swaziland.

**2.** The complaint was received at the Secretariat of the Commission on 3 June 2002 and is against the Kingdom of Swaziland which is a party to the African Charter on Human and Peoples' Rights.

**3.** The complainant states that the Kingdom of Swaziland gained independence on 6 September 1968 under the Swaziland Independence Constitution Order Act 50 of 1968. The 1968 Constitution enshrined several fundamental principles of democratic governance such as the supremacy of the Constitution and separation of powers and clearly laid down procedures for amending the Constitution.

**4.** The 1968 Constitution also provided for a justiciable Bill of Rights which secured the protection of fundamental human rights and freedoms including the right to freedom of association, expression and assembly.

**5.** The complainant alleges that on 12 April 1973, King Sobhuza II issued the King's Proclamation to the Nation (12 of 1973) whereby he declared that he had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power vested in him. In addition, he repealed the democratic Constitution of Swaziland that was enacted in 1968.

**6.** It is alleged that the King's Proclamation resulted in the loss of the protections afforded to the Swazi people under the Constitution's Bill of Rights, which effectively incorporated the rights ensured by the African Charter.

**7.** According to the complaint, the provisions of the Proclamation outlawing political parties violate the Swazi people's freedom of association, expression and assembly, thereby diminishing the rights, duties, and freedoms of the Swazi people that are enshrined in the African Charter on Human and Peoples' Rights.

**8.** Furthermore, it is alleged that the Swazi people do not possess effective judicial remedies because the King retains the power to overturn all court decisions, thereby removing any meaningful legal avenue for redress.

## Complaint

**9.** The complainant alleges that the following articles of the African Charter have been violated: Articles 1, 7, 10, 11, 13, 26.

## Procedure

**10.** At its 32nd ordinary session, the African Commission decided to be seized of the communication.

**11.** On 30 October 2002, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility within a period of three months.

**12.** At its 33rd ordinary session held in Niamey, Niger from 15 to 29 May 2003, the African Commission examined the communication and decided to defer its consideration on admissibility to the 34th ordinary session.

**13.** On 10 June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and reminded them to forward their submissions on admissibility within two months.

**14.** During its deliberations at the 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission however decided to defer consideration of the communication.

**15.** On 4 December 2003, the parties to the communication were informed of the decision of the African Commission and requested the parties to forward their written submissions on admissibility within two months.

**16.** At the 35th ordinary session held from 21 May to 4 June 2004 in Banjul, The Gambia, the complainant made oral submissions before the African Commission. The African Commission considered the communication and declared it admissible.

**17.** At its 36th ordinary session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission deferred consideration on the merits of the communication to give the respondent state one more chance to makes its submissions.

**18.** At its 37th ordinary session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and took a decision on the merits thereof.

## Law
## Admissibility

**19.** The African Commission was seized with the present communication at its 32nd ordinary session which was held in Banjul, The Gambia from 17 to 23 October 2002. The respondent state has since been requested numerous times to forward its submissions on admissibility but to no avail. The African Commission will therefore proceed to deal with this matter on admissibility based on the facts presented by the complainant.

**20.** Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with article 55 of the African Charter. All of the conditions of this article are met by the present communication except article 56(5), which merits special attention in determining the admissibility of this communication.

**21.** Article 56(5) of the African Charter provides: 'Communications ... received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

**22.** The rule requiring the exhaustion of local remedies as a condition of the presentation of a communication before the African Commission is premised on the principle that the respondent state must first have an opportunity to redress by its own means, within the framework of its own domestic legal system, the wrong alleged to have been done to the individual(s).

**23.** The complainant submits that as a result of the King's Proclamation to the Nation (12 of 1973), the written and democratic Constitution of the Kingdom of Swaziland enacted in 1968 containing

a Bill of Rights was repealed. Furthermore, the Proclamation prohibited the courts of the Kingdom of Swaziland from enquiring into the validity of the Proclamation or any acts undertaken in accordance with the Proclamation.

**24.** The complainant indicates that under the Proclamation, the King assumes supreme power in the Kingdom and judicial power is vested in him and he retains the power to overturn all court decisions, thereby removing any meaningful legal avenue for redress. The complainant quotes the case of *Professor Dlamini v The King* to illustrate instances where the King has exercised his power to undermine decisions of the courts. In that case, the Court of Appeal overturned the Non-Bailable Offences Order of 1993, which ousted the courts' jurisdiction to entertain bail applications. Following the decision of the Court of Appeal, the King issued a decree, 2 of 2001, reinstating the Non-Bailable Offences Order. However, due to international pressure, the King later repealed aspects of the reinstated Non-Bailable Offenses Order by Decree 3 of 2001.

**25.** Therefore the complainant argues they cannot exhaust domestic remedies because they are unavailable by virtue of the Proclamation and even where a matter could be instituted and won in the courts of Swaziland, it would not constitute a meaningful, durable remedy because the King would nullify such legal victory.

**26.** The complainant provides all the proclamations made by the King and after perusing the proclamations, the African Commission notes that nowhere in all the proclamations is there an ouster clause to the effect that the courts of the Kingdom of Swaziland are prohibited from enquiring into the validity of the proclamation or any acts undertaken in accordance with the Proclamation.

**27.** The African Commission has considered this matter and realises that for the past 31 years the Kingdom of Swaziland has had no Constitution. Furthermore, the complainant has presented the African Commission with information demonstrating that the King is prepared to utilise the judicial power vested in him to overturn court decisions. As such, the African Commission believes that taking into consideration the general context within which the judiciary in Swaziland is operating and the challenges that they have been faced with, especially in the recent past, any remedies that could have been utilised with respect to the present communication would have likely been temporary. In other words, the African Commission is of the view that the likelihood of the complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective. For the reasons stated herein above, the African Commission declares this communication admissible.

## Decision on the merits
## Submission from the complainant

**28.** The complainant submits that the Kingdom of Swaziland signed the African Charter on Human and Peoples' Rights in 1991. The significance of the signing is that the Kingdom declared an intention to be bound by the Charter. The complainant submits further that on 15 September 1995, the Kingdom of Swaziland then ratified the Charter and by ratifying the Charter, the Kingdom declared its final formal intention and declaration to be bound by the provisions of the Charter. Formal agreements, particularly [multi]lateral agreements, normally require ratification in addition to the signature. This requires the representative of the state subsequently to endorse the earlier signature. This provides the state with an opportunity to reconsider its decision to be bound by the treaty, and, if necessary, to effect changes to its own law to enable it to fulfil its obligation under the treaty.

**29.** The complainant notes that the Kingdom of Swaziland had ample time between 1991 and 1995 to consider whether or not to formally agree to be bound by the Charter or to change its laws to fulfil its obligations in 1995.

**30.** The complainant notes that the respondent state has violated article 1 of the African Charter as the latter imposes an obligation on member states of the African Union to adopt legislative or other measures to give effect to the rights, duties and obligation enshrined therein, noting the African Commission's decision in communication 147/95 and 149/96 [*Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46] where the African Commission found that:

> Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this article. Its violation, therefore, goes to the root of the Charter.

**31.** The complainant states further that the African Commission found that the obligation under article 1 commences at ratification and that ratification implies that the state party must also take pre-emptive steps to prevent human rights violations. According to the complainant, it goes without saying that the African Commission must declare the Proclamation to be in violation of article 1.

**32.** The complainant also alleges violation of article 7 of the African Charter noting that the Proclamation vests all powers of state in the King, including judicial powers and the authority to appoint and remove judges which necessitates the conclusion that courts are not independent, especially in view of Decree 3/2001. This Decree clearly ousts the courts' jurisdiction to grant bail on matters listed in the schedule, which schedule may be amended from time to time outside Parliament. The complainant made reference to the African

Commission's decision in communication 60/91 [*Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 12], where it was stated that:

> Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the Robbery and Firearms (Special Provisions) Act, whose members do not necessarily possess any legal expertise. Article 7(1)(d) of the African Charter requires court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not lack, of impartiality.

**33.** According to the complainant, Decree 3 of 2001 is in violation of article 7, particularly article 7(1)(d) and the African Commission is urged to find as such.

**34.** The complainant also alleges violation of article 10 and alleges that sections 11, 12 and 13 of the Proclamation in very clear terms abolish and prohibit the existence and the formation of political parties or organisations of a similar nature. In this regard, the complainant quotes communication 225/98 [*Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000)] and the African Commission's Resolution on the Right to Freedom of Association which provides that the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard; in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom; the regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter on Human and Peoples' Rights

**35.** The Commission then concluded that the state party's acts constituted a violation of article 10 of the African Charter. Accordingly, this Resolution equally applies to the Kingdom of Swaziland, and thus Swaziland is in violation. With regards to allegations of violation of article 11, the complainant argues that the King's Proclamation does not only prohibit the right to associate but also the right to assemble peacefully and adds that the right to associate cannot be divorced from the right to assembly freely and peacefully. In this regard the complainant cites the African Commission's decision in communications 147/95 and 149/96 [*Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 68] where it stated that

> the Commission in its Resolution on the Right to Freedom of Association of 1992 had also reiterated that: 'The regulation of the exercise of the right to freedom of association should be consistent with states obligations under the African Charter on Human and Peoples' Rights.' This principle does not apply to freedom of association alone but also to all other rights and freedoms enshrined in the Charter, including, the right to freedom of assembly.

**36.** The complainant also alleged violation of article 13 of the African Charter and stated that section 8 of King's Proclamation of 1981 provides that 'The provisions of section 11 and 12 of the King's Proclamation of 12 April, 1973 shall not be applicable to the Tinkundla which are hereby declared and recognised as centres for meetings of the nation'. According to the complainant the import of this section is that citizens can participate in issues of governance only within structures of the present system, which does not allow free association and assembly, expression and conscience (the Tinkhundla system of government). In this regard, the complainant refers to the Commission's decision in communication 147/95 and 146/96, *Jawara v The Gambia,* where it stated that the imposition of the ban on former Ministers and Members of Parliament is in contravention of their rights to participate freely in the government of their country provided for under article 13(1) of the Charter. Also the ban on political parties is a violation of the complainants' rights to freedom of association guaranteed under article 10(1) of the Charter.

**37.** And communication 211/98 [*Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70] which provides that:

> The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as this cannot be used to limit the responsibilities of states parties in terms of the Charter.

**38.** The complainant alleges further a violation of article 26 of the African Charter noting that a violation of article 7 is relevant to article 26 and in this regard makes reference to communication 129/94 [*Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) para 14] in which the African Commission found that:

> While article 7 focuses on the individual's right to be heard, article 26 speaks of the institutions which are essential to give meaning and content to that right. This article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power

**39.** The complainant noted further that it is beyond doubt that the vesting of judicial powers in the person of the King undermines the authority and independence of the courts, more so because the King with his legislative powers can easily water down the decision of the courts as was the case in the judgment of *Professor Dlamini v The King*, appeal case 42/2000, where the King by Decree 2 of 2001 overturned the Court of Appeal judgment by reinstating the Non-Bailable Offences Order which had been declared unconstitutional.

**40.** The complainant prays the African Commission to

- find the King's Proclamation of 12 April, 1973 to be in violation of the African Charter on Human and Peoples' Rights; and

- recommend and mandate strongly the Kingdom of Swaziland to take constitutional measures forthwith to give effect to all the provisions of the African Charter, specifically articles 1, 7, 10, 11, 13 and 26 thereof.

## Commission's decision on the merits

**41.** ln reaching this decision on the merits, the African Commission would like to point out that it is disappointed with the lack of cooperation from the respondent state. The decision on the merits was taken without any response from the state. As a matter of fact, since the communication was submitted to the Commission and in spite several correspondences to the state, there has not been any response from the latter on the matter. Under such circumstances, the Commission is left with no other option than to take a decision based on the information at its disposal.

**42.** lt must be stated however that, by relying on the information provided by the complainant, the Commission did not rush into making a decision. The Commission analysed each allegation made and established the veracity thereof.

**43.** A preliminary matter that has to be addressed by the African Commission is the competence of the commission to entertain allegations of human rights violations that took place before the adoption of the Charter or even its coming into force. In making this determination the Commission has to differentiate between allegations that are no longer being perpetrated and violations that are ongoing.

**44.** ln case of the former, that is, violations that occurred before the coming into force of the Charter but which are no longer or which stopped before the coming into force of the Charter, the Commission has no competence to entertain them. The events which occurred before the date of ratification of the Charter are therefore outside the Commission's competence *rationae temporis*. The Commission is only competent *ratione temporis* to consider events which happened after that date or before and which constitute a violation continuing after that date.

**45.** ln the present communication, the violations are said to have started in 1973 following the Proclamation by the King, that is, prior to the coming into force of the African Charter, and continued after the coming into force of the Charter through to the time when the respondent state ratified the Charter and is still ongoing. The Commission therefore has the competence to deal with the communication.

**46.** The Commission has competence *ratione loci* to examine the case because the petition alleges violations of rights protected by the African Charter, which have taken place within the territory of a state

party to that Charter. It has competence *ratione materiae* as the petition alleges violations of human rights protected by the Charter, and lastly it has competence *ratione temporis* as the facts alleged in the petition took place when the obligation to respect and guarantee the rights established in the Charter was in force for the Kingdom of Swaziland. Given that Swaziland signed the Charter in 1991 and later ratified it on 15 September 1995, it is clear that the alleged events continue to be perpetrated when the state became under the obligation to respect and safeguard all rights enshrined in the Charter, giving the Commission *rationae temporis* competence.

**47.** The two stages of signature and ratification of an international treaty provide states with the opportunity to take steps to ensure that they make the necessary domestic arrangements to ensure that by the time they ratify a treaty the latter is in conformity with their domestic law. When ratifying the Charter, the respondent state was aware of the violation complained of and had the obligation to take all necessary steps to comply with its obligations under article 1 of the Charter - to adopt legislative and other measures to give effect to the rights and freedoms in the Charter.

**48.** From the above, it is the Commission's opinion that it is competent to deal with the matter before it.

**49.** Having determined that it is competent to deal with the matter, the Commission will now proceed to examine each of the rights alleged to have been violated by the respondent state.

**50.** The complainant argues that by ratifying the African Charter and not adopting legislative and other measures to bring the 1973 Proclamation in conformity with the Charter, the respondent state has violated article 1 of the African Charter. The use of the term 'other measures' in article 1 provides state parties with a wide choice of measures to use to deal with human rights problems. In the present situation, when a decree has been passed by the head of state abrogating the constitution, it was incumbent on the same head of state and other relevant institutions in the country to demonstrate good faith and either reinstate the constitution or amend the Decree to bring it in conformity with the Charter provisions during or after ratification.

**51.** ln the opinion of the Commission, by ratifying the Charter without at the same time taking appropriate measures to bring domestic laws in conformity with it, the respondent state's action defeated the very object and spirit of the Charter and thus violated article 1 thereof.

**52.** The complainant also alleges violation of article 7 of the Charter stating that the Proclamation vests all powers of state in the King, including judicial powers and the authority to appoint and remove judges and Decree 3/2001 which ousts the courts' jurisdiction

to grant bail on matters listed in the schedule. According to the complainant this illustrates that the courts are not independent.

**53.** Article 7 of the African Charter provides for fair trial guarantees — safeguards to ensure that any person accused of an offence is given a fair hearing. In its Resolution on Fair Trial adopted at its 11th ordinary session, in Tunis, Tunisia, from 2 to 9 March 1992, the African Commission held that the right to fair trial includes, among other things, the right to be heard, the right of an arrested person to be informed at the time of arrest in a language he/she understands, of the reason for the arrest and to be informed promptly of any charges against them, the right of arrested or detained persons to be brought promptly before a judge or other officer authorised by law to exercise judicial power and be tried within a reasonable time or be released, and the right to be presumed innocent until proven guilty by a competent court.

**54.** In the present communication the Proclamation of 1973 and the Decree of 2001 vested judicial power in the King and ousted the jurisdiction of the court on certain matters. The acts of vesting judicial power in the King or ousting the jurisdiction of the courts on certain matters, in themselves, do not only constitute a violation of the right to fair trial as guaranteed in article 7 of the Charter, but also tend to undermine the independence of the judiciary.

**55.** Article 26 of the Charter provides that states parties shall have the duty to guarantee the independence of the courts. Article 1 of the UN Basic Principles on the Independence of the Judiciary states that '[t]he independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of judiciary'. Article 11 of the same Principles states that '[t]he term of office of judges, their independence, security ... shall be adequately secured by law'. Article 18 provides that '[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'. Article 30 of the International Bar Association (IBA)'s Minimum Standards of Judicial Independence also guarantees that '[a] judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge' [article 30], and article 1(b) states that '[p]ersonal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control'.

**56.** By entrusting all judicial powers to the head of state with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d'être* of the principle of separation of powers is to ensure that

no organ of government becomes to powerful and abuses its power. The separation of powers amongst the three organs of government – executive, legislature and judiciary – ensures checks and balances against excesses from any of them. By concentrating the powers of all three government structures into one person, the doctrine of separation of powers is undermined and subject to abuse.

**57.** In its Resolution on the Respect for and Strengthening of the Independence of the Judiciary adopted at its 19th ordinary session held from 26 March to 4 April 1996 at Ouagadougou, Burkina Faso, the African Commission recognised 'the need for African countries to have a strong and independent judiciary enjoying the confidence of the people for sustainable democracy and development'. The Commission then called upon all state parties to the Charter to

> repeal all their legislation which are inconsistent with the principle of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges ... refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.

**58.** Clearly, retaining a law which vests all judicial powers in the head of state with possibility of hiring and firing judges directly threatens the independence and security of judges and the judiciary as a whole. The Proclamation of 1973, to the extent that it allows the head of state to dismiss judges and exercise judicial power, is in violation of article 26 of the African Charter.

**59.** With regards the allegation of violation of articles 10 and 11, the complainant submits that the Proclamation of 1973 abolishes and prohibits the existence and the formation of political parties or organisations of a similar nature and that the Proclamation also violates article 11 — the right to assemble peacefully — as the right to associate cannot be divorced from the right to assembly freely and peacefully.

**60.** Article 10 of the African Charter provides that '[e]very individual shall have the right to free association provided that he abides by the law'. Article 11 provides that '[e]very individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law...'. In communication 225/98 [*Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000)], the African Commission, quoting its Resolution on the Right to Freedom of Association, held that the regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter and in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom and that the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards. The Commission reiterated this in communications 147/95 and 149/96 [*Jawara v The Gambia* [(2000)

AHRLR 107 (ACHPR 2000)] and concluded that this principle does not apply to freedom of association alone, but also to all other rights and freedoms enshrined in the Charter, including the right to freedom of assembly.

**61.** Admittedly, the Proclamation restricting the enjoyment of these rights was enacted prior to the coming into effect of the Charter. However, the respondent state had an obligation to ensure that the Proclamation conforms to the Charter when it ratified the latter in 1995. By ratifying the Charter without taking appropriate steps to bring its laws in line with the same, the African Commission is of the opinion that the state has not complied with its obligations under article 1 of the Charter and in failing to comply with the said duty, the prohibition on the establishment of political parties under the Proclamation remained effective and consequently restricted the enjoyment of the right to freedom of association and assembly of its citizens. The Commission therefore finds the state to have violated these two articles by virtue of the 1973 Proclamation.

**62.** The complainant also alleges violation of article 13 of the African Charter claiming that the King's Proclamation of 1973 restricted participation of citizens in governance as according to the complainant the import of sections 11 and 12 of the Proclamation is that citizens can only participate in issues of governance only within structures of the Tinkhundla. In communications 147/95 and 146/96 *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000) paras 67-68] the Commission held that:

> The imposition of the ban on former ministers and members of parliament is in contravention of their rights to participate freely in the government of their country provided for under article 13(1) of the Charter ... Also the banning of political parties is a violation of the complainants' rights to freedom of association guaranteed under article 10(1) of the Charter

**63.** In the present communication, the King's Proclamation clearly outlaws the formation of political parties or any similar structure. Political parties are one means through which citizens can participate in governance either directly or through elected representatives of their choice. By prohibiting the formation of political parties, the King's Proclamation seriously undermined the ability of the Swaziland people to participate in the government of their country and thus violated article 13 of the Charter.

**From the above reasoning, the African Commission:**

- Is of the view that the Kingdom of Swaziland by its Proclamation of 1973 and the subsequent Decree 3 of 2001 violated articles 1, 7, 10, 11, 13 and 26 of the African Charter.
- Recommends as follows:
  - that the Proclamation and the Decree be brought in conformity with the provisions of the African Charter;
  - that the state engages with other stakeholders, including members of civil society, in the conception and drafting of the new Constitution; and
  - that the Kingdom of Swaziland should inform the African Commission in writing within six months on the measures it has taken to implement the above recommendations.

# DOMESTIC DECISIONS

# BENIN

## Taïrou v Tribunal de Kandi

**(2005) AHRLR 81 (BeCC 2005)**

Constitutional Court, decision DCC 05-114, 20 September 2005
Judges: Ouinsou, Mayaba, Boukari, Brathier, Kougniazonde, Medegan-Nougbode, Sebo
Translated from French

*Trial court did not forward cases to appeal court after appeal was lodged*

**Fair trial** (trial within reasonable time; appeal, 6)

[**1.**] Approached with a request on 11 February 2005, registered with its Secretariat on 4 March 2005 under number 0504/017/REC, by which Mr Garba Taïrou, called Lokotoro, complains that, from 1992 to 2003, his ten cases are still pending at the level of the court of Kandi;

[**2.**] Having regard to the Constitution of 11 December 1990;

Having regard to law 91-009 of 4 March 1991 concerning the organic law on the Constitutional Court, modified by the law of 31 May 2001;

Having regard to the Rules of Procedure of the Constitutional Court;

Together with the documents in the file;

Having heard the report of Mr Idrissou Boukari;

After having deliberated on this,

[**3.**] Considering that the applicant states that he lodged with the High Court of Kandi ten cases; that to date, 'none of these has been heard'; that he is appealing to the Constitutional Court so that justice may be done;

[**4.**] Considering that in response to preparatory measures taken in the High Court, the state prosecutor attached to the High Court of Kandi declares:

> Only one case concerning the person named Garba Taïrou was submitted to the prosecution of Kandi ... a case of voluntary reciprocal blows and injuries of which he was also advised ... The case in question was registered under number 193/RP-95 and was the subject of judgment 20/98 of 15 January 1998. He was sentenced to a prison term of six months suspended and a fine of twenty thousand Francs;

That the President of the High Court of Kandi however states:

> The research that I have done at the level of the clerk of the court has revealed five procedures in which Garba Taïrou is involved ... Moreover, research has also brought to light that in his time, Garba Taïrou has registered appeal of decisions 16/94 of 5 April 1994 and 78/01 of 9 October 2000. But, for reasons unknown to me, these cases have not been passed on to the Appeal Court. Instructions have been given to the Chief Clerk of the Court to have these cases transferred without delay to the Appeal Court of Parakou for submission. In total, out of the ten cases referred to by Mr Taïrou Garba, it has been possible to identify five at the level of the Court of Kandi;

[**5.**] Considering that it has been established that out of the ten cases cited by the applicant, five having been the subject of judgment have been effectively identified; that two decisions have been appealed but have never been passed on to the Appeal Court for reasons that according to the President of the Court are not known; that moreover, one case has already been identified at the level of the prosecution;

[**6.**] Considering that article 7(1) of the African Charter of Human and Peoples' Rights states:

> Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; ... (d) The right to be tried within a reasonable time by an impartial court or tribunal;

that in this instance, 11 and five years after the appeals, the said cases have not yet been submitted to the Appeal Court; that these timeframes are abnormally long; that, consequently, violation of the aforesaid article 7 has occurred;

[**7.**] Considering that article 35 of the Constitution stipulates:

> Citizens responsible for a public office or elected to a political office have the duty to fulfil it with conscience, *competence*, probity, devotion, and loyalty in the *interest of the common good*;

that in behaving as they have done, the successive presidents and chief clerks of the High Court of Kandi from 1994 to date, have flouted the clauses of the aforesaid article 35.

## Decides

1. Article 7(1)(a) and (d) of the African Charter of Human and Peoples' Rights have been violated.
2. The successive presidents and chief clerks of the High Court of Kandi since 1994 have flouted the provisions of article 35 of the Constitution.
3. The present decision will be notified to Mr Garba Taïrou, called Lokotoro, to the President of the High Court of Kandi, to the Public Prosecutor attached to the Appeal Court of Parakou and published in the Government Gazette.

# Chitou v Chef de la brigade de gendarmerie d'Ifangni

**(2005) AHRLR 83 (BeCC 2005)**

Constitutional Court, decision DCC 05-137, 28 October 2005
Judges: Ouinsou, Mayaba, Boukari, Brathier, Kougniazonde, Medegan-Nougbode, Sebo
Translated from French

*Detention because of non-fulfilment of contractual obligation*

**Personal liberty and security** (arbitrary arrest and detention, detention for contractual obligation, 6)

[**1.**] Approached with a request on 24 August 2005 registered with its Secretariat on 2 September 2005 under number 1704/150/REC, by which Mrs Affissath Chitou lodges a complaint against the Chief of Police of Ifangni for violation of the clauses of article 18 paragraph 4 and following of the Constitution;

[**2.**] Having regard to the Constitution of 11 December 1990;

Having regard to law 91-009 of 4 March 1991 concerning the organic law on the Constitutional Court modified by law of 31 May 2001;

Having regard to the Rules of Procedure of the Constitutional Court;

Together with the documents of the case;

Having heard the report of Mrs Conceptia LD Ouinsou;

After having deliberated on this,

[**3.**] Considering that the applicant states that she had 'a business relationship with Mrs Sokemi'; that 'she still owes her a sum of 428 000 Naïras, this being 1 583 600 CFA Francs'; that she adds that 'to recover the said sum her creditor had her arrested by the police force of Ifangni on Thursday 18 August 2005' where she was kept until '24 August 2005 ... without any decision of the Public Prosecutor of Porto-Novo justifying this detention'; that she concludes that 'by depriving her thus of her freedom from this date of 18 August without informing the prosecuting authorities', the Chief of Police of Ifangni has 'manifestly violated the clauses of article 18 paragraph 4 and following of the Constitution'; that she consequently asks the Court to 'take a decision so as to restore the rectitude of the law'.

[**4.**] Considering that in response to the preparatory measures taken by the High Court, warrant officer Rigobert Assogba, commander of the territorial police force of Ifangni states:

> On Wednesday 24 August 2005, Mrs Aguegue Albertine, saleswoman ... brought us a Nigerian woman named Obamuyiwa Affissath to whom she had given a sum of 700 000 Naïras for the delivery of petroleum products. After having served her products to the value of 250 000 Naïras, the former vanished into thin air. Four months later, Mrs Aguegue discovered her at the market of BB and had her brought to the police station by two young men. This is when the husband of the latter ... came to see us on 25 August 2005 with a sum of 20 000 Naïras for the complainant. Mrs Aguegue having refused this sum, we began the procedure and presented his wife to the Public Prosecutor on 26 August 2005.
>
> When she arrived at court, she explained to the Prosecutor that her compatriot Kougbayi R Moses delivered petrol to her before she served her client Aguegue Albertine. But, for some months, Mr Kougbayi Moses who owes her one million Naïras has been in difficulties, which is why she was not able to honour her commitment to her client.

To sum up, Mr Olaofè S Sèmiou, the husband of Mrs Affissath, being displeased with us because of his intervention to have his wife released ..., wrote alleging that she was kept 'from 18 to 26 August 2005 without being taken to the Public Prosecutor ...'; that the police commander concludes in the transcript of his statement that Mrs Obamuyiwa was detained in the office and in the lock-up of the police station, from 25 August at 16:10 to 26 August 2005 at 08:10; that for his part, the Public Prosecutor attached to the High Court of Porto-Novo declares:

> During the night of 24 August 2005, I was informed telephonically by a police officer of the detective branch that a Nigerian woman had been brought to the station of the territorial police of Ifangni for a breach of trust concerning several million CFA Francs. Because of communication difficulties ... I requested him to present the parties to me on 25 August 2005 ... The statements of the two parties, for language reasons, made it difficult to understand the nature of the contract linking them. And so I requested the police detective officer who had brought me the charge to draw up a report of the investigation to be presented to me the next day. At the examination on 26 August 2005 ... I ascertained that Obamuyiwa Affoussatou had not misappropriated or squandered the money received ... I ordered the immediate release of Mrs Affoussath Obamuyiwa.

[**5.**] Considering that in terms of the provisions of article 16(1) of the Constitution: 'No one shall be arrested or accused except by virtue of a law promulgated prior to the charges against him ...'; that according to article 6 of the African Charter of Human and Peoples' Rights: 'No one many be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'.

[**6.**] Considering that it emerges from elements of the case that Mrs Affissath Chitou was arrested and placed in custody in the territorial police station of Ifangni for non execution of a contractual obligation; that such a motive did not warrant her arrest; that consequently, there are grounds for saying and judging that the arrest and detention of Mrs Affissath Chitou were arbitrary and constitute a violation of the Constitution;

[**7.**] Considering that article 18 of the Constitution states:

> ... No one may be detained for a duration greater than 48 hours except by a decision of the magistrate before whom he must have been presented. This delay may be prolonged only in circumstances exceptionally provided for by law and may not exceed a period greater than eight days.

[**8.**] Considering that the analysis of the documents in the case file make it impossible to determine with accuracy the length of the custody of Mrs Affissath Chitou; that, consequently, no ruling can be made on the length of the custody;

## Decides

1. The arrest and detention of Madame Affissath Chitou by warrant officer Rigobert Assogba, commander of the police station of Ifangni, were arbitrary and constitute a violation of the Constitution.
2. No ruling can be made on the length of the custody.
3. Mrs Affisath Chitou, warrant officer Rigobert Assogba, commander of the police station of Ifangni, the Public Prosecutor of the High Court of Porto-Novo, and the Director-General of the National Police Force will be notified of the present decision and it will be published in the Government Gazette.

# BOTSWANA

## Jimson v Botswana Building Society

**(2005) AHRLR 86 (BwIC 2003)**

*Rapula Jimson v Botswana Building Society*
Industrial Court, Gaborone, 30 May 2003, IC 35/03
Judge: Legwaila

*Employment terminated because employee was HIV positive*

**Equality, non-discrimination** (discrimination on the grounds of HIV status, 28-30, 45, 53)
**Work** (fair procedure in termination of employment, 28-30, 48-50)

[**1.**] The applicant, Rapula Jimson, was offered and accepted employment by the respondent, Botswana Building Society. The Botswana Building Society letter of 20 June 2002 which offered the employment made the appointment subject to

(a) six months probationary period;
(b) 48 hours notice of termination during probation; and
(c) passing a medical examination by a doctor chosen and paid for by the Society.

[**2.**] On successful completion of a probationary period the applicant would be appointed to the permanent and pensionable service of the Society and be required to join the membership of the Staff Pension Fund.

[**3.**] For purposes of medical examination the applicant was 'issued with the enclosed medical examination form to be completed by the medical doctor referred to.' Nineteen days later, on 9 July 2002, the applicant received another letter from the respondent which stated

> *Further pre-employment medical examination*
>
> Further to the pre-employment *medical examination that has been conducted on you*, you are advised that there is still a requirement for you to undergo an HIV test, as a condition for employment with the society (emphasis added).

[**4.**] The applicant complied but apparently the doctor chosen by the Society declined to conduct the HIV test because she was not convinced that the test was voluntary. The applicant then approached another doctor and had the test done at his own expense. The results of the test were sent directly to the respondent and

showed that the applicant was HIV positive. On 27 August 2002 the respondent wrote a letter to the applicant informing him that 'your probationary employment with the Society will be terminated with effect from 31 August 2002'. A copy of the results of the test was enclosed.

[**5.**] The applicant has applied to court asking for a determination on the following questions:

(a) Whether the compulsory post-employment HIV testing was legal;
(b) Whether the dismissal on the basis of positive HIV status constituted a just cause in terms of section 20(2) of the Employment Act;
(c) Whether the condition of employment that allowed termination of employment by 48 hours notice was fair;
(d) Whether the termination of employment during probationary period by 48 hours notice was fair; and
(e) Whether the termination of employment without payment of one month's remuneration in *lieu* of notice was fair.

[**6.**] The other two questions put related to criminal sanction and therefore are outside the scope of the jurisdiction of this court.

[**7.**] At the beginning of the hearing counsel for the respondent, Advocate Solomon, made the following admissions:

> *Admissions*
>
> A. Parties agree that:
>
> 1. The applicant was employed by letter of 20/6/2002. Employment commenced on 20/6/2002;
>
> 2. The applicant's employment with the respondent was subject to the applicant undergoing and passing a medical examination in terms of the letter of 20/6/2002;
>
> 3. By letter of 9/7/02 the respondent stipulated that as part of the employment medical examination the applicant was to undergo an HIV test as a condition of employment with the respondent;
>
> 4. The applicant underwent an HIV test as stipulated by the respondent by a private doctor after the doctor recommended by the respondent refused to perform the test;
>
> 5. On the 27/8/2002 the applicant received a letter of termination of probationary employment effective 31/8/2002 accompanied by the results of the HIV antibody test;
>
> 6. Besides this reason no other reason was advanced by the respondent for the termination of his employment;
>
> 7. The applicant's employment could be terminated on 14 days notice without reasons therefore or on 48 hours notice (*sic*) with reasons in terms of section 20(2) of the Employment Act; and
>
> 8. The respondent will not rely on 2.2.11 of the Statement of Defence or para 5.5 thereof.

[**8.**] As a result of the admissions, it was Advocate Solomon's view that two issues remained to be determined by the Court:

(a) Whether the respondent was entitled to insist that pre-employment medical tests should include a HIV test; and

(b) Whether based on the positive results of the test the respondent was entitled to terminate on 48 hours notice the applicant's probationary employment.

## Substantive fairness

[**9.**] The approach taken by this Court in dismissal cases is that notwithstanding the provisions of sections 18 and 19 of the Employment Act (cap 47:01) and taking into account the provisions of section 20(2), a contract of employment for an unspecified period of time should not be terminated unless *just cause* can be shown. This is also consistent with ILO Convention [158 Termination of Employment] article 4 which provides:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

[**10.**] For purposes of this part of the judgment the issue boiled down to:

(a) Whether the letter of 20 June and the attached medical form included HIV test, and,
(b) Whether the respondent was entitled to terminate the applicant's employment because of his HIV status.

[**11.**] Currently there is no legislation governing the employment of HIV positive persons. I shall deal with the procedural aspects of the complaints later under the appropriate heading.

[**12.**] The respondent's case is that it has a policy for not employing people who fail to pass the medical examination considered necessary for employment. The medical examination form starts with the prospective employee completing the first part of the form provided. This part starts with 'Family History' where the applicant is required to state the ages of parents and siblings, their state of health, and for those deceased, the cause of death.

[**13.**] After family history follows 'Personal History' under which there is a long list of questions starting with whether the applicant was ever examined for insurance and what the results were, through hereditary diseases such as epilepsy and insanity, to infections of the lungs resulting in spitting blood, asthma, pneumonia, throat infection, heart palpitations, fainting, shortness of breath, abdominal pain, infection of the urinary tract, malaria, ear infection, venereal disease, accidents, surgery etc. The applicant is to give details where answers to the questions are affirmative.

[**14.**] The part of the form to be completed by a doctor starts with a record of weight, height, chest expansion, deformity and evidence of vaccination. Then it goes to the condition of teeth, throat, respiratory system, vascular system, alimentary system, nervous

system, serious defects of sight, hearing or speech, urine and sugar. Paragraph 9 asks the doctor: 'Are there any circumstances associated with the health record or physical examinations which are of importance and have not already been mentioned?' Paragraph 10 asks the question: 'Are you satisfied that the applicant is at present in good health?' Finally the form poses the question: 'Would you recommend that the applicant be admitted to the Bank's Service, Pension Fund and/or Widows Fund?'

[**15.**] It was not disputed that the medical form explained above represented what may be termed a standard form for purposes of employment. The applicant did not raise any objection to going through the tests as specified in the form. It was also admitted in court by the respondent's representatives that the tests specified in the form were done and there was no negative recommendation.

[**16.**] The medical form does not tell the doctor the minimum state of health required of an applicant for a positive recommendation. I shall assume therefore that the matter is left to the doctor to give an expert opinion on the applicant's state of health and suitability for employment, no doubt taking into account the import of the last two questions on the applicant's general state of health. In view of the absence of objection to the test as specified in the medical test form, I shall assume that the result would still have been accepted even it if had been negative. However, unfortunately the matter did not end there.

[**17.**] The first question posed by the applicant is 'whether the compulsory *post-employment* HIV testing was legal' (emphasis added). The implication here is that the testing of HIV was not part of what was contained in the medical form and that therefore the appointment was not made subject to passing an HIV test. It was a post-employment test and was made compulsory. Unfortunately this matter was not adequately addressed further by the applicant's representative and therefore the issue was not sufficiently developed to assist the Court appreciate the argument. Counsel for the respondent submitted that it was respondent's policy that all employees be tested for HIV. That was not disputed by the applicant. However, it was also revealed in the evidence of respondent's witnesses that the policy to include HIV was introduced in June 2002, the month in which the applicant was employed. The standard medical form was clearly not altered to reflect testing for HIV. However, counsel for the respondents argued that the medical form provided for all tests including HIV even if it did not mention it specifically.

[**18.**] The Court does not agree that the form provided for a HIV test. If until June 2002 no one was tested for HIV on the basis of that form, there is no reason why it could be treated as prescribing HIV testing. It was admitted in court that a particular doctor who did the medical

examination, had been used by the respondent in the past. Not only did the doctor not consider the tests listed to include HIV but she also did not include it in the tests. The respondent did not, at that time, say to the applicant that the doctor omitted the HIV test. Instead it made it clear that the test was *additional* by stating, that 'further to the pre-employment medical examination that has been conducted on you, you are advised that there is still a requirement for you to undergo an HIV test, as a condition for employment with the Society'. In any case, having supplied the applicant with a detailed questionnaire on his health dealing with many ailments from 'spitting blood' through venereal disease, discharge from the ears, to minor ailments such as sore throat, it must be assumed on the basis of the principle, *inclusio unius est exclusion alterius*, (the inclusion of one is the exclusion of another) that a HIV test which was not mentioned was not part of the tests ordered. Admittedly the questionnaire included the question 'Any disease or illness not above mentioned'. That was part of the standard form and never resulted in HIV test before. HIV is such a prominent subject that I do not believe it could have been dealt with in that indirect and casual manner. In any case nothing in the conduct of the respondent suggests that the questionnaire was intended to cover subjects such as HIV. There is not even any reference to blood tests in the form. The test clearly focused on general physical fitness. That is the purpose of paragraph 9 of the medical form. Being HIV positive does not *per se* imply physical unfitness. It depends on the stage of the virus. (See *Hoffman v SA Airways* (2000) 21 ILJ 891 at 899).

[**19.**] It is a well established National Policy in this country that 'Pre-employment HIV testing as part of the assessment of fitness to work is unnecessary, and should not be carried out' (p 12, para 6(2) of the Botswana National Policy on HIV/AIDS).

[**20.**] The National Policy is clearly based on the World Health Organization and ILO guidelines on HIV/AIDS in the workplace of 1990 which provide that pre-employment HIV/AIDS screening as part of the assessment of fitness is unnecessary and should not be required. The SADC Code on HIV/AIDS and Employment also states that there should be no direct or indirect pre-employment HIV test. (See *Hoffman v SA Airways* (2000) 21 ILJ 891 at 908.) With all these policy codes including that of the World Health Organization, there is no way any doctor would adopt a casual approach to HIV testing without risking accusation of breach of the Hippocratic Oath. The doctor to whom the applicant was sent not only did not test for HIV but even after the respondent wrote a specific letter on HIV test, she still refused on ethical grounds as she was not satisfied as to the applicant's uncoerced consent.

[**21.**] The Court does not accept that as a matter of fact the medical form that was given to the applicant included a requirement for a HIV

test. There is no suggestion in any communication to the applicant that the doctor was expected on the basis of the form issued to test for HIV. On the contrary, the only communication availed to the Court shows that the HIV test was simply a further test which was not part of the original form. The applicant had been tested in terms of the form provided. The respondent's letter of 9 July 2002, 19 days after the offer and acceptance of appointment and while the applicant was serving, (no doubt pleased that he had passed the test), simply added another medical requirement. It said *further to the pre-employment medical examination* 'that has been conducted ... there is still a requirement for you to undergo an HIV test as a condition for employment with the Society'. There was no suggestion that an omission had been made by the doctor who conducted the first examination.

[**22.**] The applicant accepted the offer of employment on the basis of the letter of 20 June 2002. He complied with the conditions of the offer relating to the passing of a medical examination. He passed the prescribed test and therefore satisfied the conditions set from the medical point of view. Did the applicant's compliance with the demands of the letter of 9 July amount to the applicant's consent to the variation of the contract already concluded? Was the applicant made aware that the requirement for additional medical test was introducing new terms to the contract already concluded?

[**23.**] In evidence Mr Ntebela stated that the applicant belonged to the category of unskilled workers. Although he later attempted to qualify his evidence by changing to semi-skilled, that was simply an attempt to improve on his evidence.

[**24.**] On the other hand the respondent cannot be classed as unskilled or even semi-skilled. It had all the skilled manpower to conduct its business. Yet it took advantage of an unskilled employee by making a variation of the conditions of a contract entered into to look like a continuation of the original medical examination.

[**25.**] The Industrial Court is both a court of law and a court of equity. It is for this reason that it is given the power to eschew legal technicalities and rules of evidence where there is not likely to be a miscarriage of justice (section 14 of the Trade Disputes Act (cap 48:02)). The Court of Appeal in *Richard Moeti and Others v Botswana Meat Commission* (civil appeal 37/98) at page 13 of the typed judgment explained the import of the equitable jurisdiction conferred on the Court by sections 12 and 14 of the Act (formerly sections 17, and 19) as follows:

> It is significant that section 17(1) states the purpose of the Industrial Court as 'settling trade disputes' and not 'deciding trade disputes'. It seems to me that settling a dispute is a wider power than deciding the dispute. The former implies an arbitral or mediatory rather than an adjudicatory role for the tribunal on which the jurisdiction is conferred. It is not performing the task of a court, such as the High Court, in a civil

> case. The expression also means that the tribunals empowered to settle disputes has *power to take things into its own hands, and not sit back just to observe one party best the other*. This is confirmed by section 19 ... which frees the Industrial Court from being bound by the rules of evidence or procedure in civil and criminal proceedings, and gives power to the Court to disregard technical irregularities which do not or are unlikely to result in miscarriage of justice (emphasis added).

[**26.**] In the same vein, Rycroft and Jordaan in *A Guide to South African Labour Law* (Juta & Co 1992) at page 196 emphasise the point that 'the employer's reasons for dismissing an employee must be both valid and fair'. Similarly Marius Olivier in *The New Labour Law* (Juta & Co 1987) explains that 'the test in regard to unfairness revolves around the question of whether injustice, prejudice, jeopardy or detriment exists in the given circumstances' (at 354).

[**27.**] In the case of *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* (1991) 12 ILJ 1221 at 1237, Goldstone JA, made the following comment on the necessary orientation of the Industrial Court:

> In the exercise of its powers and the discretion given to it, the industrial court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the application of the principles of fairness. I agree with the observation made by Brassey *et al* at 354-5 that 'it is indeed peculiar to an unfair labour practice determination that it may have the effect of suspending the common law and law of contract consequences ... In essence, the industrial court is one in which both law and equity are to be applied.

[**28.**] In view of the foregoing authorities and court decisions on the duties and responsibilities of the Industrial Court, can this court *fairly* enforce the effect what the applicant correctly determined 'the compulsory post-employment HIV testing' which was turned into a precondition for employment contrary to the offer that had already been accepted? Does it matter that the applicant complied? All these questions must be answered in the negative. The respondent's unlawful unilateral alteration of a contract entered into, which alteration unfairly affected the applicant's employment opportunities and work security and jeopardised or prejudiced his social welfare, is not one that this Court can give blessing to. To do so would be to act contrary to the rules of fairness or equity. We would be administering injustice not justice. Compliance with a compulsory instruction by an unskilled and uninformed worker desperate for employment is not the type of consent that can form a proper basis for a defense by the respondent to the applicant's claim. Compulsion and consent are mutually exclusive concepts. It is clear from statutory intervention in the private relations between employers and employees and the introduction of concepts such as *just cause, good cause* and *lawful termination* (see sections 20(2), 33(1)(d), 120(1) & (2) and 17 respectively of the Employment Act) in the place of to common law *laissez-faire* policy that it was clearly intended to mitigate the harsh realities of unequal contracting.

[**29.**] The Court finds therefore that the compulsory post-employment HIV testing ordered by the respondent was in breach of the contract of employment entered into between the applicant and the respondent. Therefore the termination of the applicant's contract because of an HIV testing in breach of his contractual rights was substantively unfair as having been tainted by the unfairness of the test.

[**30.**] The conclusion reached also answers the question put to the Court whether the *dismissal* on the basis of positive HIV status constituted a just cause in terms of section 2(2) of the Employment [Act]. The answer is that the dismissal of the applicant was substantively unfair. The applicant having passed the medical examination he was required to go through, the deal was done. He was now in the same position as any other employee serving probation whose admission into the permanent and pensionable service could only be thwarted by poor performance or misconduct. The introduction of the HIV test at that stage amounted to discriminatory treatment, as it was not applied to other employees. Evidence was given by respondent's witness that existing employees who are found to be HIV positive are not dismissed but counselled. The applicant was exactly in that position. He should have been given the same treatment.

## Is pre-employment testing of HIV permissible?

[**31.**] The respondent's evidence is that its policy with effect from June 2002 is that all prospective employees have to be tested for HIV.

[**32.**] I have already stated that there is no statutory provision regulating the employment of HIV infected applicants. I have also referred to the existing National Policy on HIV/AIDS. This policy simply provides that: 'Pre-employment HIV testing as part of the assessment of fitness to work is unnecessary and should not be carried out'.

[**33.**] In the South African case of *Hoffman v SA Airways* (2000) 21 ILJ (CC) 2357 the Constitutional Court of South Africa ruled that the refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by the Constitution. Counsel for the respondent relied on the ruling of the Witwatersrand Local Division on the same case which favoured the employer while the applicant's representative relied on the decision of the Constitutional Court on appeal which favoured the employee.

[**34.**] Section 9(3) of the South African Constitution provides: 'The state may not unfairly discriminate directly or indirectly against anyone ...'. Section 15 of the Botswana Constitution provides that:

> (1) ... no law shall make any provision that is discriminatory either of itself or in its effect.

> (2) ... no person shall be treated in a discriminatory manner by any person acting by virtue of any written law of in the performance of the functions of any public office or public authority.

[**35.**] Two points need to be made about these constitutional provisions. First these are matters of public law as opposed to private law. Public law is:

> That branch ... of law which is concerned with the state in its political or sovereign capacity, including constitutional and administrative law and with the definition, regulation and enforcement of rights in cases where the state is regarded as the subject of right or object of duty. (*Black's Law Dictionary*, 5th ed, West Publishing Co, 1979).

The second point is that both provisions forbid discrimination by public authorities including the making and enforcing such laws by such authorities. It is because of the nature of the constitutional provisions of the South African Constitution that Ngcobo J in laying the foundation for ruling that SAA acted unconstitutionally stated:

> Transnet is a statutory body, under the control of the state, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of state and is bound by the Bill of Rights in terms of s 8(1), read with 239 of the Constitution. It is therefore, expressly prohibited from discriminating unfairly (at 2369).

[**36.**] The Botswana Constitution also forbids the making of discriminatory laws (no doubt by the state) and the discriminatory treatment of persons acting in pursuance of any written law or 'in the performance of the functions of any public office or any public authority'. See also the definition of public office in section 127(1) of the Constitution.

[**37.**] The case of *Hoffman v SAA* (at the Constitutional Court) *op cit* at 2374 cites with approval the decision in the Indian case of *MX of Bombay Indian Inhabitant v M/s ZY & Another*, AIR 1997 (Bombay) 406 at 431 where Tipnis J ruled:

> In our opinion, the state and public corporations like respondent 1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation ...
>
> Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the state cannot be permitted to condemn the victims of HIV infection many of whom may be truly unfortunate, to certain economic death.

[**38.**] It is clear that both the South African and the Indian courts based their decisions on the fact that they were dealing with the state or state organs. This is consistent with the wording of constitutions on bills of rights. The bills of rights protect the individual against the state or state power. This is public law as contradistinguished from private law which regulates dealings between private individuals including private legal persons. The wording of the National Policy on HIV/AIDS is wide and imperative enough to create the impression that it applies to all and sundry. It is binding on the respondent? The respondent is not a statutory body or

a parastatal. It is not a state organ but a private commercial entity. The government is merely a shareholder just as it is a shareholder in other private commercial entities.

[**39.**] The Botswana National Policy on HIV/AIDS is a government policy produced and approved by the said government in 1998. It is a binding policy on the government and state organs. The power to 'make laws for the peace, order and good government of Botswana' is vested only in Parliament. In the absence of specific delegated powers of legislation with respect to particular subjects, the government would not have power to legislate. Nowhere does the policy claim to have statutory authority. In any case, sublegislation is effected by way of statutory instruments and not by way of policy. Therefore however worded paragraph 6(2) of the policy may be, it remains a policy carrying only persuasive authority. It is not binding on the Botswana Building Society.

[**40.**] In another policy document, *Botswana National Strategic Framework for HIV/AIDS 2002-2003* of 29 November 2002, one of the national objectives is stated as: 'To develop and implement laws, regulations and measures to eliminate stigma and discrimination against PLWHA.' (PLWHA = People Living With HIV/AIDS).

[**41.**] In an apparent acknowledgement of the fact that so far only persuasion through policies is in place, the preamble, under the heading 'HIV/AIDS and employment', states:

> The government as an employer, as well a private sector and parastatal organizations, will have to manage staff affected by HIV/AIDS and *make decisions regarding recruitment,* deployment, training, payment of terminal benefits, retirement due to ill-health etc (emphasis added).

[**42.**] The Botswana Building Society made a decision with regard to the recruitment of people with HIV. In the absence of any legal stipulation forbidding the making of that policy, this Court cannot assume the role of a lawmaker.

[**43.**] However the Court, as a court of equity, would be remiss if it did not comment on the moral force of the applicant's case on the simple issue of mandatory HIV testing for prospective employees with consequent rejection simply because of an applicant's HIV status.

[**44.**] Professor Schoub giving medical opinion for the *Hoffman* case *op cit* identified four stages in the progression of untreated HIV infection as follows:

> (a) *Acute stage* – this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.
>
> (b) *Asymptomatic immunocompetent stage* – this follows the acute stage. During this stage the individual functions completely normally,

and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.

(c) *Asymptomatic immunosuppressed stage* – this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells per microlitre of blood . However, it is only when the count drops below 350 cells per microlitre of blood that an individual cannot be effectively vaccinated against yellow fever. Below 300 cells per mirolitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-microbials. Although the individual's immune system is now significantly depressed the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.

(d) *AIDS (Acquired Immune Deficiency Syndrome) stage* – this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them (at 2364-2365).

[**45.**] I have reproduced this medical opinion in full in order to show that it is time for the government to 'develop and implement laws and regulations ... to eliminate the stigma and discrimination against PLWHA' as promised. The applicant lost his employment because of an indiscriminate policy of the employer who took advantage of the absence of restraining legislative instruments. It was not that at that point in time the applicant was found to be incapacitated but simply because he was HIV positive. This is not the type of prejudice that can be left to the courts to tackle. The courts can only fill the gaps, clear doubt or give meaning where there is lack of clarity. But they cannot create a new law outlawing the testing for a particular disease simply because policy would wish it to be so. The Court is not unmindful of the provisions of section 13(5) of the Trade Disputes Act (cap 48:02) which permits the Court to take into consideration 'any terms and conditions of employment that may, from time to time, be issued by the government'. That does not give the Court the power to turn policy into law.

[**46.**] I stated earlier that the respondent's tests included infection of the throat. It is not clear whether the applicant would have been disqualified if he had a sore throat. An infected throat will not necessarily incapacitate a worker just as being HIV positive will not necessarily incapacitate a worker. The only reason a court would outlaw testing for HIV and not for throat infection would be in response to government policy. This is not the way courts of law and even those vested with equity jurisdiction, are supposed to operate. Courts have to apply the *law* not *policy*. The two operate at different levels. It is instructive that the policy maker after categorically stating that there should be no pre-employment HIV testing, four years later in another policy document left it to employers to 'make decisions regarding recruitment' of people with HIV.

[**47.**] The conclusion the Court arrives at is that it is for the state to decide whether it wants to stop HIV testing in the workplace in which case it would introduce legislation to that effect.

## Procedural unfairness

[**48.**] The respondent conceded that the termination of the applicant's employment by 48 hours notice was procedurally unfair. Counsel for the respondent is to be commended for saving the Court's time. However for purposes of providing guidance to the respondent in its future operations, the Court will give a brief outline of the procedural rules for termination.

[**49.**] The notice required for employees paid at monthly intervals is one month. The first qualification is for persons who have been employed for ten or more years who require six weeks notice. (See section 18 of the Employment Act.) The one month notice applies also to employees on probation in situations where the employer is prepared to give reasons for the termination, that is, to prove *just cause*. However section 20(2) permits an employer to terminate the contract of an employee *on probation* by giving 14 days notice without giving reasons for such termination. Such termination will be deemed to have been terminated for just cause. But a termination will not be deemed to have been made for just cause unless the 14 day rule is satisfied. That is the second qualification.

[**50.**] If the employer gives 14 days notice to a probationary employee but goes on to voluntarily divulge the reasons for termination as was done in this case then the exemption under section 20(2) from giving reasons is lost. Therefore the employer must show good cause as the employee will be entitled to challenge the reasons revealed. It is immaterial that the revelation of the reasons for termination was made without prejudice. The effect of section 20(2) is that 14 days is the minimum length of notice permissible. The respondent's policy of 48 hours for probationary employees is not provided for anywhere in the law and is therefore illegal. There are of course provisions for summary dismissal which are not applicable to this case.

[**51.**] The respondent has offered to pay the applicant a month's salary in lieu of notice. The applicant has understandably rejected the offer. Acceptance of the offer would have implied that the notice pay was being accepted as settlement of the claim for the alleged unfair termination. The respondent has also tendered payment for the costs of HIV testing.

[**52.**] Notice pay and compensation are, for purposes of unfair termination involving *inter alia* procedural unfairness, mutually exclusive. If pay is made in lieu of notice that cures the procedural unfairness. However the employee has the option to demand

compensation for the procedural unfairness and reject payment of notice pay. The applicant rejected respondent's offer of payment of notice pay. The Court is given the discretion to order compensation where there has been procedural unfairness (section 19(1) of the Trade Disputes Act).

## Compensation

[**53.**] Section 19 of the Trade Disputes Act provides that where the Court determines that an employee has been wrongfully dismissed or disciplined, it may make any order it deems just including, in the case of wrongful dismissal, reinstatement of the employee with or without compensation or order compensation in lieu of reinstatement. The Court has found that the dismissal was wrongful as it was based on the results of an HIV test which was not part of the terms of offer accepted by the applicant but was introduced after the applicant satisfied the medical examination requirements contained in the offer.

[**54.**] In the case of wrongful disciplinary action, including procedural irregularities in effecting termination, the court may order payment of compensation. It has been admitted by the respondent that the 48 hour termination was contrary to the provisions of section 20(2) of the Employment Act. Compensation is not to exceed six months' monetary wages.

[**55.**] Compulsory reinstatement as a remedy for wrongful termination is to be considered only where certain aggravating factors are present or where the employment relationship has not irrevocably broken down. There are no aggravating circumstances of the type referred to in the Act in the present case. Judging by the respondent's attitude to the applicant's case, the Court does not believe that cordial relations can be re-established.

[**56.**] Subsection 19(2) of the Act enjoins the Court to take the following factors into account in assessing the amount of compensation:

(a) The accrual and future loss to be suffered by the employee as a result of wrongful dismissal;
(b) The age of the employee;
(c) The prospects of finding other equivalent employment;
(d) The circumstances of the dismissal;
(e) The acceptance or rejection by either the employer or the employee of any recommendations made by the Court for the reinstatement of the employee;
(f) Whether or not there has been any contravention of the terms of any collective agreement or of any law relating to employment by the employer or the employee;
(g) The employer's ability to pay.

[**57.**] The applicant was on probation and his confirmation depended on the quality of his performance. It is not certain at this stage what

the outcome would have been if his probation had not been interrupted. The age of the applicant is to his advantage but prospects of finding other employment have virtually been destroyed by the circumstances of this case. The Court has no information on the level of his HIV status.

[**58.**] The circumstances of the dismissal were most unfortunate. The applicant had not committed any misconduct. But he was treated no differently from persons subject to summary dismissal for serious misconduct under section 26 of the Employment Act. There was no need for such treatment. His case was not a proper case for summary dismissal. A caring employer could have even retained him until a replacement was found.

[**59.**] Although the Court ruled that the National Policy had no force of law, it has been observed also that it has persuasive moral force. The applicant received the most unfair treatment that can be meted out to an HIV sufferer by a commercial entity depending for its survival on the patronage of members of the public. The applicant is a member of that public.

[**60.**] According to the applicant the doctor who tested him did not reveal that he was HIV positive. He was only told that he had traces of TB. The test results were sent directly to the respondent. That is the normal procedure and the respondent is aware of it. In an unfortunate turn of events, the respondent's employee, one L Phoi, callously delivered two bombshells to the unsuspecting applicant. He wrote the applicant a letter terminating his employment with only 48 hours notice contrary to all the legal stipulations of the Employment Act. As if that was not enough, he casually enclosed the positive results of the HIV test with the letter of dismissal, oblivious of the most likely traumatic impact that the bizarre handling of the devastating information would have on the applicant.

[**61.**] Paragraph 6 of the National Policy on HIV/AIDS recommends the following with respect to the ethical aspects of dealing with HIV infected persons:

> Pre- and post-test counselling should accompany all testing in which the individual will be given test results. Referral for on-going supportive counselling should be offered as part of the post-test service. When private commercial organizations such as insurance companies require HIV testing, they should ensure that counselling accompanies testing.

[**62.**] This is an ethical issue which even though the document in which it is contained is not legally binding, sets proper standards of prepared persons for handling information that traumatises them. It is not good enough to say the document as such is not binding. The real question is whether the servants of the Botswana Building Society have no conscience. The ethical issues raised in the document are an appeal to the national conscience. Failure to observe these can only amount to an aggravation of the unfairness of the procedural aspects of the case. That is why the Act requires this Court to look into the

circumstances of the dismissal in assessing the amount of compensation. A morally reprehensible treatment of an employee is an aggravating factor. A humane approach is always a mitigating factor. This is the essence of fairness which does not depend on the existence of any national policy.

[**63.**] There was no recommendation by the Court.

[**64.**] The termination did not contravene any collective agreement but violated the law relating to entering into contracts of employment.

[**65.**] The employer has not pleaded inability to pay.

## Determination

[**66.**] In consequence of the foregoing the Court makes the following determination:

(a) The termination of the contract of employment of the applicant was substantively unfair.
(b) The said termination was also procedurally unfair.
(c) The National Policy on HIV/AIDS has no force of law but has a strong moral persuasive force. It is therefore not legally binding on the respondent which has the right to 'make (its) decisions regarding recruitment'.
(d) The respondent is hereby ordered to pay the applicant compensation for substantive and procedural unfairness in the amount of P 9240 being the equivalent of six months' monetary wages for the applicant at the time of termination. (P 1540 x 6). No other compensation is due for the alleged remainder of the probationary period.
(e) The respondent is also ordered to pay the costs of HIV testing, as conceded, in the amount of P 159.50.
(f) The total amount of P 9399.50 shall be paid by the respondent to the Applicant through the Office of the Registrar of this Court on or before 30 June 2003.
(g) No order is made as to costs.

# CAMEROON

## The People v Nya and Others

**(2005) AHRLR 101 (CaFI 2001)**

*The People v Nya Henry & 4 Others*
Court of First Instance, Bamenda, 29 October 2001
Judge: Bea Abednego Kalla
Previously reported: (2005) 1 CCLR 61

*Defendants not released despite court order*

**Fair trial** (presumption of innocence, 4-6, 9, 12)

[**1.**] Before proceeding with this matter today, I asked the Legal Department whether they object to me, Bea Abednego Kala, handling this case and their reply was that they do not. If they did object I would have transferred this matter to another magistrate of this jurisdiction with alacrity. The reason I address my mind to that point is because of their refusal to carry out the court order releasing these people on bail. Now that they do not object, I am confident that, although they have refused to carry out that bail order, they still have confidence in my competence and impartiality in this matter. I am therefore satisfied that they would not have reason here-after to complain that I, being President of this court assigned it to myself in order to proceed in this manner I now want to handle this matter.

[**2.**] These persons are charged before me with two offences: violation of a prefectorial order under section K 370(II) of the Penal Code, a simple offence attracting a maximum of 25 000 francs CFA and or 10 days imprisonment, and unlawful assembly under section 231(1) of the Penal Code, a misdemeanour punishable with a maximum penalty of six months imprisonment and a fine of 100 000 francs CFA.

[**3.**] They have not yet been called upon to enter a plea before me. Before a trial takes off and a trial begins with the taking of a plea there are certain preliminary issues which are often taken for granted but which are raised at times. These issues may be raised by counsel or the court *sua moto*. These may include: the competence of the court to handle the matter, the capacity of the prosecution in criminal matters, the capacity and status of the defendant to stand trial in criminal matters, whether the charge before the court is proper etc. To give samples: this court would not be competent to try

an adult for a felony; a seventy year-old person lacks the capacity to face a criminal charge before this court as well as an insane person. In fact the instances abound.

[**4.**] Our Constitution in its preamble provides: 'Every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence'.

[**5.**] This presumption of innocence, in my considered opinion is a matter of law and fact. By law, I understand it to mean it should be provided by the legislation of the system in question and this has been taken care of as quoted above by our Constitution. But the factual situation is whether the department in charge of public prosecutions has treated the people as such. I have heard from the counsel for the department, from the clerk of court and from the defendants themselves that they were not released after the court order as a result of instructions of the *Procureur General* of the North West Province, the highest officer I know to be in charge of public prosecution, in this province and I believe them and hold that they have told me the truth. The question then is whether these persons who have been charged before me have in fact been presumed innocent.

[**6.**] My answer to that question is that, by refusing to carry out the order of the court releasing them from bail, these people have been brought before me as people presumed guilty that I may convict. This makes me conclude that the constitutional right of the defendants of presumption of innocence has been violated.

[**7.**] Again this presumption of innocence is not only a constitutional right but also a human right. And in this wise our Constitution again provides: 'Affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights ...'.

[**8.**] Article 11 of the Universal Declaration of Human Rights provides:

> Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.

[**9.**] So therefore I will be doing no justice in this matter to call upon these people to take plea before me with the gross violation of their constitutional and human right before my very nose. A corollary of that reasoning is that the defendants are presumed to have lost their status of innocent citizens who are thus pursued by persecutors and not prosecutors.

[**10.**] Or will the legal department contend that they could not obey that order since they took an appeal against it? I wish to remind them that, that motion was an interlocutory matter to this substantive matter and my opinion is that an appeal does not lie on an

interlocutory decision while the substantive matter has not been disposed of.

[**11.**] And the principle of law which I now adumbrate is that and who says African magistrates cannot do this — where a court of competent jurisdiction in a criminal matter orders the release of a defendant on bail and the department in charge of public prosecution, in our case the Legal Department, refuses to carry out the order the obvious conclusion is that that defendant has been denied his right to presumption of innocence and the proper course for that court is to set that defendant free.

[**12.**] I accordingly rule that the presumption of innocence of these five defendants has been violated and this matter is dismissed under section 301/1 of the Criminal Procedure Ordinance on the merits. It being that this violation can no longer be remedied and they are set free from this court hall.

[**13.**] I wish to observe as follows:

1. That I strongly and verily believe that this nation of Cameroon is a state of law where the decision of a competent court, until reversed by superior court, stands and has the force of law.
2. That a magistrate in this our state of law is free to render or capable of rendering justice without fear or favour.
3. That those who cherish the status of this country as a state of law should keenly follow-up the outcome of this case before the superior courts and any developments in the career of this magistrate after this case.
4. That the national and international communities should be aware of the above three observations

Wherefore I order as follows:

(a) That the Head of State — the supreme magistrate and guarantor of the independence of the judiciary — be served with a record of these proceedings, which include those for the motion for bail through the chairpersons of the National Commission for Human Rights;
(b) That the French ambassador in Cameroon, the British High Commissioner in Cameroon and USA ambassador in Cameroon be served with copies of this ruling;
(c) That the UN Commission for Human rights, Amnesty International and Transparency International be also served with copies of this ruling; and
(d) That copies of this ruling be made available to the press in general for publication and in particular to CRTV Bamenda and Cameroon Tribune Yaoundé.

# CHAD

## Société des Femmes Tchadiennes Transitaires v Ministère des Finances

**(2005) AHRLR 104 (ChSC 2005)**

*Société des Femmes Tchadiennes Transitaires contre Ministère des Finances*
Supreme Court, ruling 024/05, 13 December 2005
Judges: Hamid, Outman, Idjemi
Translated from French

*Women denied access to the customs office*

**Equality, non-discrimination** (discrimination on the grounds of sex, 5, 8, 13, 14)
**Work** (right to livelihood, 5-7, 9)

[**1.**] Having regard to the request dated 29 November 2005, registered by the Clerk of the Court on the same day under 027/CA/ 05, and that of 7 December 2005, according to which Maîtres Kodengar Odjengar Radet and Belkoulayo Doumiandjé Augustine, advocates of the Court, acting on behalf of the *Société des Femmes Tchadiennes Transitaires* (the Society of Chadian Women Forwarding Agents), lodged an appeal in order to obtain as a matter of urgency the suspension of internal note 102/DGDDI/ DLDCCS/DLR/05 of 21 November 2005 concerning the formal banning of entry to customs offices of women;

[**2.**] Having regard to the deposit paid by the counsel of the applicants and acknowledged by a receipt dated 2 December 2005;
Having regard to law 006/PR/98 of 07 August 1998 concerning the organisation and operation of the Supreme Court;
Having regard to all the documents in the file;
Having heard the report of the reporting counsellor;
Having heard the pleas of the counsel of the applicants;
Having heard the conclusions of the section head of judicial monitoring and administrative litigation of the general secretariat of the government;
Having heard the conclusions of the government commissioner;
After having deliberated on this in accordance with the law;

## Procedure

[**3.**] Considering that the admissibility of the request for suspension of execution is not subject to any condition of a time limit;

[**4.**] That it falls due to admit the request for suspension of execution lodged on 29 November 2005 and 7 December 2005 by Maîtres Radet and Belkoulayo against internal note 102/DGDDI/ DLDCCS/DLR/05 concerning the formal banning of entry to customs offices of women;

## Merits

[**5.**] Considering that the counsel of the applicant request the court to suspend the execution of internal note 102/DGDDI/DLDCCS/DLR/ 05 concerning the formal banning of entry to customs offices of women on the grounds that the Director-General of Customs and Indirect Duties enjoined the *Société des Femmes Tchadiennes Transitaires* (consisting only of women) to find men for all its forwarding operations and refused it access to its offices;

[**6.**] That a considerable amount of merchandise of its clients is stored in Customs;

[**7.**] That the *Société des Femmes Tchadiennes Transitaires* can no longer honour its commitments to its clients who are constantly harassing and even threatening it;

[**8.**] That the aforementioned internal note is moreover discriminatory and violates the clauses of the Constitution (article 13) and of the Convention on the Elimination of All Forms of Discrimination against Women;

[**9.**] That the degree of segregation observed by the Director-General of Customs in the said internal note causes enormous harm to the *Société des Femmes Tchadiennes Transitaires*;

[**10.**] That this is why the counsel of the *Société des Femmes Tchadiennes Transitaires* consider that it is urgent to take a protective measure;

[**11.**] That the section head of judicial monitoring and administrative litigation has concluded that the request for the suspension of this measure is not justified, and that in acting thus the Director-General of Customs and Indirect Duties has only remained within the law by taking a decision based on the law and deserving positive appreciation;

[**12.**] That according to the section head of judicial monitoring and administrative litigation there is no urgency;

[**13.**] That it appears in this instance on reading the requests and analysing the means invoked by the counsel of the applicants that the

measures preventing women forwarding agents from entering customs offices are exclusive and discriminatory;

[**14.**] That by thus preventing women forwarding agents from performing their activities on the sole basis that they are women, the Director-General of Customs and Indirect Dues has misunderstood the clauses of article 13 of Constitutional law 08/PR/05 of 15 July 2005 that stipulates that: 'Chadians of either sex have the same rights and the same duties. They are equal before the law'; and those of article 13 of the Convention on the Elimination of All Forms of Discrimination against Women that states that:

> States parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:
>
> (a) The right to family benefits;
>
> (b) The right to bank loans, mortgages and other forms of financial credit;
>
> (c) The right to participate in recreational activities, sports and all aspects of cultural life.

[**15.**] That taking into account all of the above, there is cause for deducing the urgent need to grant the suspension of execution of order 102/DGDDI/ DLDCCS/DLR/05 of 21 November 2005 concerning the formal banning of entry to customs offices of women;

## On these grounds

[**16.**] Giving a ruling publicly and contradictorily with regard to the parties in the matter of administrative summary judgment in both the first and last resort:

## Decides

[**17.**] Declares admissible the requests for summary judgment for the purposes of the suspension of execution of the internal note 102/ DGDDI/ DLDCCS/DLR/05 of 21 November 2005 lodged on 29 November 2005 and 7 December 2005 by the *Société des Femmes Tchadiennes Transitaires* (SOFTT);

Declares that it is urgent;

Orders the suspension of partial execution of internal note 102/ DGDDI/ DLDCCS/DLR/05 concerning women forwarding agents of the *Société des Femmes Tchadiennes Transitaires* (SOFTT);

Makes the national treasury liable for the costs;

Declares that an authenticated copy of the present ruling will be brought to the attention of the Director-General of Customs and Indirect Dues as a matter of urgency.

# KENYA

## Rono v Rono

**(2005) AHRLR 107 (KeCA 2005)**

*Mary Rono v Jane and William Rono*
Court of Appeal at Eldoret, civil appeal 66 of 2002, 29 April 2005
Judges: Waki, Omolo, O'Kubasu

*Division of land in the estate of a polygamous man*

**International law** (application, 21-24)
**Equality, non-discrimination** (discrimination on the grounds of sex, 28, 29)

### Judgment of Waki JA
### Background

[**1.**] This is a succession matter relating to the estate of Stephen Rono Rongoei Cherono who died intestate on 15 July 1988 at the age of 64. He was a farmer in Vasin Gishu. At the time of his death he left a sizeable number of properties, both moveable and immoveable. He was also survived by two wives and nine children (six daughters and three sons). In Probate and Administration Cause 40/88, the High Court in Eldoret granted Letters of Administration to the two widows and the eldest son without objection from other members of the family. Disputes however soon arose about the distribution of the assets and liabilities of the estate and *viva voce* evidence was recorded for determination of the distribution by the court. Ultimately on 12 June 1997, Nambuye J delivered her judgment (dated 5 May 1997) determining the distribution. The second widow however, together with her children, was dissatisfied with that judgment and so preferred an appeal to this Court.

### Undisputed facts

[**2.**] From the record and findings of the superior court, the following facts are common ground:

1. The deceased had two wives Jane Toroitich Rono (hereafter 'Jane') the first widow and Mary Toroitich Rono (hereafter 'Mary') the second widow.
2. The deceased had three sons and two daughters with Jane: William Malakwen Rono (William), Samwel Bet Rono, John

Toroitich Rono, Mary Kpisiro (Chebii) Rono, Lina Chepkemoi Rono.

3. Mary Kipriso (Chebii) Rono, the eldest daughter, aged 42 years at the time of hearing in 1994, was married but divorced her husband and returned home with 4 children of the marriage.
4. Lina Rono, the second born daughter aged 40 in 1994, was unmarried but staying in a loose cohabitation with a man and had two children.
5. The deceased had four daughters with Mary: Rose Cheriuyot Rono (Rose), Cherotich Rono, Grace Rono, Joan Jepkemboi (Kipkemoi) Rono.
6. Rose aged 32 years in 1994 was married under custom (though no dowry was paid) and had four children.
7. Cherotich aged 30 in 1994 was unmarried with no children.
8. Grace aged 29 in 1994 was unmarried but a single parent of one child.
9. Joan Jepkemobi aged 20 years in 1994 was unmarried with no child.
10. The following assets were left unencumbered and available for distribution:

    (a) Land
    - 192 acres of freehold land LR NO 9249 comprising approximately 303 acres
    - Farm house on LR NO 9249
    - ¾ of an acre of undeveloped commercial plot No 117, Iten township

    (b) Vehicles and machinery
    - M/V reg no KTX 951, Toyota Hilux
    - Ford Tractor reg no KLV 349
    - Posho mill complete with a lister engine, water tank, mill and five stores.
    - Fodder chopper
    - Maize sheller
    - Tractor plough

    (c) Household furniture and effects
    - 4 beds, 2 wardrobes, bookshelf, 2 dining tables and 6 dining chairs, 1 coffee table and 4 chairs, 1 sofa set, 4 stools, coffee table in the shape of map of Africa, 2 chest of drawers, 3 pressure lamps, 2 hurricane lamps, sewing table, typewriter, record player, wall clock, milk separator, fixed washing basins, 2 lamp stands, water tank boiler, milk cans, 1 national radio, wall safe.

11. The following liabilities were left unsettled by the deceased:
    - Hospital bill Kshs 220,884.50
    - AFC loan Kshs 31,366.70
    - Iten County Council rates Kshs 5,518.00
    - Wareng County Council rates Kshs 5,518.10
    - Income Tax Kshs 103,760.00
    - Settlement Fund Trustees Loan (unknown)

12. The deceased belonged to the Keiyo sub-tribe of the Kalenjin community.
13. The deceased lived with his two wives and children in one farmhouse and treated all of them equally.

## The dispute

[**3.**] The dispute was highlighted in the *viva voce* evidence of Wiliam, supported by Jane, representing the first house, and by Rose, supported by Mary, representing the second house.

[**4.**] Both houses were agreed on the distribution relating to the Iten township plot, the Toyota vehicle, the tractor and its implements, the posho mill together with water tank and stores, the fodder-chopper and all the household furniture and effects except six items of minor significance. The major bone of contention related to the distribution of the 192 acres of land, and the liabilities of the estate.

[**5.**] The proposal put forward by the first house in respect of the land was that the first house would share 108 acres; 22 acres going to the three sons and 14 acres each, to Jane and her two daughters. The second house would share 70 acres; all five of them, including Mary, getting 14 acres each. The remaining 14 acres would comprise: 11 acres for a market where each member of the family would be entitled to 1 acre; 2 acres for a communal cattle dip, and 1 acre for the farmhouse where all members of the family were entitled to reside.

[**6.**] The rationale for giving a bigger share to the first house and to the male children was because the land was bought and improvements were made, before the second house came into existence, and because the girls of the family had an option of getting married and leaving the home. At all events, according to Keiyo traditions, girls have no right to inheritance of their father's estate.

[**7.**] The second house saw plain discrimination in that proposal and proposed a 50/50 share of the land, each house receiving 96 acres and deciding what to do with it. Nothing would be set aside for communal use except a cattle dip and the farmhouse which would be occupied by all but remain as part of the half share for each house. There was no evidence, they contended that the first house worked harder on the land than the second house and in any event the deceased treated and educated them all equally without discriminating between boys and girls in his lifetime. He had even given one of the sons of the first house (Samwel) to the second house where there were no sons.

[**8.**] As for liabilities, the first house proposed that they settle the Aga Khan Hospital bill in the sum of Shs 264,525 while the second house settles the other bills relating to AFC, income tax, lands office and county councils, all totalling Shs 203,271.95. That would be in the

ratio 60:40. On the other hand, the second house proposed an equal liability payment of all debts at the ratio of 50:50.

## The High Court decision

[**9.**] In arriving at what it called 'its own independent distribution', the superior court considered both customary and statutory laws on succession. It made a finding that the deceased was Marakwet, although the evidence was that he was Keiyo. The Elgeyo sub-tribe (also referred to as 'Keiyo') are listed in the same chapter as the 'Marakwet' and the 'Tugen' in Cotran's *Restatement of African Law* (vol 2), which the superior court referred to for the proposition that the pattern of inheritance was patrilineal, and that in polygamous households distribution was by reference to the house of each wife irrespective of the number of children in it. Daughters receive no share of inheritance. The superior court also referred to the Law of Succession Act sections 27, 28, 40(1) and (2) relating to distribution to dependents and division to houses according to the number of units, adding the widow as an additional unit. In the end, the learned Judge took into consideration the wishes of the parties and of written law that the girls should also inherit. But she found that the possibility of the girls getting married and inheriting further property from their new families would give them an unfair advantage over the other family members. She held:

> The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute law recognizes both sexes to be [eligible] for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all the daughters will get equal shares and all the sons will get equal shares. However, due to the fact that daughters have an option to marry the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than daughters of the second house.

[**10.**] The distribution of the land thus ended up as follows:

(a) Widows

| | | |
|---|---|---|
| Jane Rono | - | 20 acres |
| Mary Rono | - | 50 acres |
| Total | | 70 acres |

(b) Daughters

| | | |
|---|---|---|
| Lina Rono | - | 5 acres |
| Mary Chebii | - | 5 acres |
| Cherutich Rono | - | 5 acres |
| Grace Rono | - | 5 acres |
| Chepkemboi Rono | - | 5 acres |
| Rose Rono | - | 5 acres |
| Total | | 30 acres |

(c) Sons

| | | |
|---|---|---|
| William Rono | - | 30 acres |
| Samuel Rono | - | 30 acres |
| John Rono | - | 30 acres |
| Total | - | 92 acres (sic) |

The liabilities were distributed as follows:

(i) First house

| | |
|---|---|
| (a) Hospital bill | Kshs 110,442.25 |
| (b) AFC Loan | Kshs 15,683.35 |
| (c) Iten County Council | Kshs 2,889.00 |
| (d) Wareng County Council | Kshs 1,759.05 |
| (e) Income Tax | Kshs 51,880.00 |
| Total | Kshs 182,653.65 |

(ii) Second house

| | |
|---|---|
| (a) Hospital bill | Kshs 110,442.25 |
| (b) AFC Loan | Kshs 15,683.35 |
| (c) Iten County Council | Kshs 2,889.00 |
| (d) Wareng County Council | Kshs 1,759.05 |
| (e) Income Tax | Kshs 51,880.00 |
| Total | Kshs 182,653.65 |

[**11.**] The other orders made by the superior court are contained in the decree issued on 21 March 2002 and are not challenged save for the omission to provide that ½ share of plot 117, Iten township would go to the second widow, Mary Rono, which omission is conceded in this appeal.

## The appeal and submissions of council

[**12.**] The decree of the superior court was challenged by Mary on 11 grounds but it is unnecessary to reproduce them since one ground was abandoned and the rest were condensed into three and were ably argued as such by learned counsel for the appellant, Mr P Gicheru.

[**13.**] The main ground was that the superior court erred in taking into consideration the Marakwet customary law or any customary law, since the estate that fell for consideration was governed by the Law of Succession Act, Cap 160 Laws of Kenya. Section 3(2) of that Act defines 'child' without any discrimination on account of sex. The Constitution of Kenya also in section 82 outlaws discrimination on grounds, *inter alia*, of sex. Mr Gicheru thus submitted that section 40 of the Succession Act should have been applied in which case all the children and the widows would have been considered as units, entitling them to equal distribution of the land. It was erroneous therefore to entertain the consideration that the girls would have unfair advantage due to the possibility of their future marriage. On the evidence the girls in both houses were advanced in age in 1994 and were still unmarried or divorced 10 years late when this appeal was argued. The speculation that they would marry had therefore no

basis. As there was no special inquiry made to determine whether any of the heirs deserved more land than the others, there was no basis for discrimination against the girls. It did not matter, he submitted, that the appellant received 50 acres, which is 30 acres more than her co-widow. Such distribution would still be contrary to the law and the purpose of the appeal was to enforce compliance with the law of succession.

[**14.**] For his part, learned counsel for the respondents, Mr PKK Birech, submitted on this issue that the superior court judge had a discretion to distribute the estate and she cannot be faulted. She considered and discarded the application of customary law. She then applied sections 27, 28 and 40 of the Succession Act. He conceded that the Act catered for all children including unmarried daughters but referred to section 33 of the Act which exempts the application of the Act to agricultural land and livestock and subjects distribution of such property on intestacy to the law or custom applicable to the deceased's community or tribe. The superior court was justified therefore in considering customary law and giving only nominal acreage of the land to the girls.

[**15.**] The second ground of appeal, which was readily conceded, was that there was no mention in the judgment or decree about the remaining half share of plot 117 of Iten township after the superior court distributed one half of it to the first widow, Jane. It was submitted and accepted, that the remaining half share should go to the appellant, Mary.

[**16.**] Finally on the third ground of appeal on distribution of liabilities Mr Girechu submitted that it was inequitable for the learned judge, having dished out a large portion of the immovable property to the first house, to order payment of the sizeable liabilities on equal basis. The distribution of the liabilities should be proportionate to the distribution of assets. For his part, Mr Birech saw nothing wrong with ordering the girls to pay up the liabilities since they had shared in the assets of the estate.

## The law

[**17.**] The manner in which courts apply the law in this country is spelt out in section 3 of the Judicature Act, Chapter 8, Laws of Kenya. The application of African customary laws takes pride of place in section 3(2) but it is circumscribed thus: ' ... so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law ...'.

[**18.**] The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect. That is section 82(1). In section 82(3), it defines discrimination as follows:

> affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed, *or sex*, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

That provision has not always been the same with regard to discrimination on grounds of sex. '[O]r sex' was inserted in a relatively recent constitutional amendment by Act 9 of 1997. In the same section, however, the protection is taken away by provisions in section 82(4) which allow discriminatory laws, thus:

> Subsection (1) shall not apply to any law so far as the law makes provision -
>
> ...
>
> (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
>
> (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
>
> (d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons for any other such description, is reasonably justifiable in a democratic society.

[**19.**] Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the international Bill of Rights, which is the Universal Declaration of Human rights (1948) and two international human rights covenants: the Covenant on Economic, Social and Cultural rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in [1966]). In 1984 it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women, in short, 'CEDAW'. Article 1 thereof defines discrimination against women as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

[**20.**] In the African context, Kenya subscribes to the African Charter of Human and Peoples' Rights, otherwise known as the Banjul Charter (1981), which it ratified in 1992 without reservations. In article 18, the Charter enjoins member states, *inter alia*: 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'.

[**21.**] It is in the context of those international laws that the 1997 amendment to section 82 of the constitution becomes understandable. The country was moving in tandem with emerging global culture, particularly on gender issues. There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[**22.**] That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In *Longwe v International Hotels* 1993 (4 LRC 221), Justice Musumali stated:

> ... ratification of such (instruments) by [a] nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.

[**23.**] A clear pointer to the currency of that thinking in this country is in the draft Constitution where it is proposed that the Laws of Kenya comprise, amongst others: 'Customary international law and international agreements applicable to Kenya'.

[**24.**] I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relating to discrimination which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, will also inform my decision.

## Conclusion

[**25.**] The deceased in this matter died in 1988 while the Succession Act which was enacted in 1972, became operational by Legal Notice

93/81, published on 23 June 1981. I must therefore hold, as the Act so directs, that the estate of the deceased falls for consideration under the Act. Section 2(1) provides:

> Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of decreased persons dying after the commencement of this Act and to the administration of estates of those persons.

[**26.**] The application of customary law, whether Marakwet, Keiyo or otherwise, is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in sections 32 and 33 in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. But the application of the law or custom is only limited to 'such areas as the Minister may by Notice in the Gazette specify'. By Legal Notice 94/81, made on 23 June 1981, the Minister specified the various districts in which those provisions are not applicable. The list does not include Uasin Gishu district within which the deceased was domiciled. So that, the law applicable in the distribution of the agricultural land in issue in this matter is also written law. Does the Act provide for the manner of distribution? Partly, yes.

[**27.**] The superior court was of the view that section 27 of the Act donates unfettered discretion to the court in the sharing of the estate considering the definition of 'dependant' in section 29 to include the 'wife and the children of the deceased'. It is in exercise of that discretion that the learned Judge disregarded consideration of the sharing proposed by the parties altogether and made her 'own independent distribution'. It was also pursuant to that discretion that she based her decision to allocate minimal shares to the daughters on the basis that they would get married.

[**28.**] While I do not doubt the discretion donated by the Act in matters where dependents seek a fair distribution of the deceased's net estate, I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis. The possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion. It is not a determining factor. In this particular case however, I find no firm factual basis for making a finding that the daughters would be married. As shown by the undisputed facts above, all except one were unmarried or divorced in 1994 and were advanced in age. Eleven years later when this appeal was heard, there was no evidence that the situation had changed. It is also an undisputed fact that the deceased treated all his children equally and never discriminated between them on account of sex. It is a factor in my view that was not sufficiently considered although it resonates with the noble notions enunciated in our Constitution and international laws. The respondents themselves

clearly recognised and honoured the wishes of the deceased when they proposed to give 14 acres of the land to each daughter of the deceased. I find no justification for the superior court whittling that proposal down to 5 acres to each daughter. More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the 'houses according to the number of children in each house, but also adding any wife surviving the deceased as an addition unit to the number of children'. A 'house' in a polygamous setting is defined in section 3 of the Act as a 'family unit comprising a wife … and the children of that wife'. There is no discrimination of such children on account of their sex.

[**29.**] I think, in the circumstances of this case there is considerable force in the argument by Mr Gicheru that the estate of the deceased ought to have been distributed more equitably taking into account all relevant factors and the available legal provisions. I now take all that into account, and come to the conclusion that the distribution of the land, which is the issue falling for determination, must be set aside and substituted with an order that the net estate of 192 acres of land be shared out as follows:

(a) Two acres for the farm-house now common occupied by all members of the family to be held in trust by the joint administrators of the estate;
(b) Thirty acres to the first widow, Jane Toroitich Rono;
(c) Thirty acres to the second widow, Mary Toroitich Rono;
(d) Fourteen decimal four four (14.44) acres to each of the nine (9) children of the deceased.

[**30.**] As for the liabilities, they should in reality have been paid off by the estate as a whole before distribution of the net intestate estate. The superior court however found it fit to distribute the liabilities equally between the two houses, and the only challenge on appeal was that the distribution of the land should have been similarly treated. As I have inferred with the distribution of the land, I find no other basis for disturbing the order made by the superior court in respect of liabilities.

[**31.**] In the result, I would allow the appeal to the extent stated above. A fresh decree would issue accordingly. As this is a family matter, each party shall bear its own costs.

## Judgment of Omolo JA

[**32.**] I had the advantage of reading in draft form the judgment prepared by Waki JA and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that

a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act. Section 40(1) of the Act provides that:

> Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses *according to the number of children in each house*, but also adding any wife surviving him as an additional unit to the number of children.

[**33.**] My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

[**34.**] Nor do I see any provision in the act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality.

[**35.**] What I understand Waki JA to be saying is that in the circumstances of this particular case, there was no reasonable factual basis for drawing a distinction between the sons on the one hand and the daughters on the other hand. Subject to what I have said herein, I agree with the judgment of Waki JA and the orders proposed by him. Those orders shall be the orders of the Court.

## Judgment of O'Kubasu JA

[**36.**] Subject to what Omolo JA says in his judgment I agree with the judgment of Waki JA and the orders proposed by him.

# Kemai and Others v Attorney-General and Others

## (2005) AHRLR 118 (KeHC 2000)

*Francis Kemai, David Sitienei, Kipsang Kitel, Witson Martim, Witlliam Kirinyet, Joel Busienei, Joseph Barno, Samuel Sitienei, David Korir, Joseph Ku'langatroticii v The Attorney-General, The Provincial Commissioner, Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner for Nakuru*
High Court of Kenya at Nairobi, civil case 238 of 1999, 23 March 2000
Judges: Oguk, Kuloba

*Clash between claims of indigenous group and environmental protection*

**Life** (right to livelihood, 17-20, 38)
**Environment** (access to natural resources, 19; common good, 20; sustainable development, 30-35)
**Property** (land rights of indigenous people, 22-23, 38)
**Equality** (discrimination on the grounds of ethnic group, 25, 29)
**Limitations** (environmental considerations, 32-34; common good, 40)

[**1.**] In this suit instituted by way of an originating summons (which the plaintiffs called an 'originating motion' which all the parties had no doubt was meant to refer to the 'originating summons', the 5000 members of the Ogiek ethnic community, ten of whom are expressly impleaded as plaintiffs representing themselves and the rest of the others who consented to be represented in this suit, have moved this Court (after leave of the Court for that purpose) to make two declarations and two orders, that is to say:

(a) A declaration that their eviction from Tinet Forest by the government (acting by the provincial administration) contravenes their rights to the protection of the law, not to be discriminated against, and to reside in any part of Kenya;
(b) A declaration that their right to life has been contravened by the forcible eviction from the Tinet Forest;
(c) An order that the government herein represented by the Attorney-General, compensates the plaintiffs; and
(d) An order that the defendants pay the costs of this suit.

[**2.**] The plaintiffs seek these declarations and orders on the basis of their pleaded averments that they have been living in Tinet Forest

since time immemorial (counting the time their community began living in the area), and yet after virtually daily harassment by the defendants, the plaintiffs are now ordered to vacate the forest which has been the home of their ancestors before the birth of this nation, and which is still the home of the plaintiffs as the descendants and members of that community, even after their ancestral land was declared a forest as far back as the early colonial rule and has since remained a declared forest area to this day. They complain that the eviction is coming after the government had finally accepted to have their community settled in Tinet Forest and a number of other places like Marioshoni, Tieret and Ndoinet, among others. They say this government acceptance was in 1991; and between 1991 and 1998 the community settled in the area in question, with the full co-operation of the government which issued letters of allotment of specific pieces of land to the individual members of the community each of whom was shown the precise plots on the ground, whereupon the community has embarked on massive developmental activities, building many primary schools and trading centres, carrying out modern crop farming and animal husbandry and other economic management, and the construction of permanent and semi permanent residential houses.

[**3.**] So, the plaintiffs say that when in May last year (1999) the government through the District Commissioner, issued a fourteen days' ultimatum, followed a few days later with a re-iteration of the threat to the community to vacate or risk a forceful eviction from the forest and their ancestral land, they considered the ultimatum and threat a violation of their aforesaid rights and that it was so real and eminent that the eviction must be stopped, to avoid irremediable harm befalling the plaintiffs and their children and the community generally. They say that tension in Tinet Forest, following the threat, is so high that unless the government stops making good its threat there may be a breakdown in law and order in what the plaintiffs call 'a clash'. They say that their constitutional rights guaranteed under sections 71 and 82 of the Constitution of Kenya, are at stake. That is the reason they are before us, seeking the declarations to which we have already adumbrated: that is to say, that Tinet Forest, admittedly one of the country's gazetted forests, is their ancestral home where they derive their livelihood where they gather food and hunt and farm, and they are not going to go away; they do not know any other home except this forest: they would be landless if evicted. It was said on their behalf, that the applicants depend, for their livelihood, on the forest, they being food gatherers, hunters, peasant farmers, beekeepers, and their culture is associated with this forest where they have their residential houses. It was said that their culture is basically one concerned with the preservation of nature so as to sustain their livelihood. Because of their attachment to the forest, it is said, the members of this community have been a source

of the preservation of the natural environment; they have never been a threat to the natural environment, and they can never interfere with it, except in so far as it is necessary to build schools, provincial government administrative centres, trading centres, and houses of worship (to wit, the Roman Catholic Church buildings).

[**4.**] The four respondents, on behalf of the government, answered the applicants by stating that the applicants have not disclosed the truth of the matter concerning this case; and, according to the respondents, the truth of the matter is that these applicants and the 5000 persons they represent, are not the genuine members of the Ogiek community, and they have not been living in Tinet Forest since time immemorial; for, the genuine members of the Ogiek community were settled by the government at Sururu, Likia and Teret. The respondents said that in the period between 1991 and 1998 the government, intending to degazette a part of Tinet Forest to settle there landless Kenyans, proceeded and issued some allocation of land documents certifying that the individuals named in each card and identified therein, had been allocated the plot of land whose number was stated in the respective cards, copies of which were exhibited before us in court. According to the respondents those documents were not letters of land allotment but a mere promise by the government to allocate those people with land if it became available; but, nevertheless, the applicants were not amongst the people who were issued with those cards anyway.

[**5.**] The respondents say that the government later realised that the part of Tinet Forest which was intended to be degazetted for settling 'the applicants' was a water catchment area, and the government shelved the settlement plan; and when the government discovered that the applicants had entered Tinet Forest unlawfully, it, through the Chief Conservator of Forests, gave the applicants a notice to vacate the forest with immediate effect. The District Commissioner for Nakuru District under which the Tinet Forest falls says that he gave notice to the applicants to vacate the area because the applicants had entered and settled there unlawfully. He has never harassed the applicants, but instead he has advised them to vacate the government gazetted forest peacefully. The legal advice the district commissioner has received and believes to be correct is that 'those rights and freedoms enshrined in the Constitution are subject to limitations designed to ensure that their enjoyment by any individual does not prejudice the rights and freedoms of others or the public interest'. Concerning the position taken by the applicants that they are completely landless, the respondents say that that is not the true position, and that archival administrative records availed from our National Archives show the contrary and that the colonial government resettled the applicants elsewhere, along with other WaDorobo people. But after the said resettlement elsewhere, some people entered the Forest of Tinet, with an intention to dwell there

without any licence given by the forests authority on behalf of the government. The unauthorised occupation of the forest has been followed by numerous evictions since the date of the gazettement of the forest as such. The government's 1991-1998 plan to settle all landless persons (including some Ogiek people) was purely on humanitarian considerations, but the programme did not materialise when it was later found that to go ahead with it would necessarily result in environmental degradation which would adversely affect the role of the forest as a natural forest reserve and a water catchment area, with dire consequences for rivers springing from there which presumably sustain human life, the fauna and the flora there and downstream and their environs. So the plan was shelved, at least for the time being.

[**6.**] Concerning the claim of the applicants that the eviction was selectively discriminatory against them alone, the respondents answered by denying any discrimination and stated that all persons who have invaded the forest are the subject of the eviction. Regarding the applicants' averments that the eviction would deprive them of their right to livelihood, the respondents say that this allegation is not true, because the applicants have not been dependent on forest produce alone, because they also keep livestock. The applicants' statements that there are massive developments in the area are denied by the respondents who add that things like building schools and churches could not be done without the express authorisation of the commissioner of lands as the custodian of government land. (This aspect suggests that there was no such express or any authorisation.) The respondents say that the forest in question is still intact, and no sub-division and allocation of any piece of land there to anyone has been approved or effected.

[**7.**] The local Catholic Diocese of Nakuru came into this litigation on the side of the applicants, expressing its interest in the matter for three reasons, namely, first, that the Diocese has built churches and schools in the disputed area and is, therefore, a stakeholder on any issue touching on that land; secondly, that in the event of an eviction of the applicants taking place as it is threatened, such action is likely to impinge on the operations of the Church in the area, because the persons adversely affected by the eviction are likely to seek assistance (both material and spiritual) from the Church, and the Church is likely to incur tremendous amounts of monetary expenditure trying to look for alternative accommodation for displaced persons; and thirdly, that the Diocese has been assisting the peasant farmers in the disputed area in matters of agriculture by supplying seed and fertilizers, to ensure that the farmers are self-supporting. These are the reasons why the local Diocese is interested in the outcome of this case, and that is why it has stood by the applicants in these proceedings. No affidavit was filed on behalf of the Diocese, but it adopted everything filed by and for the applicants on the basis

of which the Diocese supported the application and joined the applicants in seeking the declarations and orders which we specified at the beginning of our judgment. The Diocese adopted the factual exposition laid out for the applicants.

[**8.**] From the historical records furnished to the Court in these proceedings it is plain that by the time of the second phase of the colonial evolution and organisation of racial segregation by the creation of African ethnic land reserves through legal regimes enacted in the early 1930's particularly following the Land Commission (commonly referred to as the Carter Commission), Cmd 4556, 1934, which had actually started its work as early as 1930, there were found in an area including Tinet Forest, peoples whose changing nomenclature and profusion of alternate names are one of the sources of confusion, just as the simplistic and indiscriminate groupings and the misleading lumping together of those diverse peoples is not helpful in distinguishing and identifying which persons are being referred to. But in these proceedings it was agreed that the people found in the area in question in the 1930's were Ndorobo, or Dorobo, or Wandorobo, being variant terms of the Maasai term Il Torobo meaning poor folk, on account of having no cattle and reduced to eating the meat of wild animals, and were, in their primary economic pursuit, hunters and gatherers hunting game and collecting honey. They commonly inhabited highland forests in the past; but with the intrusion of the white settlers they were dispersed to the plains, although they preferred their accustomed elevations, with forests as their natural environment where they found safety, familiarity and food. They left their refuge of foliage with the greatest reluctance, thanks to their honey complex.

[**9.**] Amongst the Dorobo is a group called Okiek, or Ogiek, living in close proximity to Kalenjin speaking peoples, such as the Nandi and the Kipsigis, and they speak a Kalenjin-related dialect, and bear many overt cultural characteristics of their said neighbours. Traditionally they were highland hunter-gatherers inhabiting the southerly highland areas and the fringes of the lower forests. But as Andrew Fedders and Cynthia Salvadori in their useful study, *Peoples and Cultures of Kenya* (1979), at 14, tell us, today's Ogiek 'is not the sum of an age-old pre-food-producing past', and to uninitiated eyes they disguise their elemental hunter gatherer cultural characteristics; and, indeed, as those learned authors write about these people (at 15), these people today attempt to herd or cultivate so that hunting has become a secondary economic pursuit for them; and although the social value of honey is incalculable, it 'has never constituted more than one-fifth of their diet', and is only a pre-eminent element in ritual and social communication through exchange. It is said that their attachment to place is proverbial, yet they have always been mobile and nomadic within the general bounds of their hunting and gathering

grounds. Their rights 'specifically involve the collection of honey and extend to hunting and gathering' wild vegetables, roots and berries.

[**10.**] One matter sharply illustrates the clear change from the traditional cultural way of life to a very different modern lifestyle of a present-day Ogiek. Studies show an Ogiek of yesterday as one characterised by a simplicity of material culture. Home is a dome-shaped hut constructed from a frame of sticks, twigs and branches and thatched with leaves or grass; a semi-permanent shelter, easily abandoned, and no burden when people move. These traditional shelters contrast sharply with the modern houses of corrugated iron-sheet roofs and glass windows, whose photographs this Court was shown by the applicants. The schools and churches the applicants have built; the market centres developed, and agricultural activities engaged in, are all evidence of a fundamentally changed people. It boils down to one thing. It belies the notion that these people sustain their livelihood by hunting and gathering as the main or only way out today. They cannot be said to be engaging in cultural and economic activities which depend on ensuring the continuous presence of forests. While the Ogiek of yester-years shaped his life on the basis of thick forests or at least landscapes with adequate trees and other vegetation, one of today may have to clear at least a part of the forest to make room for a market centre. While yesterday's Ogiek lived in loosely organised societies lacking centralised authority, resulting in a social fluidity which enabled him to respond to the slightest changes in his environment with an essential sensitivity and speed on which his very life may depend, an Ogiek of today, we are told by the applicants in their sworn affidavit, lives under a chief who was until recently his own son. While Ogieks of perhaps the yonder past were bound by honey, those of today, as we have seen from the applicants' affidavits, are bound by the spirit of the Church. So, whilst in his undiluted traditional culture the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment. As we have just said, they cannot build a school or a church house, or develop a market centre, without cutting down a tree or clear a shrub and natural flowers on which bees depend, and on which beehives can be lodged, from which honey can be collected, and from which fruits and berries can be gathered. The bush in which wild game can be hunted is inconsistent with the farming (even though the applicants call it peasant farming) they tell us they are now engaged in.

[**11.**] Their own relatively permanent homesteads cannot also be home of wild game which the applicants want us to believe to be one of their mainstays. As the applicants dig pit-latrines or construct other sewage systems for schools, marketplaces, residences, etc, as of necessity they must have, they obviously provide sources of actual or potential terrestrial pollutants. Plainly, therefore, for the

applicants to tell the court as they did, that they lead a life which is environmentally conservational is to be speaking of a people of a by-gone era, and not of the present. Professor William Robert Ochieng, in his study of the histories, development and transformation of certain societies of the Rift Valley, groups the Ogiek people amongst communities whose character as predominantly hunter-gathers who practised very minimal agriculture subsisted only up 'until the middle of the eighteenth century', and that is when they 'did not have cattle' and lived by hunting; but from 'the middle of the seventh century' their economy had begun to change: William Robert Ochieng, *An outline history of the Rift Valley of Kenya up to AD 1900*, (1975, reprinted 1982), at 10.

[**12.**] It is on record and agreed in these proceedings, that the colonial authorities declared the disputed area to be a forest area and moved people out of it and translocated them in certain designated areas and the area has remained gazetted as a forest area to this day, under the Forests Act (Cap 385). One of the effects of declaring the area to be a forest area was that it was also declared to be a nature reserve for the purpose of preserving the natural amenities thereof and the flora and fauna therein. In such a nature reserve, no cutting, grazing, removal of forest produce or disturbance of the flora shall be allowed, except with the permission of the Director of Forestry, and permission shall only be given with the object of conservation of the natural flora and amenities of the reserve. Hunting, fishing and the disturbance of the fauna shall be prohibited except in so far as may be permitted by the Director of Forestry in consultation with the Chief Game Warden, and permission shall only be given in cases where the Director of Forestry in consultation with the Chief Game Warden considers it necessary or desirable to take or kill any species. The Director of Forestry or any person authorised by him in that behalf may issue licences for all or any of the enumerated purposes, upon such conditions as may be approved by the Director of Forestry or upon such conditions and subject to payment of such fees or royalties as may be prescribed; but no licence shall be issued for any purpose in respect of which a licence is required under the Wildlife (Conservation and Management) Act (Cap 376) or under the Fisheries Act (Cap 378).

[**13.**] The activities in the forest, which require the aforesaid licence, and are otherwise prohibited unless an actor has a licence to do so, include felling, cutting, burning, injuring or removing any forest produce, which includes back, beeswax, canes, charcoal, creepers, earth, fibres, firewood, fruit, galls, grass, gum, honey, leaves, limestone, litter, moss, murram, peat, plants, reeds, resin, rushes, rubber, sap, seeds, spices, stone, timber, trees, wax, withies and such other things as the minister may, by notice in the Gazette declare to be forest produce. Another prohibition, unless done with a licence, is to be or remain in a forest area between the hours of 9 pm

and 6 am unless one is using a recognised road or footpath or is in occupation of a building authorised by the Director of Forestry. Others of the various prohibitions which are relevant to the present case, are that as a rule, no person shall, except under the licence of the Director of Forestry, in a forest area, erect any building or cattle enclosure; or depasture cattle, or allow any cattle to be therein; or clear, cultivate or break up land for cultivation or for any other purpose; or capture or kill any animal, set or be in possession of any trap, snare, gin or net, or dig any pit, for the purpose of catching any animal, or use or be in possession of any poison or poisoned weapon; but capturing or killing an animal in accordance with the conditions of a valid licence or permit issued under the Wildlife (Conservation and Management) Act is allowed. No one is allowed to collect any honey or beeswax or to hang on any tree where any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or to enter for the purpose of collecting these things or any of them, or to be in the forest with any equipment designed for the purpose of collecting honey or beeswax.

[**14.**] Sections 9 to 13 of the Forests Act set out certain statutory measures to be taken to enforce the prohibitory provisions of the Act. Nothing in the Act suggests that those measures are comprehensive and exhaustively exclusive. Certain penalties of a criminal nature following a successful criminal prosecution under the Act are also prescribed. Again nothing in the Act suggests that those are the only penal or remedial sanctions under the law to be exacted. In the Act there are also provisions for the forests authorities to have recourse to extra-curial self-help actions to deal with the law transgressors. As we had the misfortune of the learned advocates for all the parties not addressing us satisfactorily on this important legislation and its import, we had no advantage of benefiting from their expressed respective positions on the Act, and we only raise it because it is in our minds as we consider the presence of the applicants and other persons in the forest area in question. It is one of the laws relevant to the subject; nobody has challenged its prohibitions and its permit and licensing requirements; and he who has not shown that he has complied with that law or any other law applicable, for him to be in the forest area and to exploit and enjoy its natural endowments should surely not be heard to seek the help of the law to protect him from positive action taken to help him desist from acting in disregard of the law of the land. It was conceded by Mr Mirugi Kariuki for the interested party, and by extension, by Mr Sergon for the applicants, that the applicants and/or their forefathers were repeatedly evicted from this area but they kept on returning to this forest area. They were removed to an area known as Chepalungu, and after each eviction there had been a tendency for individuals to seep back into the Tinet and adjoining forest area, where lack of supervision caused a further build-up of settlement until measures once again had to be

taken to sort them out. Records state (at document 30AAA in the bundle of exhibits in court) that since 1941 until roughly 1952 the Tinet Forest area had been largely uninhabited. Later the forest department encouraged the settlement of a limited number of families to look after the interests of the department on a part-time basis. This resulted in a build-up of settlement, and the matter led to strained relations between various colonial government departments. By 1956 only a mere seven persons appear to be in Tinet, but as forest guards.

[**15.**] Mr Mirugi Kariuki said that what the repeated evictions and repeated seeping back show us is a continuing struggle of a people: a resistance of the people all along: evicted people always coming back, and being pushed out again, and people return. From all these things the Court finds that if the applicants' children, or if they themselves or some of them, are living in Tinet Forest, they are forcefully there: they are in that forest and doing what they say they are doing in that forest, as a part of then continuing struggle and resistance. They are not there after compliance with the requirements of the Forests Act. They have not bothered to seek any licence to be there. Theirs is simply to seep back into the forest after every eviction, and after trickling back they build-up in numbers and increase their socio-economic activities to a point they are noticed and evicted again.

[**16.**] These people do not think much of a law which will stand between them and the Tinet Forest. In particular, of the Forests Act they say through Mr Mirugi Kariuki, that it found them there in 1942 when it was enacted, and it never adversely affected them. But the recorded evictions they acknowledge and their admitted repeated coming back, followed by other evictions contradict them on this. That is why even in their affidavit in support they complain of a continuous harassment by the provincial administration.

[**17.**] The centre piece of the arguments in support of the applicants' case was that to evict the applicants from this particular forest would be unconstitutional because (a) it would defeat a people's rights to their indigenous home, and deprive them of their right to life or livelihood (as they preferred to put it); and (b) it is discriminatory, insofar as other ethnic groups who are not Ogiek are not being evicted from this very place. We were referred to the Indian case of *Tellis and others v Bombay Municipal Corporation and Others* [1987] LRC (Const) 351, on the first point concerning the right to life as one of the constitutional fundamental rights. It was a case of the forcible eviction of pavement and slum dwellers in the city of Bombay, India. When we read that case, we found its main thrust on this point to be that although the right to life was a wide and far reaching right, and the evidence suggested that eviction of the petitioners had deprived them of their livelihood, the Constitution did not impose an absolute

embargo on deprivation of life or personal liberty. What was protected was protection against deprivation not according to procedure established by law, which must be fair, just and reasonable; eg affording an intended evictee an opportunity to show why he should not be moved. In fact in that case the Supreme Court of India consisting of the very eminent Chief Justice Chandrachud, and the Hon Justices Ali, Tulzapurkar, Reddy and Varandarajan, found and decided and concluded that the Bombay Municipal Corporation were justified in removing the petitioners, even though these pavement and slum dwellers were probably the poorest of the poor on the planet earth.

[**18.**] *Tellis* case is not, therefore, helpful to the present applicants. The applicants are not the poorest of poor earthlings; and even if they were, records show that they by themselves or by their ancestors were given alternative land during the colonial days, and such alternative land for Tinet Forest was compensation. All along they have had a fair opportunity to come to the Court to challenge the many evictions that have gone on before, but they have never done so till this late. If they showed to the government reasons why they should not be evicted on any previous occasions and the government did not reverse evictions, it was incumbent upon the applicants or their forefathers to seek redress of the law. Instead, however, they have opted for either surreptitious or forceful occupation of the forest. These applicants cannot say that Tinet Forest is their land and, therefore, their means of livelihood. By attempting to show that the government has allowed them to remain in the area, and by trying to found their right to remain on the land by virtue of letters of land allotment and allocation of parcels of the land as they tried to show in the attached copies of those certificates of land allocation, the applicants thereby recognised the government as the owner of the land in question, and the right, authority and the legal power of the government to allocate a part of its land to the applicants. If the applicants maintain that the land was theirs by right, then how could they accept allocation to them of what was theirs by one who had no right and capacity to give and allocate what it did not have or own? Once they sought to peg however lightly, their claim of right on these government certificates of allocation of land to themselves, the plaintiffs forfeited a right to deny that the land belonged to the allocating authority, and they cannot be heard to assert that the land is theirs from time immemorial when they are at the same time accepting it from he whose title they deny. So, we find that these particular plaintiffs are not being deprived of their means to livelihood; they are merely being told to go to where they had previously been removed: they have alternative land to go to, namely, at Sururu, Likia, Teret, etc, but they are resisting efforts to have them go there. They have not said that the alternative land given them is a dead moon incapable of sustaining human life.

[**19.**] To say that to be evicted from the forest is to be deprived of the means to livelihood because then there will be no place from which to collect honey or where to cultivate and get wild game, etc, is to miss the point. You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it. This is like to say, that to climb Mount Kenya you must own it; to fish in our territorial waters of the Indian Ocean you must dwell on, and own the Indian Ocean; to drink water from the weeping stone of Kakamega you must own that stone; to have access to the scenic caves of Mount Elgon you must own that mountain. But as we all know, those who fish in Lake Victoria do not own and reside on the Lake; they come from afar and near: just as those who may wish to exploit the natural resources of the Tinet Forest do not have to reside in the forest, and they may come from far away districts or from nearby. We know that those who exploit the proverbial Meru Oak from Mount Kenya forests do not necessarily dwell on that mountain in those forests. Those who enjoy the honey of Tharaka do not necessarily own the shrubs and wild flowers and wildbees which manufacture it; nor do we who enjoy that honey own the lands where it is sourced. There is no reason why the Ogiek should be the only favoured community to own and exploit at source the sources of our natural resources, a privilege not enjoyed or extended to other Kenyans. No; they are not being deprived of their means of livelihood and a right to life.

[**20.**] Like every other Kenyan, they are being told not to dwell on a means of livelihood preserved and protected for all others in the Republic; but they can, like other Kenyans, still eke out a livelihood out of the same forest area by observing permit and licensing laws like everyone else does or may do. The applicants can obtain permits and licences to enter the forest and engage in some permissible and permitted life-supporting economic activity there. The quit-the-forest notice to the applicants does not bar them from continuing to enjoy the same privileges permitted by law, on obtaining the statutorily prescribed authorisation from the relevant authorities. They can get those permits when they are outside the forest area; just the same way other Kenyans who do not live anywhere near this same forest are gaining access to the forest and exploiting its resources, as we have been told by the applicants. They do not dwell there, and yet they come there under permit. Plainly, the means of livelihood is not denied to the applicants. The forest and its resources are open to the applicants as much as they are to other Kenyans, but under controlled and regulated access and exploitation necessary for the good of all Kenya. If hunting and gathering in a territory were in themselves alone to give automatic legal proprietary rights to the grounds and soils we hunt and gather upon then those who graze cattle nomadically in migratory shifts everywhere according to climatic changes, would have claimed ownership of every inch of

every soil on which they have grazed their cattle. If every fisherman who fished in the Sagana River or River Tana or in Lake Victoria were to say his is the Sagana the River, his is the mighty Tana, his is Lake Victoria, then these and other rivers would not belong to Kenya but to private persons; and Lake Victoria would not be ours, but would have been grabbed long time ago by every fisherman. But these gifts by Mother Nature to us have not suffered that fate, because they are common property for the good of everyone; just as public forests are common property for the common weal of mankind. They cannot be a free subject of uncontrolled and unregulated privatisation either for the benefit of individuals or a group of individuals howsoever classified and called. It is our considered opinion, that as the applicants in common with all other Kenyans may still have access to the forest under licences and permits the eviction order complained of has not encroached on the fundamental rights of the applicants as protected by the Constitution of Kenya, and their right to life is intact; their livelihood can still be earned from the forest as by law prescribed.

[**21.**] We were referred to the Australian case of *Eddie Mabo and Others v The State of Queensland* [1992] 66 QLR 408. We carefully read that case. Its decision seems to have overthrown the land law of that country of about 200 years. The High Court of Australia greatly benefited from the very careful and closely reasoned arguments and a perfect analysis by the advocates who argued the case. The entire corpus of the common law and land statutes and customary law rights of the indigenous peoples of Australia, were dissected to their core by arguments most discerning; and the well-prepared and well-presented lawyers' discourses on the whole law were placed before the court. Here we have missed the opportunity to closely analyse the whole of our land law, because the various land statutes and customary law were not argued, and the case was presented within the narrow limits of the forests legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere.

[**22.**] Although we were denied the opportunity by a lack of full or any serious argument on, and analysis of, the various relevant land statutes, customary law rights, and the common law, we read the *Mabo* case, but found that the material facts in it and which led to the propositions of principle there cannot be fairly likened to those obtaining in the instant case. There the facts justified the analysis by the court of the theory of universal and absolute crown ownership, the acquisition of sovereignty, reception of the common law, crown title to colonies and crown ownership of colonial land, the patrimony of the nation, the royal prerogative, the need for recognition by the crown of native title, the nature and incidents of native title, the extinguishment of native title, the effect of post-acquisition transactions, and deed of grant in trust. The applicants there had a

culture and rights sharply different from those of the applicants in the instant case. Theirs was a life of settled people in houses in villages in one fixed place, with land cultivation and crop agriculture as their way of life. They lived in houses organised in named villages, and one would be moving from one village to another. Land was culturally parcelled out to individuals, and 'boundaries are in terms of known land marks'. Gardening was of the most profound importance to the inhabitants at and prior to early European contact. Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange. Prestige depended on gardening prowess.

[**23.**] In that kind of setting, those people's rights were to the land itself. Our people of Tinet Forest were concerned more with hunting and gathering, with no territorial fixity. They traditionally shifted from place to place in search of hunting and gathering facilities. For such people climatic changes controlled their temporary residence. Whether a people without a fixity of residence could have proprietary rights to any given piece of land, or whether they only had rights of access to hunting and gathering grounds - whether a right of access to havens of birds, game, fruits and honey gives title to the lands where wild game, berries and bees are found - were not the focus of the arguments in this case and the material legal issues arising from the various land law regimes were not canvassed before us as they were in the *Mabo* case. In the *Mabo* case the residents at no time ever conceded that government had a right over the land in question. In the instant case the applicants conceded the right of the government over the land which they were asking the government to allocate to them. Government could not allocate to them what was theirs already if it did not have ownership powers.

[**24.**] These considerations make it superfluous for us to deal specifically with the other cases cited on this point, although we have anxiously studied them, and we have found them not advancing the applicants' case on the present facts before us.

[**25.**] With regard to the complaint that there is discriminatory action by the government against the plaintiffs, the applicants said that while the respondents say that they are taking the action complained of because it is a gazetted forest area which they seek to protect by evicting the plaintiffs from it, there are other persons who are allowed to live in the same forest. It is said that it is the plaintiffs alone who are being addressed. This assertion if true, and it has been denied, would obviously give the plaintiff a cause for feeling discriminated against unless other lawful and proper considerations entered the picture. The trouble here is that this was a matter of evidence, and evidence was required to prove at least seven things: (1) who these other people were; (2) when they entered to live in the forest; (3) under what colour of right (if any) they claimed to enter;

(4) whether they are there in violation of the provisions of the statute concerned; (5) the precise wording of the order of eviction; and (6) the exact scope of the order of eviction, particularly with regard to the persons to be adversely affected by its implementation; (7) the actual cited ground for removing the applicants, ie whether they are being removed solely or predominantly on grounds of their ethnicity.

[**26.**] Evidence on these things must be provided by the person alleging discriminatory action against him. For instance, in the case of *Akar v Attorney-General of Sierra Leone* [1969] 3 All ER 384, which was cited to us, a legislation was alleged to be discriminatory against a person not of negro African descent born in Sierra Leone acquiring citizenship at the time of independence. The legislation in question retrospectively limited citizenship to persons of negro-African descent. It was struck down as enacting discrimination on the ground of race. To arrive at that decision the Judicial Committee of the Privy Council had to analyse the precise wording of the legislation in order to find what was discriminatory in it, taken in its proper context.

[**27.**] In a case here at home, *Shah Vershi Devshi & Co Ltd v The Transport Licensing Board* [1971] EA 289, decided by this High Court composed of Chanan Singh J and Simpson J (afterwards Chief Justice of Kenya), refusal of a licence (under a transport licensing legislation) to citizens of Kenya, by reason of their being of Asian origin, led to the court holding the treatment discriminatory. To reach that conclusion the court was furnished with a letter and the court paid particular attention to it, in which was written by the chairman of the licensing board, that the licences should be refused 'on the ground that the majority shares' were 'owned by non-citizens' and that Africans should be favoured. As it turned out 'non-citizens' was only a euphemism covering citizens who were not of black African stock. Anyway, the point is that the acts and actual words complained of were before the court.

[**28.**] The same was what happened in the case of *Madhwa and others v The City Council of Nairobi* [1968] EA 406, where a resolution of the Social Services and Housing Committee was in the enumerated terms titled 'Africanization of Commerce: Municipal Market', then followed what had been resolved, and was complained of as being discriminatory of non-citizens being evicted from the market stalls by the City Council of Nairobi. Again the court had before it what was expressed. In our case, the actual acts and words complained of were not placed before us. What we have before us are copies of newspaper cuttings. They bear headlines 'government to evict the Ogiek' and 'Ogiek notice stays, says DC'. The plaintiffs have told us that there are in the forest people from other communities. The newspapers did not mention anything about such people, and whether the quit notice covered them. The accuracy of those headlines was not guaranteed.

[**29.**] The Ogiek people might have been the dominant community to capture the newspaper headlines, but that did not necessarily exclude from the quit order other persons. So, there is no evidence before us proving discriminatory treatment against the plaintiffs. It was argued in support of the plaintiffs, that the area cannot be compulsorily acquired by the government without complying with compensation requirements. We intend no offence when we answer in short that there is nothing of anyone which is being compulsorily acquired by the government in this case. It is the user of the forest which is being controlled here.

[**30.**] When Mrs Madahana and Mr Njoroge, for the respondents, said that the government is taking these steps to protect the forest area as a water catchment area, they were summarily dismissed by Mr Mirugi who wondered as to when government came to know that it was a water catchment area; and said that the fact that the land is a forest area gazetted as such, does not mean that human beings should be prevented from living in that forest.

[**31.**] With due respect, the Court expected a more extended and in-depth presentation on this very deep-seated problem of our environment raised by the reference to the need to preserve and protect rain water catchment areas. We cannot be oblivious to that problem as we discuss land rights and land use, natural resources and their exploitation, human settlement and landlessness. But the casual way in which the issue of the preservation and protection of rain water catchment areas, was handled by counsel in these proceedings only goes to illustrate the negative results of the purely economics-driven approaches to human and social problems, without caring for the limitations of the biosphere with a view to undertaking human, and socio-economic development within the limits of earth's finite natural resources endowments. There is a failure to realise that the unsustainable utilisation of our natural resources undermines our very human existence.

[**32.**] In grappling with our socio-economic cultural problems and the complex relationship between the environment and good governance, we must not ignore the linkages between landlessness, land tenure, cultural practices and habits, land titles, land use, and natural resources management, which must be at the heart of policy options in environmental, constitutional law and human rights litigation such as this one. While we discuss rights in a macro-economic context, sight cannot be lost of the legal and constitutional effects on the environment.

[**33.**] A narrow legalistic interpretation of human rights and enforcement of absolute individual rights may only take away a hospitable environment necessary for the enjoyment of those very human rights. A sure enforcement of legal rules for environmental governance and management of our natural resources, is the only

guarantee for our very survival and enjoyment of our individual and human rights. At present the ultimate responsibility and task of good management of our natural resources lies with the government, with the help and cooperation, of course, of individuals and groups of civil society, including the Church. Good environmental governance will succeed or fail, depending on how we all share the responsibility for managing the rules of natural resource management, the monitoring and evaluation and re-evaluation of existing forms of coping with environmental conservation and development, and depending on the feedback which must be accessed at all times, the appropriate reformulation and rigorous enforcement of the relevant rules. It is an increasingly complex exercise which must involve many actors at all times. And if as we urge the upholding of human rights in their purest form we do not integrate environmental considerations into our human and property rights, then we as a country are headed for a catastrophe in a foreseeable future. Integrate environmental considerations in our arguments for our clients' human and property rights. We do not want a situation where our constitutional terrain on which human and property rights systems are rooted, cultivated and exploited for short term political, economic or cultural gains and satisfaction for a mere maximisation of temporary economic returns, based on development strategies and legal arrangements for land ownership use and exploitation without taking account of ecological principles and the centrality of long term natural resources conservation rooted in a conservation national ethic. In 21st century Kenya, land ownership, land use, one's right to live and one's right to livelihood, are not simply economic and property questions, naked individual jural rights, or a matter of politics. All these, and more, are questions of the sustainable use of natural resources for the very survival of mankind before he can begin to claim those 'fundamental rights'.

[**34.**] The old individualistic models of development and property have no place in today's socio-economic and political strategies. Today it is startling to hear arid legal arguments putting excessive emphasis on the recognition and protection of group or private property rights, at the expense of the corresponding duty of ecological stewardship to meet long term national expectations which humanity must place in land to environmental factors into growth strategies and legal argument about human rights, must be the core to all programmes, policies and the administration of justice. Without such integration we all lose humanity's supportive environment and we might not be alive to pursue the right to live, let alone the right to live in the Tinet Forest.

[**35.**] Indeed, a legal system which provides extensive and simplified procedures for converting public land to private ownership, or which gives a reckless access to public natural resources, with little or no regard for ecological and sustainable social developmental impacts,

is a national enemy of the people. We must all be ecological ignorance free; and justice system which does not uphold efforts to protect the environment for sustainable development is a danger to the enjoyment of human rights. The real threat to the right to life and to livelihood is not the government eviction orders in themselves. The real threat to these human rights is the negative environmental effect of ecological mismanagement, neglect and the raping of the resources endowed unto us by Mother Nature, which are the most fundamental of all human rights: the right to breathe fresh air from the forests so that we can live to hunt and gather; the right to drink clean water so that we can have something to sweat after hunting and gathering. Hence, the importance of the issue of preserving the rain water catchment area.

[**36.**] We have found from the evidential materials before us in this case, that Sururu, Likia and Teret, among others, were homes for persons who seeped back into Tinet Forest and are now crying foul when they are being evicted by government for the umpteenth time. It is not being forthright to say they know no other home to go back to.

[**37.**] We have found that there is no proof by the plaintiffs of lawful re-entry after the various evictions. They have simply kept on re-entering and reoccupying, only to be met with repeated evictions.

[**38.**] The pre-European history of the Ogiek and the plaintiffs was not presented to us in court, to enable us determine whether their claim that they were in Tinet Forest from time immemorial is well-founded. We only meet them in the said forest in the 1930's. Such recent history does not make the stay of the Ogiek in the Tinet Forest dateless and inveterate (as we understand the meaning of the expression 'immemorial' in this context); and nothing was placed before us by way of early history to give them an ancestry in this particular place, to confer them with any land rights. Remember, they are a migratory people, depending on the climate. The pretensions of today's Ogiek to conserve the forest when he has moved away from his age-old pre-food producing past which was environmentally friendly, are short of candidness. They have taken to different socio-economic pursuits which may be inimical to forest conservation.

[**39.**] The government action complained of does not contravene the rights of the plaintiffs to the protection of the law, not to be discriminated against, and to reside in any part of Kenya: it is themselves who seek to confine themselves in one forest only. Their right to life has not been contravened by the forcible eviction from the forest: it is themselves who wish to live as outlaws with no respect for the law conserving and protecting forests: it is themselves who do not want the public forest protected to sustain their lives and

those of others. They were compensated by an exchange of alternative lands for this forest.

[**40.**] The upshot of everything we have said from the beginning of this judgment up to this point is that the eviction, is for the purposes of the whole Kenya from a possible environmental disaster, it is being carried out for the common good within statutory powers; it is aimed at persons who have made home in the forest and are exploiting its resources without following the statutory requirements, and they have alternative land given them ever since the colonial days, which is not shown to be inhabitable. We find that if any schools, churches, market places have been developed, they are incompatible with the purposes for which national forests are preserved, and without following the law to put them up; the applicants have acknowledged the rights of the government in and over the forest. There was no evidence of a discriminatory treatment of the applicants against them on ethnic or other improper grounds. No case was made out for compensation to be given once more. The plaintiffs can live anywhere in Kenya, subject to the law and the rights of others.

[**41.**] For these reasons the Court dismisses all the prayers sought. Allow us to add that any other determination would be of mischievous consequences for the country, and must lead to an extent to prodigious vexatious litigation, and, perhaps to interminable law suits. It would be a fallacious mode and an unjustifiable mode of administering justice between parties and for the public good of this country. In the context of this case, we know no safe way for this country and for these litigants, than dismissing this case with costs to the respondents.

[**42.**] We so order.

# LESOTHO

## Ts'epe v The Independent Electoral Commission and Others

**(2005) AHRLR 136 (LeCA 2005)**

*Molefi Ts'epe v The Independent Electoral Commission, The Returning Officer, Litjotjela no 5 electoral division, The Minister of Justice, Human Rights and Constitutional Affairs, The Minister of Local Government, The Attorney-General*
Court of Appeal of Lesotho, C of A (Civ) No 11/05, 30 June 2005
Judges: Steyn Grosskopf, Melunsky, Smalberger, Gauntlett

*Affirmative action to ensure higher percentage of women in local government permissible under the Constitution*

**Equality, non-discrimination** (affirmative action, 14, 16, 18-22, 29, 34, 40; substantive equality, 22)
**Interpretation** (purposive and generous, 15; international law, 16-22)
**Political participation** (affirmative action, 29, 30, 34, 40)

### Gauntlett JA

[**1.**] This appeal has been heard on an urgent basis, the Court convening specifically for that purpose. It concerns a constitutional challenge to key legislative provisions relating to the conduct of the first democratic local government elections recently held in Lesotho.

[**2.**] The appellant is a male, describing himself as a registered voter of Ha Mokokoana, Tsikoane in the district of Leribe. He wished to stand as a candidate, specifically in his home electoral division, designated Litjotjela no 5. This, he says, had been his set intention and he had worked hard to mobilise support there. However, on reporting to the office of the second respondent (the returning officer for that electoral division) to register his candidacy, he was informed of an insurmountable obstacle. While qualified in all other respects (to the extent that he was provisionally granted, as an independent candidate, the symbol of a lion), he was informed by the second respondent that the particular electoral division for which he was set to stand had been reserved for women candidates only. It is the refusal to register his candidacy for Litjotjela no 5 on this single ground that has set in train the present challenge.

[**3.**] The essential statutory framework relevant to the case is this. The Local Government Act, 6 of 1997 (the LGA), laid the foundation for a new era of local government in Lesotho. It empowered the Minister of Local Government to declare areas for various types of councils, including community councils. Areas in turn were divided into electoral divisions (simply put, seats). Litjotjela 5 is one. Thereafter the Local Government Election Act, 9 of 1998 (the Election Act), was passed. It provides for the election of councillors and for the division of councils into electoral divisions by name and serial number, as specified by the country's Independent Electoral Commission (the IEC). Last year the Election Act was amended, *inter alia* by the introduction of provisions for the reservation of one-third of the seats in every council for women, the remainder to remain open to be contested by men and women alike. It is this electoral quota which is now in issue.

[**4.**] The appellant has invoked the provisions of section 22 of the Constitution. This confers upon the High Court original jurisdiction to adjudicate a constitutional challenge: that is to say, an application in which it is contended that any of the provisions of sections 4 to 21 of the Constitution have been, are being or are likely to be, contravened. He sought an order declaring unconstitutional the provisions of section 26(1A)(a) and (b) of the Election Act, '[t]o the extent that they authorise the exclusion of the [appellant] from participating as a candidate in electoral division Litjotjela no 5 on the basis of his sex in contravention of section 18(1), (2) and (3) of the Lesotho Constitution'. He also sought an order declaring his exclusion from participation as a candidate for Litjotjela no 5 to be unconstitutional as being in violation of his rights enshrined in section 20(1) of the Constitution, and certain consequential relief.

[**5.**] The relevant provisions of section 26 of the Election Act read:

> (1) Subject to subsections (1A) and (2), and subsection (1) of section 5, every person is eligible for election as a member of a Council and may be nominated and elected as a candidate for election in the electoral division delineated by the Independent Electoral Commission under section 8.
>
> (1A) In accordance with the Local Government Act 1997, one third of the seats in each Council shall be [re]served for women as follows: (a) for the first local authority elections, one third of the seats reserved for women shall be from every third electoral division in the Council; (b) for subsequent local authority elections, one third of the total electoral divisions in each Council shall be reserved by rotation, but such rotation shall not exceed two terms of office. (c) No person referred to in subsection (1) shall be eligible for election as a member of a Council and to be nominated as a candidate for election, if he or she is disqualified in respect of the disqualifications set out in the Third Schedule.

[**6.**] The ambit of dispute is narrow. The respondents concede that these measures discriminate against men simply by reason of their sex. But they contend that in Lesotho positive discrimination in these terms is justified, on grounds later considered. The appellant's response is that the respondents have failed to establish that the

measures are constitutionally justified: that, indeed, securing a minimum of one-third female representation in local government in Lesotho could have been achieved without debarring men as candidates in specific electoral divisions. Thus, he asserts, the admitted infringement of his rights is unconstitutional, and the provisions authorising this are invalid.

[**7.**] The matter was heard at first instance by a full bench of the High Court. It entertained the matter on an urgent basis, handing down a ruling dismissing it after the conclusion of oral argument, and furnishing its written reasons shortly thereafter. These reasons took the form of two judgments: the main judgment of Nomngcongo J (Guni J concurring), and a further judgment by Peete J, expressing his complete agreement with the main judgment, but adding certain further observations of his own.

[**8.**] The appellant has contended before us that both judgments are flawed. His argument in summary is this: that as a departure point, any advantaging of women cannot permissibly be at his expense; that the court *a quo* has misconceived the nature of what the appellant has termed 'the justificatory onus' in constitutional litigation; that in this regard, it had not applied the decision of this court in *Attorney-General of Lesotho v 'Mopa* 2002 (6) BCLR 645 (LAC); and that had it done so, it would have held that the respondents had failed to adduce adequate evidence to establish the three essential requirements laid down in *'Mopa supra* as regards the justification of the infringement of a constitutional right. Finally it was said that both judgments of the court *a quo* showed an inappropriate degree of deference to the legislature as regards the model it had devised which is now in issue.

[**9.**] The relevant constitutional provisions in this case are these. Section 4(1), in introducing Chapter II of the Constitution (the Bill of Rights), states that 'every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms' in the respects there listed. These include specifically 'the right to equality before the law and the equal protection of the law' (sub-section (o)), and 'the right to participate in government' (sub-section (p)). Section 18 is then in these terms:

> *Freedom from discrimination*
>
> (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law to the extent that the law makes provision -

(a) with respect to persons who are not citizens of Lesotho; or (b) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or (c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or (d) for the appropriation of public revenues or other public funds; or (e) whereby persons of any such description as is mentioned in subsection (3) may be made subject to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

Nothing in this subsection shall prevent the making of laws in pursuance of the principle of state policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards of qualifications (not being standards of qualifications specifically relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.

(6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).

(7) No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) The provisions of this section shall be without prejudice to the generality of section 19 of this Constitution.

Section 19 thereupon provides simply that '[e]very person shall be entitled to equality before the law and to the equal protection of the law', while section 20 is in these terms:

Right to participate in government

(1) Every citizen of Lesotho shall enjoy the right -

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot; (c) to have access, on general terms of equality, to the public service.

(2) The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution.

[**10.**] Finally, it is to be noted, Chapter III records certain principles as forming 'part of the public policy of Lesotho' and which, while 'not...enforceable by any court ... shall guide the authorities and agencies of Lesotho ... in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles'. One of these principles is the following:

> *Equality and justice*
>
> (1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> (2) In particular, the state shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in society to enable them to participate fully in all spheres of public life.

Although chapter III records that these principles are not *per se* enforceable, it is to be noted that section 18(4) *ad finem* — quoted above — expressly subordinates that subsection to section 26. In other words, to the extent that laws *are* made pursuant to section 26(2) directed at 'removing any discriminatory law' courts must give effect to them. Such laws are authorised by the Constitution.

[**11.**] At the outset the majority judgment correctly notes the concession by the respondents that the impugned measures infringe the provisions of section 20(1)(a) and (b) of the Constitution and that they are discriminatory in the sense expressed by section 18(1) read with section 18(3) of the Constitution. It is clear that statutory preference has been given to women because they are women; men are concomitantly disadvantaged by reason of their sex alone. This constitutes an infringement of each of the constitutional rights identified. What remains is the inquiry as to whether the infringements are justified, and hence the impugned measures saved from unconstitutionality (and, if not, what relief is appropriate).

[**12.**] An initial question, raised by the approach advanced on behalf of the appellant, presents itself.

[**13.**] This relates to his departure point, to which reference has already been made: that 'while there is nothing wrong in increasing the participation of women in public bodies/affairs', as it was put in the heads of argument, 'this should not be done to his detriment and in a discriminatory manner'.

[**14.**] This evokes an approach to equality provisions which subordinates substantive to formal equality. It is inimical to any form of handicap (positive or negative) and to quotas. If section 18(3) of the Constitution stood alone, it would be a valid point of departure in an inquiry such as the present. But the Constitution, like that of many other countries, does not prohibit outright measures which confer advantage on some over others. In the careful language of section 18(4)(e), the inquiry in relation to any such preference is whether

'having regard to its nature and to special circumstances pertaining to those persons or to persons of any such description, [it] is reasonably justifiable in a democratic society'.

[**15.**] It is well-established that in general principle, provisions in a bill of rights are to be purposively and generously interpreted (*'Mopa's* case, supra at 650D-F, and *Lesotho National General Insurance Company Limited v Nkuebe* Court of Appeal civ 18 of 2003, 7 April 2004, para 3, and earlier cases there cited). In relation to South Africa's equality clause in particular, its Constitutional Court has noted:

> ... what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.

(*Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para [31]).

Or as it was put in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at paras [60]-[61]:

> It is insufficient for the Constitution merely to ensure ... that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the constitution of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied ... One could refer to such equality as ... restitutionary equality.

[**16.**] But, contends the appellant, Lesotho's international treaty obligations suggest a different answer, and its municipal law should be interpreted to avoid a conflict. The true principle appears in fact to be that where there is uncertainty as regards the terms of domestic legislation, a treaty becomes relevant, because there is a *prima facie* presumption that the legislature does not intend to act in breach of international law, including treaty obligations (*Salomon v Commissioner of Customs and Excise* [1966] 3 All ER 871 (CA) at 875; *The Andrea Ursula* [1971] 1 All ER 821 (PDA); *Binga v Cabinet for SWA* 1988 (3) SA 155 (A) at 184F-185F; *AZAPO v President of the RSA* 1996 (4) SA 671 (CC) at 688B-689A). There is no uncertainty, in the light of section 18(4)(e), that the Constitution authorises (on the conditions laid down by it) the advantaging of some over others. Of course '[t]he giving of preference to one group of applicants necessarily [works] to the disadvantage of any group of applicants to whom preference was not given' (*Bishop of Roman Catholic Diocese of Port Louis v Tengur* [2004] UKPC 9; 2004 (16) BHRC 21).

[**17.**] In any event, Lesotho's treaty commitments do not support the appellant. Lesotho (it was common cause before us) has ratified the

International Covenant on Civil and Political Rights (ICCPR), 1966; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981; and the African Charter on Human and Peoples' Rights, 1981.

[**18.**] The ICCPR provides in article 3 that:

> The states parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Furthermore it provides in article 26 that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A report of the Human Rights Committee of the ICCPR in 1989 published a general comment (General Comment 18 (Thirty-seventh session 1989) Report of the Human Rights Committee vol 1, UN doc A/45/40 as reproduced in Eide *et al* (eds) *Economic, Social and Cultural Rights* (2nd ed 2001) 173-5) on the implementation of article 26. Paragraph 8 states: 'The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance'. In fact, the Committee (paragraph 10) further comments on the adoption of special measures to ensure the attainment of equality as follows:

> The Committee also wishes to point out that the principle of equality sometimes requires states parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in special matters as compared with the rest of the population. However as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

Measures must thus be taken under the ICCPR to ensure the attainment of restitutionary equality, which are temporary and aimed at eliminating inequality in a specified segment of society.

[**19.**] CEDAW is the definitive international legal instrument requiring respect for and observance of the human rights of women. Article 3 provides a general obligation

> to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.

In order to achieve this obligation article 4 provides for a limited form of positive discrimination or affirmative action. Article 4 provides that:

> Adoption by states parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be

> considered discrimination as defined in this Convention, but shall in no way entail as a consequence, the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

It thus allows state parties the right to adopt 'temporary special measures' aimed at accelerating *de facto* equality between men and women. While positive discrimination is thus allowed, the Convention is very clear that this does not sanction the maintenance of unequal and separate treatment; once equality of opportunity and treatment has been achieved the measures adopted must be discontinued.

Lesotho, it may be noted, has filed a reservation to the Convention to the effect that it shall not take any legislative measures under CEDAW if those measures would conflict with the Lesotho Constitution. (Acheampong 'The Ramifications of Lesotho's Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women', (1993) *Lesotho Law Journal* vol 9 no 104).

[**20.**] The African Charter on Human and Peoples' Rights, 1981, also protects equality. Article 2 states that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The Charter makes provision for special measures to be taken in the protection of certain groups in society in article 18(3) and (4):

> (3) The state shall ensure the elimination of every discrimination against women and also the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
>
> (4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Although 'special measures' are only mentioned in article 18(4) with regard to the rights of the aged and disabled, the use of 'also' in article 18(4) suggests that the expression may extend to women's rights. Furthermore article 18(3) explicitly mentions other international obligations to protect women's rights. As already mentioned, CEDAW makes provision for special measures to be taken to ensure the protection of women's rights. These articles (as Acheampong *The African Charter and the Equalization of Human Rights* (1991) 7 *Lesotho Law Journal* no 2 at 29 notes) are also a clear recognition that the equality entailed in the enjoyment of human rights and fundamental freedoms does not necessarily entail formal equality.

[**21.**] In 1997 the SADC heads of state issued a formal Declaration on Gender and Development. It noted the undertaking by member states in article 6(2) of the SADC Treaty (to which Lesotho is also a party) not to discriminate on grounds of gender, and recorded that all SADC member states had signed CEDAW (or were 'in the final stages of doing so'). It committed SADC members *inter alia* to

> [e]nsuring the equal representation of women and men in the decision-making of member states and SADC structures at all levels, and the achievement of at least thirty percent target of women in political and decision-making structures by year 2005.

**[22.]** It is accordingly evident that if regard is had to Lesotho's international law obligations, these, if anything, reinforce the interpretation of section 18(4)(e) of the Constitution and require equality which is substantive, not merely formal, and restitutionary in its reach.

**[23.]** Even if this is so, the appellant contends, the respondents have failed to establish a constitutional justification for the infringements of the appellant's rights they are constrained to admit. This is stated to be on each of the main bases summarised in paragraph 8 above.

**[24.]** As regards the first — the asserted misconception by the court *a quo* of 'the justificatory onus', and in particular the contention that it failed to apply this court's earlier decision in *Mopa supra* — this has to be said. Justification, it should immediately be noted, does not always require evidence. The limitation exercise is 'a process, described in *S v Makwanyane and Another* as "the weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests"' (*National Coalition for Gay and Lesbian Equality v Minister of Justice supra* at paras 33-35). It will often require factual material to be placed before court (cf *Moise v Greater Germiston TLC: Minister of Justice Intervening* 2001 (4) SA 491 (CC) at paras 19-20), but there are also cases where the justification is self-evident (cf *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at 226-7).

**[25.]** Did the court *a quo* misdirect itself in relation to following our earlier decision in '*Mopa supra*? In that matter we dealt for the first time in some detail with the question as to the proper approach to be adopted in applying the Constitution, more particularly when an issue of infringement which is sought to be justified arises. We did so in general terms, not in relation to the claims made specifically under sections 18 and 20, as they are in this case. The core of our judgment in the relevant respect reads as follows:

> The Constitution does not provide (as some constitutional instruments do) expressly for the justification of an infringement of a Chapter 2 right, but it is apparent from the scheme of the Constitution that a limitation of a right is authorised where, in accordance with the broad test articulated by Dickson CJC in the Canadian Supreme Court in the well known matter of *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at 226-7, the limitation of the right is reasonable and 'demonstrably justified in a free and democratic society'. The first aspect relates to the objective or purpose of a limitation, and the second to the aspect of proportionality. The objective must be sufficiently substantial and important so as to warrant overriding a constitutionally protected right, while the proportionality test requires that the means chosen to limit the right are appropriate. Dickson CJC said in this latter respect: 'There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on

> irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: *R v Big M Drug Mart Limited* (1985) 18 DLR (4th) 321 at 352. Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as 'of sufficient importance'.
>
> The onus of proving that a limitation is justified rests upon the person averring it (*S v Makwanyane* (*supra*) at para 102), and it must be discharged 'clearly and convincingly' (*S v Mbatha, S v Prinsloo* 1996 (2) SA 464 (CC). In *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 831D, it was stressed that: '[t]here must be a reason which is justifiable in an open democratic society based on human dignity, equality and freedom for the infringement of a constitutional right. Further, the limitation must be shown to serve the justifiable purpose.' (at 654H-655F).

**[26.]** The opening words of the passage from *'Mopa supra* just quoted refer to the lack of a general limitation clause under the Lesotho Constitution (in contrast, for instance, with that of South Africa). But in relation to some of the provisions of chapter II there are specific limitation provisions. Section 18(4)(e), and the concluding paragraph of that sub-section (quoted in paragraph 9 above), is one such. Section 20(2) is another: it is effectively a cross-reference to section 18(4)(e). The appellant's argument does not address these, in its castigation of the court *a quo* for not applying *'Mopa supra*.

**[27.]** The proper inquiry is that whether section 26(1A)(a) and (b) are reasonably justifiable measures in the context indicated by the Constitution. The more general test in *'Mopa supra* - with its three components - assists in answering that question.

**[28.]** It is not true that the court *a quo* gave no consideration to *'Mopa supra*. The main judgment makes frequent explicit reference to it, and its reasoning appears to track its elements, in considering the factors advanced on behalf of the respondents in justification of section 26(1A)(a) and (b) of the Election Act.

**[29.]** Making express reference to this Court's decision in *'Mopa supra* the court *a quo* proceeded to consider the material put before it regarding justification. That material amounts to the following. Some 51 per cent of the people of Lesotho is female. Yet currently only 12 per cent of the seats in the National Assembly are held by women. Thus while throughout the world, the under-representation of women in public life is marked, in Lesotho the disparity is particularly acute. The holding of the first democratic local government election in Lesotho presented an obvious opportunity to address it. The African Union requires member states to secure equal participation for women (thus 50 per cent), while SADC, as has been seen, sets a target of at least 30 per cent representation by women in political and decision-making structures by 2005.

[**30.**] The impugned provisions, moreover, were supported by the IEC. This, as its name indicates, is an independent institution created by amendment to the Constitution (section 66), appointed by the King acting in accordance with the advice of the Council of State, comprising a chair who has held or is qualified to hold 'high judicial office' and two other members with that qualification or who possess 'considerable experience and [have] demonstrated competence in administration or in the conduct of public affairs'. An affidavit was filed before the court *a quo* on its behalf by one of its three members stressing the serious imbalance in the representation of women in public life in Lesotho, and supporting the impugned measures. In this regard, reference is made by the deponent to the fact that seats reserved for women in one election in respect of a particular seat are open to both sexes in the next election, while the whole system of reservation of seats has a so-called 'sunset clause': its remedial effect is intended not to be permanent, but to last for only three elections.

[**31.**] The evidence also stresses that Lesotho - like some other constitutional democracies - has chosen (in relation to local government) to retain a 'first-past-the-post-electoral' system in preference to proportional representation. This is for fundamental policy reasons, related to a belief in the value of constituency representation, a concern that proportional representation inevitably intends to exclude independent candidates, and a conviction that Lesotho's model is particularly suitable for local government as it allows wide representation on local councils. Speaking on behalf of the IEC, the deponent also points out that the effect of the legislation on the appellant 'is not great in that he may not stand in his home division (but may stand in any neighbouring division) for the first election only'.

[**32.**] The court *a quo* in the majority judgment not only recites, quite explicitly, the three requirements summarised in *'Mopa supra*. It recorded, too, 'that the objective of the limitation is sufficiently substantial and important, is now common cause and it cannot now be open to doubt'. Correctly it posed the question whether the means chosen to limit the affected rights were appropriate - in the obvious sense of meeting the *'Mopa* criteria - and whether the respondents had established justification in this sense.

[**33.**] The evidence before the court *a quo* was furthermore that the IEC had devised a procedure for the establishment of electoral divisions reserved for women in a way to prevent any political party from deriving benefit from the manner of allocating seats exclusively for women candidates. Its proposal was also no arbitrary imposition: it was the subject of a meeting it convened attended by two delegates from all registered political parties; the proposal was put to the delegates, who unanimously supported it.

[**34.**] The procedure for the application of section 26(1A) is in essence this. Each political party may select one of its delegates to represent that party in drawing a ballot to fix the first division from which the count to determine the divisions in a particular council reserved for women commences. The effect of such a ballot is a random determination of reserved divisions, so that parties cannot know beforehand which divisions are to be reserved exclusively for women. The example is given that where a particular council is allocated eleven divisions, the latter is numbered from 1 to 11, the numbers put in a box, and the delegate chosen by the political party to draw for that council draws a number. The division represented by that number, whatever it is, becomes the first division. Thus if division 5 is drawn in the ballot, division 7 (the third division, counting division 5 as the first division) becomes the division reserved for women, as do divisions 10 and 2. In this way the one-third reservation of electoral divisions for women is indeed randomly selected. Neither the IEC itself nor any political party has any way of predicting which division is so reserved. The random components make for fairness, not arbitrariness. No challenge was directed at these features.

[**35.**] The appellant however contends that the impairment of his constitutional rights so conceded is not in fact justified: that in particular, other alternatives to enhance political representation by women in local government existed, less intrusive of Chapter II rights. To demonstrate this, he offered one alternative himself. It amounts to this. He refers to electoral provision for the election of chiefs — traditional leaders — by ballot, provision being made for two ballot boxes in each division, one to be used in respect of chief-candidates and another in respect of ordinary candidates. The same, the appellant contends, could be accomplished by pairing with each division reserved for women a division not so reserved, and providing for two ballots — one for the female representative and one for the open representative — in respect of the paired divisions.

[**36.**] As was however pointed out in argument on behalf of the respondents, the model to which the appellant refers in fact (although provided for by section 4(a) of the Local Government Act, 1997) has since been replaced (by section 4 of the Local Government (Amendment) Act, 5 of 2004) and has not been implemented. This aside, it is pointed out, the proposed model has distinct disadvantages. In the first place, the suggested 'pairing' effectively negates delimitation which has taken place. That delimitation has been predicated upon the constituency and 'first-past-the-post' systems operative in Lesotho. The appellant's model would undo that, and deprive individual divisions — delimited according to criteria identifying them as appropriately separate — from selecting each its own representative. As the court *a quo* noted, the proposed model is not simple — an important attribute, it might be thought, of

electoral provisions, particularly at local government level — and presents obvious opportunities for confusion.

[**37.**] Of course identifying flaws in an alternative model propounded by a litigant in the position of the appellant does not of itself answer the threefold inquiry relating to justification outlined in *'Mopa supra*. Conversely, however, an inquiry as to what is reasonably justifiable is not resolved by presenting a possibly preferable model. A legislative measure is not unconstitutional because arguably, either as a matter of conception in policy or execution in drafting, a better one might conceivably be devised.

[**38.**] This leads to the last of the appellant's attacks: the contention that the court *a quo* was unduly deferential in accepting the justification proffered by the respondents. The constitutional function of courts prevents them from being deferential to the legislative or executive, in the general sense of that word, with 'its overtones of servility, or perhaps gracious concession' (per Lord Hoffmann in *R (on the application of Prolife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) at paras 75 to 76). But the proper balance to be struck was recently expressed by O'Regan, J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para [48]:

> In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the Executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

This was said in relation to administrative acts, but its thrust holds good in relation to legislative and executive acts too.

[**39.**] The court *a quo* adopted just such an approach. It did not act on any bland assertion of constitutional compliance by executive or legislative agencies. It subjected the justification advanced to appropriate scrutiny. The fact that it found it persuasive in the result is not a reason to characterise the process as unduly deferential.

[**40.**] In my view, accordingly, the court *a quo's* reasoning was sound. Contrary to the submission on the part of the appellant, it expressly cited and followed our earlier decision in *'Mopa supra*. It did so correctly. The impugned measures were, in the language of Dickson CJC (in *R v Oakes supra* quoted in *'Mopa* at 654I-655C), 'carefully designed to achieve the objective in question'. They were equally not 'arbitrary, unfair or based on irrational considerations'. They were indeed 'rationally connected to the objective'. And as regards the means, the court *a quo* correctly considered that those employed to advance greater electoral representation of women indeed impaired 'as little as possible' the rights in question. This is particularly because of their rotating mechanism, their restricted lifespan and the fact that fully two-thirds of seats remain open to all-comers. Thirdly, in all the circumstances there was a proportionality between the effects of the measures and the objective, conceded by the appellant himself to be 'of sufficient importance', again in the sense used in *R v Oakes supra*.

[**41.**] The appeal must accordingly fail.

[**42.**] There is also a cross-appeal. This was noted conditionally by the respondents, in the event of it being held that the court *a quo* had dismissed their *in limine* objection to the non-joinder of all other candidates in the election (no express order was in fact made). In view of the conclusion in relation to the appeal, the cross-appeal becomes moot. It is accepted by the parties that any costs in relation to it are insignificant.

[**43.**] Counsel for the respondents had asked that, in the event of the appeal being dismissed, the appellant be ordered to pay the costs. There is no single rule relating to order of costs in constitutional matters, as little as there is in other forms of civil proceedings. Nevertheless, there is a general reluctance by courts to make an adverse order of costs in a substantial constitutional challenge of a public nature, as this court most recently has had occasion to note (*Khathang Tema Baitsokoli and Another v Maseru City Council* Court of Appeal civ 4/05, delivered on 20 April 2005, p 21, and further authorities there cited; and cf *Road Transport Board v Northern Venture Association* Court of Appeal civ 10/05, 20 April 2005, p 13). The issue raised in the present case was important. The appellant had sought to represent a particular electoral division for reasons related substantially to the public interest. His challenge doubtless applies to a significant number of other would-be contenders. A reasoned argument was advanced on his behalf. In our view, in the particular circumstances of the case, this would not be an appropriate matter to order the unsuccessful appellant to pay the respondents' costs.

[**44.**] The order the court makes is accordingly as follows:
(a) The appeal is dismissed.

(b) No order is made in relation to the conditional notice of cross-appeal.
(c) No order is made in relation to the costs of either the appeal or the conditional notice of cross-appeal.

# NIGERIA

## Gbemre v Shell Petroleum Development Company Nigeria Limited and Others

**(2005) AHRLR 151 (NgHC 2005)**

*Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation*
Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005
Judge: Nwokorie
Extracts. Full text on www.chr.up.ac.za

*Gas flaring in the course of oil extraction violates the right to life and a healthy environment*

**Environment** (right to a healthy environment, 6; environmental impact assessment, 6)
**Life** (effect of pollution, 6)

[**1.**] On 21 July 2005 this Court granted leave to the applicants to apply for an order enforcing or securing the enforcement of their fundamental rights to life and dignity of human person as provided by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 vol 1, Laws of the Federation of Nigeria, 2004. By a further leave of court I permitted the applicant to commence these proceedings for himself and as representing other members, individuals and residents of Iwherekan community in Delta State of Nigeria, in view of the copious unwieldly list of members contained in an earlier application for leave they brought in respect thereof, which was withdrawn by their counsel at the prompting of the Court.

[**2.**] The reliefs claimed by the applicants in their subsequent motion on notice filed on 29 July 2005 include:

1. A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably

includes the right to clean poison-free, pollution-free and healthy environment.

2. A declaration that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, vol1, Laws of the Federation of Nigeria 2004.
3. A declaration that the failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environment Impact Assessment Act, Cap E12 vol 6 Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person.
4. A declaration that the provisions of section 3(2)(a), (b) of the Associated Gas Re-injection Act Cap A25 vol 1 Laws of the Federation of Nigeria, 2004 and Section 1 of the Associated Gas Re-Injection (continued flaring of gas) Regulations Section 1.43 of 1984, under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 vol 1 Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.
5. An order of perpetual injunction restraining the 1st and 2nd respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever form further flaring of gas in the applicants said community.

[**3.**] It is the case of the applicants, as shown in the itemized grounds upon which the above-mentioned reliefs are sought that:

(a) By virtue of the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 they have a fundamental right to life and dignity of human person.
(b) Also by virtue of articles 4, 16 and 24 of the African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) Act Cap A9, vol 1 Laws of Federation of Nigeria, 2004, they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development.
(c) That the gas flaring activities in the community in Delta State of Nigeria by the 1st and 2nd respondents are a violation of their said fundamental rights to life and dignity of human person and to a healthy life in a healthy environment.
(d) That no environmental impact assessment was carried out by the 1st and 2nd respondents concerning their gas flaring activities in the applicant's community as required by section 2(2) of the Environmental Impact Assessment Act, Cap E 12 vol 6, Laws of the Federation of Nigeria 2004, and this has contributed to the unrestrained, mindless flaring of gas by the 1st and 2nd respondents in their community in violation of their said fundamental rights.
(e) That no valid ministerial gas flaring certificates were obtained by any of the 1st and 2nd respondents authorizing the gas flaring in the applicant's said community in violation of section 3(2) of the

Associated Gas Re-Injection Act, Cap A25 vol 1, Laws of the Federation of Nigeria, 2004.

(f) That the provisions of section 3(2) of the Associated Gas Re-Injection Act, Cap A25, vol 1, Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Re-Injection (Continued Flaring of Gas) Regulations, 43 of 1984, under which gas flaring in Nigeria may be continued are inconsistent with the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 and articles 4, 16 and 24 of African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) are therefore unconstitutional, null and void.

(g) That the provisions of both sections 21(1) and (2) of the Federal Environmental Protection Agency Act (FEPA) Cap F10 vol 1 Laws of the Federation of Nigeria, 2004 makes the gas flaring activities of the 1st and 2nd respondents a crime, the continuation of which should be discouraged and restrained by the Court.

[**4.**] It is also, in the case of the applicants (as summarised in their affidavit in verification of all the above-stated facts that they are *bona fide* citizens of the Federal Republic of Nigeria [and]

1. That the 1st and 2nd respondents are oil and gas companies in Nigeria who are engaged jointly and severally in the exploration and production of crude oil and other petroleum products in Nigeria.
2. That in further support of their rights to life and dignity of their persons they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state physical and mental health as well as right to a general satisfactory environment favourable to their development.
3. That the 1st and 2nd respondents have been engaged in massive, relentless and continuous gas flaring in their community and that the 2nd respondent is a joint venture partner with the 1st respondent in its oil exploration and production activities, which includes gas-flaring in Nigeria.
4. That the activities of the 1st and 2nd respondents in continuing to flare gas in their community seriously pollutes the air, causes respiratory diseases and generally endangers and impairs their health.
5. That the 1st and 2nd respondents have carried on gas flaring continuously in their community without any regard to its deleterious and ruinous consequences concentrating only on pursuing their commercial interest and maximizing profit.
6. That the 1st and 2nd respondents do not like to find gas together with oil in their oil-fields (ie associated gas, AG), but prefer to find gas without it being mixed up with oil - so called non-associated gas (non AG), and that the attitude of the 1st and 2nd respondents whenever they find oil mixed with gas is to dispose of the associated gas in order to profit front the oil (which is the more lucrative component) and this process of gas flaring is unrestrained and mindless.
7. That burning of gas by flaring same in their community gives rise to the following:

(a) Poisons and pollutes the environment as it leads to the emission of carbon dioxide, the main green house gas; the flares contain a cocktail of toxins that affect their heath, lives and livelihood.

(b) Exposes them to an increased risk of premature death, respiratory illness, asthma and cancer.

(c) Contributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, pollutes their food and water.

(d) Causes painful breathing chronic bronchitis, decreased lung function and death.

(e) Reduces crop production and adversely impacts on their food security.
(f) Causes acid rain, their corrugated house roofs are corroded by the composition of the rain that falls as a result of gas flaring saying that the primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine with atmospheric moisture to form sulphuric moisture to form sulphuric acid and nitric acid respectively. The acidic rain consequently acidifies their lakes and streams and damages their vegetation.

8. That the emissions resulting from the 1st and 2nd respondents burning of associated gas by flaring in their community in an open uncontrolled manner is a mixture of smoke more precisely referred to particulate matter, combustion by-products including sulphur dioxide, nitrogen dioxides and carcinogenic substances, all of which are very dangerous to human health and lives in particular.
9. That no Environmental Impact Assessment (EIA) whatsoever was undertaken by any of the 1st and 2nd respondents to ascertain the harmful consequences of their gas flaring activities in the area to the environment, health, food, water, development, lives, infrastructure etc.
10. That if the 1st and 2nd respondents had carried out environmental impact assessment in their community concerning this gas flaring as required by law, they would have known or found out that it is most dangerous to their health, life and environment and refrained from gas flaring and that they deliberately failed to so out of their selfish economic interest.
11. That so many natives of the community have died and countless others are suffering various sicknesses occasioned by the effects of gas flaring by the 1st and 2nd defendants.
12. That their community is thereby grossly undeveloped, very poor and without adequate medical facilities to cope with the adverse and harmful effects on their health and lives occasioned by the unrestrained gas flaring activities in the area.
13. That the 1st and 2nd respondents have not bothered to consider the negative unhealthy and very damaging impact on their health, lives, and environment of their persistent gas flaring activities and have made no arrangements to provide them with adequate medical attention and facilities to cushion the adverse effects of their gas flaring activities.
14. That the constitutional guarantee of right to life and dignity of human person available to them as citizens of Nigeria includes the right to a clean, poison-free and pollution-free air and healthy environment conducive for human beings to reside in for our development and full enjoyment of life; and that these rights to life and dignity of human person have been and are being wantonly violated and are continuously threatened with persistent violation by these gas flaring activities.
15. That unless this Court promptly intervenes their said fundamental rights being breached by the 1st and 2nd respondents will continue unabated and with impunity while its members will continue to suffer various sicknesses, deterioration of health and premature death.
16. And that the 1st and 2nd respondents have no right to continue to engage in gas-flaring in violation of their right to life and to a clean, healthy, pollution-free environment and dignity of human person

Finally, that the 1st and 2nd respondents have no valid ministerial certificates authorizing them to flare gas in the applicant's community.

...

[**5.**] Upon a thorough evaluation of all the processes, submission, judicial and statutory authorities as well as the nature of the subject matter together with the urgency which both parties through their counsel have observably treated the weighty issued raised in the substantive claim, I find, myself able to hold as follows (after a thoroughly painstaking consideration):

1. That the applicants were properly granted leave to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria.
2. That this Court has the inherent jurisdiction to grant leave to the applicants who are *bona fide* citizens and residents of the Federal Republic of Nigeria, to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999.
3. That these constitutionally guaranteed rights inevitably include the right to clean, poison-free, pollution-free healthy environment.
4. The actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants' community is a gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution.
5. Failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicants' community concerning the effects of their gas flaring activities is a clear violation of section 2(2) of the Environmental Impact Assessment Act, Cap E12 vol 6, Laws of the Federation of Nigeria 2004, and has contributed to a further violation of the said fundamental rights.
6. That section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations section 1.43 of 1984, under which gas flaring in Nigeria may be allowed are inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, vol 1, Laws of the Federation of Nigeria, 2004) and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

[**6.**] Based on the above findings, the reliefs claimed by the applicants as stated in their motion paper as 1, 2, 3, 4 are hereby granted as I make and repeat the specific declarations contained there as the final orders of the Court:

[*for reliefs 1-4 see para 2 above – eds*]

5. I hereby order that the 1st and 2nd respondents are accordingly restrained whether by themselves, their servants or workers or otherwise from further flaring of gas in applicants' community and are to take immediate steps to stop the further flaring of gas in the applicant's community
6. The Honorable Attorney-General of the Federation and Ministry of Justice, 3rd respondent in these proceedings who, regrettably, did not put up any appearance, and/or defend these proceedings is hereby ordered to immediately set into motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of a Bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and the Regulations made there under to quickly bring them in line with the provisions of chapter 4

of the Constitution, especially in view of the fact that the Associated Gas Re-Injection Act even by itself also makes the said continuous gas flaring a crime having prescribed penalties in respect thereof. Accordingly, the case as put forward by the 1st and 2nd respondents as well as their various preliminary objections are hereby dismissed as lacking merit.

7. This is the final judgment of the Court and I make no award of damages, costs or compensations whatsoever.

# SOUTH AFRICA

## Alexkor Limited and Another v The Richtersveld Community and Others

**(2005) AHRLR 157 (SACC 2003)**

*Alexkor Limited and the Government of the Republic of South Africa v The Richtersveld Community and Others*
Constitutional Court of South Africa, 14 October 2003
Judges: Chaskalson, Langa, Ackermann, Goldstone, Madala, Mokgoro, Ngcobo, O'Regan, Sachs, Yacoob
Previously reported: (2004) 1 SA 460 (CC); 2003 (12) BCLR 1301 (CC)

*Right to restitution of mineral-rich land to community from which the land had been seized through racially discriminatory practices*

**Jurisdiction** (constitutional matter, 23-32)
**Interpretation** (lexical, 29; purposive, 30; foreign case law, 33-35; customary law, 51-56)
**Property** (customary right to ownership of land, 62-64, 68, 70, 73, 74, 76, 81, 83, 90)
**Equality, non-discrimination** (discrimination on the grounds of race, 92, 95-99

### The Court
### Introduction

[**1.**] This appeal concerns a claim for restitution of land by the Richtersveld community under the provisions of the Restitution of Land Rights Act (the Act).[1] The claim was dismissed by the Land Claims Court (LCC).[2] That court also dismissed an application for leave to appeal.[3] The Supreme Court of Appeal (SCA) granted leave, set aside the order of the LCC and granted relief to the respondent (the Richtersveld Community).[4] Initially, only the first appellant

1 Act 22 of 1994.
2 The judgment of the LCC is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC).
3 The judgment is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* [2001] (4) All SA 563 (LCC). All references to the judgment of the LCC will be to the main judgment referred to above, n 2.
4 The judgment of the SCA is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA).

(Alexkor)[5] sought special leave to appeal to this Court. That application succeeded.

**[2.]** Some three weeks prior to the hearing of this appeal, the second appellant (the government) sought condonation for its failure to apply timeously for special leave to appeal against the order of the SCA. The government was directed to file its heads of argument, and its condonation application was heard together with the argument on the merits of the appeal. This application is referred to below.[6] Suffice it to say at this stage that the relief sought by the government was granted, and it was admitted as the second appellant.

**[3.]** The facts and issues raised in this appeal appear from the earlier judgments of the LCC and SCA. It is thus not necessary to set them out in detail in this judgment. We will refer only to those facts necessary to make what follows intelligible.

**[4.]** The Richtersveld is a large area of land situated in the north-western corner of the Northern Cape Province. For centuries it has been inhabited by what is now known as the Richtersveld Community. The application was launched by the Community as such, its members in the main centres of the Richtersveld and in the names of all of the present members of the Community. In the SCA, nothing turned on standing and it was the Richtersveld Community's claim that was upheld. We follow the example of the SCA and refer to the respondent simply as 'the Richtersveld Community' or 'the Community'.

**[5.]** The claim does not relate to the whole of the Richtersveld, but only to a narrow strip of land along the west coast from the Gariep (Orange) River in the north to just below Port Nolloth in the south. We shall refer to this as 'the subject land'. It is registered in the name of Alexkor.

**[6.]** The relevant provisions of the Act are to be found in section 2(1). It provides that:

> A person shall be entitled to restitution of a right in land if —
>
> ...
>
> (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
>
> (e) the claim for such restitution is lodged not later than 31 December 1998.

5 Alexkor is a public company established in terms of the Alexkor Limited Act 116 of 1992. It is wholly owned by the second appellant, the Government of the Republic of South Africa and conducts business in the diamond mining sector.

6 Paras 11-7.

In terms of section 1 of the Act 'restitution of a right in land' means: '(a) the restoration of a right in land;[7] or (b) equitable redress'; 'right in land' means:

> any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question;

and 'racially discriminatory practices' means:

> racially discriminatory practices, acts or omissions, direct or indirect, by:
>
> (a) any department of state or administration in the national, provincial or local sphere of government;
>
> (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation.

[**7.**] By agreement between the parties, the LCC confined itself to deciding the question whether the Richtersveld Community met the requirements of section 2(1) of the Act, and in particular whether it constituted a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices. The Richtersveld Community claimed that it was dispossessed of ownership (under common law or indigenous law)[8] or the right to exclusive beneficial occupation and use of the subject land including the exploitation of its natural resources.

[**8.**] The LCC held that the Richtersveld Community constituted 'a community' for the purposes of the Act, and had beneficially occupied the subject land for a continuous period of not less than ten years prior to its dispossession after 19 June 1913. However, it held further that the Community had failed to prove that this dispossession was the result of discriminatory laws or practices.

[**9.**] In upholding the appeal, the SCA, in a comprehensive and helpful judgment, found that the Richtersveld Community had been in exclusive possession of the whole of the Richtersveld, including the subject land, prior to and after its annexation by the British Crown in 1847. It held that those rights to the land (including minerals and precious stones) were akin to those held under common law ownership and that they constituted a 'customary law interest' as defined in the Act. It further found that in the 1920s, when diamonds were discovered on the subject land, the rights of the Richtersveld Community were ignored by the state which dispossessed them and eventually made a grant of those rights in full ownership to Alexkor. Finally, the SCA held that the manner in which the Richtersveld

7 In turn, section 1 defines 'restoration of a right in land' to mean: 'the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices'.

8 In this judgment we prefer to use the term 'indigenous law' which has the same meaning as 'customary law'.

Community was dispossessed of the subject land amounted to racially discriminatory practices as defined in the Act. The SCA accordingly made the following order:

> In result the appeal succeeds with costs including the costs of two counsel. The orders of the LCC are set aside and replaced with an order in the following terms:
>
> (a) It is declared that, subject to the issues that stand over for later determination, the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land (including its minerals and precious stones);
>
> (b) The defendants are ordered jointly and severally to pay the plaintiffs' costs including the costs of three counsel.[9]

[**10.**] Alexkor and the government contend that any rights in the subject land which the Richtersveld Community might have held prior to the annexation of that land by the British Crown were terminated by reason of such annexation. They contend further that, in any event, the dispossession of the subject land after 19 June 1913 was not the consequence of racially discriminatory laws or practices. Accordingly they seek to set aside the order made by the SCA.

## Admission of the government as a second appellant

[**11.**] The government participated actively as a party to the proceedings in the LCC and the SCA. The judgment of the SCA was delivered on 24 March 2003. The time provided in rule 20 of the rules of this Court for lodging an application for special leave to appeal expired on 14 April 2003.[10] By agreement between the parties that time was extended by the Chief Justice to 30 April 2003.

[**12.**] By letter dated 24 April 2003, the state attorney advised the attorneys for the Richtersveld Community that, as Alexkor was appealing the judgment of the SCA, the government had decided that it would not actively participate in the proceedings and had opted to abide the decision of this Court. Thereafter the government pursued attempts to settle the claim of the Richtersveld Community. Discussions to that end were held between 8 April 2003 and 26 May 2003. They were not successful.

[**13.**] It appears from the affidavit filed on behalf of the government that on 4 August 2003 the Chief State Law Adviser instructed senior counsel to prepare an application for special leave to appeal and for

9 SCA judgment above n 4, para 111.

10 Rule 20(1) and (2) reads as follows: '(1) An appeal to the Court on a constitutional matter against a judgment or order of the Supreme Court of Appeal shall be granted only with the special leave of the Court on application made to it. (2) A litigant who is aggrieved by the decision of the Supreme Court of Appeal on a constitutional matter and who wishes to appeal against it to the Court shall, within 15 days of the judgment against which appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the registrar of the Court an application for leave to appeal'.

condonation of the late application for that relief. The delay is ascribed to the number of departments of state that were involved in the matter and to the fact that 'no co-ordinated evaluation of the order of the SCA was undertaken before the Cabinet decision of 11 June 2003'. The affidavit goes on to record that: '[i]t was only at the meeting of 16 July 2003 that serious consideration was given to the possibility of seeking special leave to appeal on behalf of the applicant'. The application for condonation was filed in this Court on 13 August 2003.

[**14.**] We were informed by counsel for the Richtersveld Community that it would abide the decision of the Court in respect of the government's application. However, counsel pointed out that according to the government's own affidavit, it took a decision after the delivery of the judgment of the SCA not to appeal against it and thereby perempted the right to do so. Thereafter the government changed its mind and now seeks special leave to appeal.

[**15.**] Had the government been the only party in this matter, the peremption of its right to appeal might well have brought an end to the litigation. However, Alexkor, which is wholly owned by the government, has been granted special leave to appeal. The joinder of the government in the lower court proceedings has the consequence that any order made by this Court against Alexkor would be binding on the government. It was not submitted that the Richtersveld Community would be prejudiced if this Court received the heads of argument submitted on behalf of the government or if we heard oral argument from its counsel.

[**16.**] In these circumstances we decided that we should receive the government's heads of argument. As the heads of argument substantially traversed the same ground covered by those submitted on behalf of Alexkor, we restricted the oral submissions of the government to responding to any questions that might be put to them by members of the Court.

[**17.**] We heard argument on the question as to whether a special order for costs should be made against the government in respect of its condonation application. The proceedings in the LCC were instituted at the end of 1998 and at all times since then the government has been actively involved in the litigation. The delay in applying for special leave to appeal is unacceptable and has not been adequately explained. There can be no question that the costs incurred by the Richtersveld Community with regard to the application must be paid by the government. To mark its displeasure at the delay, this Court will order those costs be paid on the attorney client scale.

## The issues that arise in this appeal

[**18.**] The following questions were argued in this appeal:
(a) The identification of the issues that fall within the jurisdiction of this Court;
(b) The law to be applied to relevant events that antedate the interim Constitution;[11]
(c) The nature of the rights in land of the Richtersveld Community prior to annexation;
(d) The legal consequences of annexation of the subject land;
(e) The nature of the rights in the subject land held by the Richtersveld Community after 19 June 1913;
(f) The steps taken by the state in respect of the subject land after 19 June 1913;
(g) Whether the dispossession was the result of racially discriminatory laws or practices.

We shall consider each of these issues in turn.

### *(a) The identification of the issues that fall within the jurisdiction of this Court*

[**19.**] To found an entitlement to restitution of a right in land under section 2(1)(d) and (e) of the Act, quoted in paragraph 6 above, the following have to be established:
(a) that the Richtersveld Community is a 'community' or 'part of a community' as envisaged by the subsection;
(b) that the Community had a 'right in land' as envisaged;
(c) that such a right in land continued to exist after 19 June 1913;
(d) that the Community was, after 19 June 1913, 'dispossessed' of such 'right in land';
(e) that such dispossession was the 'result of past racially discriminatory laws or practices'; and
(f) that the Community's claim for 'restitution' was lodged not later than 31 December 1998.

[**20.**] Issues (a) and (f) are now common cause and, as will emerge in the course of the judgment, so too are aspects of the other issues.

[**21.**] The issue of jurisdiction relates in part to the division of final jurisdiction between the Constitutional Court and the Supreme Court of Appeal. Section 167(3) of the Constitution, after providing in paragraph (a) that the Constitutional Court 'is the highest Court in all constitutional matters', proceeds in paragraph (b) to define the Constitutional Court's jurisdiction by providing that it '… may decide only constitutional matters, and *issues connected with decisions on constitutional matters*' (emphasis supplied). This latter provision must be read together with section 167(3)(c) which provides that the Constitutional Court ' ... makes the final decision whether a matter

[11] Act 200 of 1993.

is a constitutional matter or whether an issue is connected with a decision on a constitutional matter', with section 167(7) which states that '[a] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution', and with section 168(3) which states that the Supreme Court of Appeal is 'the highest court of appeal except in constitutional matters'.

[**22.**] It thus becomes necessary to consider whether, and to what extent, this Court has the power to determine any of the issues referred to in paragraph 19(b) to (e) above. Section 25(7) of the Constitution provides:

> A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

This provision is, in relation to matters relevant to the present case, and with one exception, mirrored in the provisions of section 2(1)(d) of the Act, quoted in paragraph 6 above. The exception relates to the fact that in the Constitution the dispossession relates to 'property' whereas in the Act it relates to 'a right in land.' Nothing turns on this difference in the present case. A similar 'mirroring' occurred between the relevant provisions in the interim Constitution and those in the Act, prior to its amendment by section 3(1) of Act 63 of 1997.[12]

[**23.**] In *Nehawu v University of Cape Town and Others*[13] this Court held that where a statute has been enacted to give content to a constitutional right or to meet the legislature's constitutional obligations, the proper construction of such statute is a constitutional matter for purposes of section 167(3)(b) of the Constitution.[14] The provisions of section 2(1) of the Act are clearly statutory provisions enacted to give content to the section 25(7) constitutional right and to fulfil Parliament's obligations expressly referred to in the subsection. It follows, therefore, that the issues in this appeal, detailed above and relating to the interpretation and application of

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12 The relevant provision in sec 121(2) of the interim Constitution reads as follows: 'A person or a community shall be entitled to claim restitution of a right in land from the state if – (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and (b) such dispossession was effected under or for the purpose of furthering the object of *a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession*' (emphasis supplied). The relevant part of sec 3 of the Act reads: '... a person shall be entitled to claim title in land if such claimant or his, her or its antecedent – (a) was prevented from obtaining or retaining title to the claimed land because of *a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Constitution had that subsection been in operation at the relevant time* ...'. (emphasis supplied).

13 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC).

14 Id paras 14 and 15.

section 2(1) of the Act, are all 'constitutional matters' over which this Court has jurisdiction.

[**24.**] A more difficult question is to determine whether this Court has jurisdiction to deal with all issues bearing on or related to establishing the existence of these matters. For example, the question might be asked whether the issue concerning the existence of the Community's rights in land prior to the colonisation of the Cape, or the content or incidence of such rights, constitute in themselves 'constitutional matters'; the same might be asked concerning the continued existence of such rights after the British Crown's annexation of the Cape in 1806, or after the 1847 Proclamation or the subsequent statutory and other acts thereafter.

[**25.**] The question is whether such matters are 'issues connected with decisions on constitutional matters' for purposes of section 167(3)(b) of the Constitution.

[**26.**] This Court is declared to be the highest court in respect of constitutional matters in terms of section 167(3)(a) of the Constitution. It has not yet, in so many words, decided whether 'issues connected with decisions on constitutional matters', constitute a 'constitutional matter' for purposes of section 167(3)(a). We are mindful of the cautionary observation by this Court in *S v Boesak*[15] that, although the jurisdiction of this Court is 'clearly … extensive',[16] it ought not to be so construed as to render 'illusory' the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA.[17]

[**27.**] Nevertheless, when one adopts a purposive approach to the harmonising of section 167(3) and (7) and section 168(3) referred to in paragraph 21 above, as *Boesak* enjoins us to do,[18] it is evident that this Court is the highest court in respect of issues connected with decisions on constitutional matters. The contrary conclusion would be anomalous and contrary to the Constitution's structure of jurisdiction and its division between this Court and the SCA. It would mean that, although this Court is granted jurisdiction in respect of 'issues connected with decisions on constitutional matters,' those would be the only matters under its jurisdiction in respect whereof its judgment would not be final. This would moreover give rise to a serious hiatus in the Constitution, since there is no appeal from this Court.

[**28.**] The conclusion that this Court is the highest court also in relation to 'issues connected with decisions on constitutional matters' is in our view placed beyond doubt by the fact that section

15 *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) para 15.
16 Id para 14.
17 Id para 15.
18 Id.

167(3)(c) provides that this Court also makes the final decision on 'whether an issue is connected with a decision on a constitutional matter'.

[**29.**] This opens the way to considering more directly how broadly or narrowly the phrase 'issues connected with decisions on constitutional matters' must be construed, more particularly the words 'connected with'. 'Connected', defined variously by the Oxford English Dictionary as 'linked together' or 'joined together in order or sequence (as words or ideas)' or 'related, associated (in nature or idea)', is clearly a word of wide import, connoting a relationship between, amongst other things, ideas or concepts. It is not limited by any sense of immediacy or close relationship.

[**30.**] This wide construction is consistent with the purpose of the provision. It is intended to extend the jurisdiction of this Court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the Court's jurisdiction. The underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of this Court's functioning when obliged to determine a constitutional matter. If any anterior matter, logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter, then it would be artificial and arbitrary to exclude such consideration from the Court's evaluation of the primary constitutional matter. To state it more formally, when any *factum probandum*[19] of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum*, is itself an issue 'connected with [a] decision [ ] on [a] constitutional matter [ ]'.

[**31.**] In conclusion, on this jurisdictional issue, it is necessary to apply the above analysis and conclusion to the issues in this appeal relating to section 2(1) of the Act. This is best done by considering, for example, the issue whether, after 19 June 1913, the Richtersveld Community had a 'right in land' as envisaged by section 2(1) of the Act.

[**32.**] One of the relevant questions is whether the Community had such a right or rights prior to the British Crown acquiring sovereignty over the subject land in 1847. Determination of this issue, for the reasons just stated, is connected with the decision on a constitutional matter, namely, the question as to whether the Community, after 19 June 1913, had such a 'right in land'. It follows from what has been said above, that this Court does have jurisdiction to determine this anterior question. For the same reason, this Court has jurisdiction in relation to all intervening events in relation to which it could be suggested that the Community had lost such a 'right in land'. The

[19] As to the distinction between a *factum probandum* and a *factum probans*, but in a different context, see *King's Transport v Viljoen* 1954 (1) SA 133 (C).

Court likewise has jurisdiction to determine all issues relevant to the matters that have to be established under section 2(1) of the Act, whether anterior thereto or not.

### *(b) The law to be applied to relevant events that antedate the interim Constitution*

[**33.**] Where appropriate, this Court has consistently made use of comparative law. At the same time it has cautioned against the uncritical use of comparative material and pointed to its potential dangers.[20]

[**34.**] Courts in other jurisdictions have in recent times been faced with the complex and difficult problems of dealing, after the event, with the injustices caused by dispossessions of land, or rights in land, from indigenous inhabitants by later occupiers of the land in question.[21] These later occupiers claimed political and legal sovereignty over the land, and such dispossessions invariably took place in a racially discriminatory manner. They often occurred centuries ago, when the legal norms and principles of the later occupiers differed substantially from those of today.

[**35.**] In this regard, our situation in this country differs substantially from that of the jurisdictions referred to above in that both our interim Constitution and the Constitution have dealt expressly with this problem. The general rule established by this Court in *Du Plessis and Others v De Klerk and Another*[22] is that the interim Constitution did not operate retroactively, in the sense that

> ... as at a past date the law shall be taken to have been that which it was not, so as to invalidate what was previously valid, or vice versa ... the [interim] Constitution does not turn conduct which was unlawful before it came into force into lawful conduct.[23]

The consequences of this general principle are not invariable, so it has been stated, and the possibility has been left open that

> ... there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis.[24]

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20 See, for example, *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) para 133.

21 See, for example, *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 (SCC); *Mabo and Others v The State of Queensland* (No. 2) (1992) 175 CLR 1 (HCA); *R v Adams* (1996) 138 DLR (4th) 657 (SCC); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

22 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) para 13.

23 Id paras 13 and 20, respectively.

24 Id para 20.

To date there has been no occasion when the above general principle has not been applied, either by this or any other Court.[25]

[**36.**] However, both the interim Constitution and the Constitution have provided expressly for their retroactive application to dispossessions of rights in land that took place after 19 June 1913. The interim Constitution, in section 121(2), provided that

> [a] person or a community shall be entitled to claim restitution of a right in land from the state if –
>
> (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and
> (b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.

and section 121(3) provided that the date fixed by subsection (2)(a) should not be a date earlier than 19 June 1913. Section 25(7) of the 1996 Constitution provides that

> [a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practice is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

[**37.**] For present purposes it is only necessary to deal with the provisions of the Constitution. The date chosen, 19 June 1913, is of course the date on which the Natives Land Act 27 of 1913 came into operation. This Act deprived black South Africans of the right to own land and rights in land in the vast majority of the South African land mass. It is quite apparent that section 25(7) and the implementing provisions of the Act have retroactive effect until at least 19 June 1913, because the very purpose behind their provisions is to provide redress for dispossessions that were valid under the law of that time.

[**38.**] The question that arises, however, is whether these provisions have retroactive effect antedating 19 June 1913. There are strong indications that they do not. It must be assumed that, in the light of the judgment in *Du Plessis and Others v De Klerk and Another*,[26] the drafters of the Constitution were aware of the general rule against retroactivity. They obviously applied their minds to this aspect in relation to the restoration of land and land rights, which has always been an issue of supreme importance. This was highlighted by the different approaches of the negotiating parties to the problem. The limit of retroactivity agreed upon and enacted in the Constitution is set at 19 June 1913. Had there been any desire for the provisions of the 1996 Constitution to have retroactive effect beyond this date, one would have expected this to have been so enacted. It was not. It

[25] See, for example, *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 29.

[26] Above n 22.

is however not necessary to express a definitive view on this particular issue in the present case. There has been no contention that any provision of the Constitution has retrospective effect antedating 19 June 1913. The present case can be dealt with effectively on the assumption that none of the provisions has such effect. The question whether a court, when considering the common law applicable at a time before both the interim Constitution and the Constitution came into force,[27] may develop the common law in the light of provisions of the Constitution as provided for by section 39(2) of the Constitution,[28] does not, in the view we have taken of the matter, arise in this case. This is a complex matter which we leave open for future decision, as we have done before.[29]

[**39.**] It is not so clear how this time limitation is to be applied to the requirement that such dispossession must be 'as a result of past racially discriminatory laws or practices.' One purpose is, no doubt, to make clear that the dispossession must have occurred before the interim Constitution came into operation.

[**40.**] Whatever the phrase might mean, it cannot have the effect of making a dispossession actionable that took effect before 19 June 1913. This does not mean that regard may not be had to racially discriminatory laws and practices that were in existence or took place before that date. Regard may indeed be had to them if the purpose is to throw light on the nature of a dispossession that took place thereafter or to show that when it so took place it was the result of racially discriminatory laws or practices that were still operative at the time of the dispossession.

[**41.**] However, when it comes to the legal effect of other events prior to 19 June 1913, these must be adjudged according to the law then prevailing. So, for example, when considering the effect of the British annexation of the Cape in 1806 and its impact on acquired rights, or of the 1847 Proclamation or other legislative or administrative acts, the then prevailing law must be applied. This does not mean that when evaluating rights, including the indigenous rights of the Richtersveld Community, as to their existence or content, use may not be made of later evidence or scholarship in regard to such rights or their content.

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27 The Constitution of the Republic of South Africa Act 200 of 1993 came into force on 27 April 1994 and the current Constitution came into force on 4 February 1997.

28 Sec 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

29 See *Du Plessis and Others v De Klerk and Another* (above n 22) paras 65-6; *Amod v Multilateral Motor Vehicle Accidents Fund* (10) BCLR 1207 (CC); 1998 (4) SA 753 (CC) para 31.

### *(c) The nature of the rights in land of the Richtersveld Community prior to annexation*

[**42.**] In this Court Alexkor contended that the SCA erred in holding that the Richtersveld Community held 'a customary law interest' in the subject land which was akin to ownership under common law and that this right included the ownership of minerals and precious stones. But, according to the judgment of the SCA, Alexkor and the government conceded this issue.[30] The preliminary question which arises is whether it is open to Alexkor to revive this issue on appeal in this Court.

[**43.**] The applicable rule is that enunciated in *Paddock Motors (Pty) Ltd v Igesund*.[31] In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal. The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant.[32] The result would be a confirmation of a decision that is clearly wrong.[33] As the court put it:

> If the contention the appellant now seeks to revive is good, and the other two bad, it means that this Court, by refusing to investigate it, would be upholding a wrong order.[34]

[**44.**] It is therefore open to Alexkor and the government to raise in this Court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld Community.[35] The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal.[36] In terms of that rule 'it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness . . . and raises no new factual issues.'[37]

[**45.**] We are concerned here with a legal contention relating to the nature and the content of the rights held by the Richtersveld Community in the subject land. That contention does not raise new

30 SCA judgment (above n 4) para 26.
31 1976 (3) SA 16 (A) at 23D-24G.
32 See *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) 510A.
33 See *Cole v Government of the Union of South Africa* 1910 AD 263 272-3.
34 *Paddock Motors v Igesund* (n 31 above) 24F.
35 Compare *Cole v Government of the Union of South Africa* (n 33 above) 272.
36 *Paddock Motors v Igesund* (n 31 above ) 23G-H.
37 *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) 558A; 1998 (8) BCLR 945 (SCA) 960 (footnotes omitted).

factual issues. Its consideration will not involve any unfairness to the Richtersveld Community, which has been able to deal with it fully. The determination of the nature and the content of the land right of the Richtersveld Community prior to and after annexation is basic to the adjudication of the central question presented in the appeal, namely, whether the Richtersveld Community was dispossessed of its land rights after 19 June 1913 as a result of discriminatory laws or practices. In addition, the proper characterisation of the title is crucial to any order that the LCC may ultimately make.[38]

[**46.**] For all of these reasons, we are entitled to determine firstly, the nature and the content of the land rights that the Richtersveld Community held in the subject land prior to annexation; and secondly, whether such rights survived annexation. It now remains to consider these issues.

[**47.**] In the SCA, the Richtersveld Community contended that, as at 19 June 1913, it possessed (a) a right of ownership; (b) the right to exclusive beneficial occupation and use; or (c) the right to use the subject land for certain specified purposes, including exploitation of natural resources.[39] In the main, the Community contended that it possessed these rights under indigenous law and, after annexation, under the common law of the Cape Colony or international law which protected the rights acquired under indigenous law. In the alternative, it was contended that the rights which the Community held in the subject land under its own indigenous law constituted a 'customary law interest', a right in land within the meaning of the Act, even if these rights were not recognised or protected.[40] These rights were also asserted in relation to the right of beneficial occupation for a continuous period of not less than 10 years that had been found by the LCC.

[**48.**] As pointed out above, the SCA found that the Richtersveld Community

> ... had a 'customary law interest' in the subject land within the definition of 'right in land' in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common-law ownership ...[41]

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38 The Act envisages a number of rights that claimants may have in the subject land. These rights range from ownership to interests in land such as that of a beneficiary under a trust arrangement or beneficial occupation for a period of not less than 10 years or a customary law interest in the land. In terms of sec 35 of the Act, the LCC may order, amongst other things, the restoration of the land or a portion of the land, or a right in land. The nature of the right found will therefore determine the nature of the restitution to be ordered. Thus where the right of ownership in the land has been found, the LCC may order the restitution of the land. Where only a right to occupy has been found, the court may order the restoration of that right or the equivalent compensation.

39 SCA judgment (n 4 above) para 10.

40 Id para 11.

41 Id para 29.

[**49.**] In this Court the Richtersveld Community persisted in the claims that it had asserted in the SCA. It contended that its indigenous law ownership constituted a real right in land in indigenous law or at the very least 'a customary law interest' within the definition of a right in land.

[**50.**] The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights.[42] Those rights cannot be determined by reference to common law. The Privy Council has held, and we agree, that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law 'without importing English conceptions of property law.'[43]

[**51.**] While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution.[44] Its validity must now be determined by reference not to common law, but to the Constitution.[45] The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.[46] Our Constitution

> ... does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].[47]

It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it.[48] In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

[**52.**] In 1988,[49] the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take

42 Compare *Oyekan and Others v Adele* [1957] 2 All ER 785 at 788G-H.
43 Id.
44 Compare *Pharmaceutical Manufacturers Association of South Africa and Another in re Ex Parte the President of the Republic of South Africa and Others* (n 25 above) para 44.
45 Sec 2 of the Constitution, see *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) para 32.
46 Sec 39(2) of the Constitution.
47 Sec 39(3) of the Constitution.
48 Sec 211(3) of the Constitution.
49 After the abolition of the Commissioners' Courts and their courts of appeal and the unification of all courts into a single hierarchy.

judicial notice of indigenous law.[50] Such law may be established by adducing evidence.[51] It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. As this Court pointed out in the *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*:[52]

> The [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how ... customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.[53]

**[53.]** In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community.[54] And it will continue to

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50 Law of Evidence Amendment Act 45 of 1988, provides in sec 1: 'Judicial notice of law of foreign state and of indigenous law — (1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles. (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned ... (4) For the purposes of this section 'indigenous law' means the law or custom as applied by the Black tribes in the Republic [Subsec (4) amended by sec 4 of Act 18 of 1996]'.
In terms of sec 1(1) indigenous law is to be applied if it is not 'opposed to the principles of public policy and natural justice'. In *Mabuza v Mbatha* (n 45 above) para 32, the court held that the test for the validity of indigenous law is no longer consistency with public policy and natural justice, but consistency with the Constitution. It is not necessary to express any opinion on the correctness of that decision.

51 TW Bennett, *A Sourcebook of African Customary Law for Southern Africa* (Juta and Co Ltd, Cape Town, 1991) Preface at (vi), points to the need for caution in this respect. Although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given jural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people.

52 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC).

53 Id para 197.

54 In some parts of the country codification of indigenous law interfered with this process, raising questions as to the accuracy of such codification, its appropriateness and its possible stultification of the development of indigenous law.

evolve within the context of its values and norms consistently with the Constitution.

[**54.**] Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides.[55] It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved.[56]

[**55.**] This case does not require us to examine the full range of problems concerned. In the present matter extensive evidence exists as to the nature of the indigenous law rights exercised by the Richtersveld Community as they evolved up until 1913. As we stressed above, to understand them properly these rights must be considered in their own terms and not through the prism of the common law.

[**56.**] The dangers of looking at indigenous law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions. In this regard we are in agreement with the observations of the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*:[57]

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely ... The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community ... To ascertain how far this latter development of right has progressed *involves the study of the history of the particular community and its usages* in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading.[58]

[**57.**] The determination of the real character of indigenous title to land therefore 'involves the study of the history of a particular community and its usages.'[59] So does the determination of its content.

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55 See, for example, *Mabuza v Mbatha* (n 45 above).

56 The question of the test to be applied in establishing indigenous law does not arise in this case. Nor is it necessary for us to consider whether the test enunciated in *Van Breda v Jacobs* 1921 AD 330 334 is applicable in determining the content of indigenous law.

57 2 AC [1921] 399 (PC).

58 Id 402-4 (emphasis supplied).

59 Id at 404.

[**58.**] Under indigenous Nama law, land was communally owned by the community. Members of the community had a right to occupy and use the land. In this regard the SCA found:

> One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples. A non-member using communal grazing without permission would be fined 'a couple of head of cattle'; the Reverend Hein, who settled in the Richtersveld in 1844, recorded in his diary three years later a protest by the community that Captain Paul (Bierkaptein) Links had, without the consent of the 'raad', let ('verpacht') some of its best grazing land at the Gariep River Mouth; and the trader McDougal established himself at the mouth of the Gariep River in 1847 only after obtaining the permission of Captain Links on behalf of the community and agreeing to pay for the privilege. The captain and his 'raad' enforced the rules relating to the use of the communal land and gave permission to newcomers to join the community or to use the land.[60]

[**59.**] On this issue the LCC similarly found that the Richtersveld Community 'considered the Richtersveld to be their land, held by them in common.'[61] These findings are supported by the evidence and we accept them.

[**60.**] The content of the land rights held by the Community must be determined by reference to the history and the usages of the community of Richtersveld. The undisputed evidence shows a history of prospecting in minerals by the Community and conduct that is consistent only with ownership of the minerals being vested in the Community.

[**61.**] The witnesses on behalf of the Richtersveld Community testified that long before the annexation the Nama people in Little Namaqualand had mined and used copper for purposes of adornment. The witnesses testified that visitors to the Namaqualand were reported to have observed Nama people in the neighbourhood of Gariep smelting copper and using molten metal to make rings; working in copper and iron; and making copper beads and copper plates as ornaments. One writer concluded from eyewitness accounts that they showed a Nama 'industry in two metals, copper and iron, materials available locally and in quantity.'[62] The record includes a text describing the long history of copper mining in Namaqualand by the indigenous people prior to the annexation in 1847.[63] In addition,

60 SCA judgment (n 4 above ) para 18.

61 LCC judgment (n 2 above) para 68.

62 AJH Goodwin 'Metal Working among the early Hottentots' in *South African Archaelogical Bulletin* (1956).

63 JM Smalberger *Aspects of the History of Copper mining in Namaqualand* 1846–1931 (Struik, Cape Town, 1975).

outsiders were not entitled to prospect for or extract minerals. The evidence established that the Richtersveld Community granted mineral leases to outsiders between the years 1856 and 1910.[64]

[**62.**] In the light of the evidence and of the findings by the SCA and the LCC, we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.[65]

[**63.**] However, Alexkor contended that whatever land rights the Richtersveld Community may have held, such rights did not include ownership of the minerals and precious stones. This contention was apparently based on the assumption that the Community did not engage in mining and that, even if they did, this became unlawful after annexation. The fallacy in this argument is that it ignores the undisputed evidence on the mining activities of the Community. The submission that if there was any mining, such mining was unlawful after annexation, simply begs the question.

[**64.**] We are satisfied that under the indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones. Indeed both Alexkor and the government were unable to suggest in whom ownership in the minerals vested if it did not vest in the Community. Accordingly, we conclude that the history and usages of the Richtersveld Community establish that ownership of the minerals and precious stones vested in the Community under indigenous law.

### *(d) The legal consequences of the annexation of the subject land in 1847*

[**65.**] The principal contention by Alexkor was that upon annexation British law became applicable to the subject land. Consequently the British Crown became the owner of all land that had not been granted by it under some form of tenure. As the subject land was such land, so the argument went, it became the property of the British Crown. In this manner, it was submitted, the Richtersveld Community lost all

64 See SCA judgment (n 4 above) paras 85-7. See also lease agreement between Kling and Wrensch, dated 23 February 1910.

65 In the light of this finding, it is unnecessary to decide whether the reference by the SCA to *Van Breda v Jacobs* (n 56 above) was appropriate. It is important that indigenous law be allowed to develop consistently with the Constitution and that the approach adopted in *Van Breda* should not be allowed to inhibit this.

title to the subject land. As this occurred prior to 19 June 1913, the claim must fail.

[**66.**] The subject land was annexed by the British Crown in 1847 pursuant to the Annexation Proclamation which incorporated Richtersveld as part and parcel of the Cape Colony. Under that Proclamation, the British Crown acquired sovereignty over Richtersveld, including the subject land. This gave the British Crown the power to make new laws, recognise existing rights or extinguish them and create new rights. In *Oyekan and Others v Adele* the Privy Council described the effect of acquisition of sovereignty over a territory as follows:

> Their Lordships desire to point out that the Treaty of Cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos ... The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and, therefore, the power to recognise existing rights or extinguish them, or to create new ones.[66]

[**67.**] In order to ascertain what rights passed to the British Crown or were retained by the indigenous people at the time of and subsequent to annexation, we must look to both the Annexation Proclamation and other relevant conduct of the British Crown such as legislative acts or acts of state.[67]

[**68.**] In our view there is nothing either in the events preceding the annexation of Richtersveld or in the language of the Proclamation which suggests that annexation extinguished the land rights of the Richtersveld Community. The contention to the contrary by Alexkor was rightly rejected by the SCA.

[**69.**] The SCA held that the terms of the Annexation Proclamation do not purport to terminate any right over the annexed territory.[68] It found that the majority of colonial decisions favoured an approach that a mere change in sovereignty is not meant to disturb the rights of private owners,[69] and appeared to favour the approach by the Privy Council that:

> In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the

66 *Oyekan and Others v Adele* (n 42 above) 788B-C.

67 Compare *Oyekan and Others v Adele* (n 42 above) 788C-D. The Privy Council took the view that 'in order to ascertain what rights passed to the British Crown or are retained by the inhabitants the courts of law look, not to the treaty, but to the conduct of the British Crown'. In our view the starting point must be the terms of the Annexation Proclamation if it throws light on the matter.

68 SCA judgment (n 4 above) para 34.

69 Id paras 58-9.

> inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law ...[70]

The SCA adopted the rule that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty and concluded that the rights of the Richtersveld Community survived annexation.[71] We endorse that conclusion.

### *(e) The nature of the rights in the subject land held by the Richtersveld Community after 19 June 1913*

[**70.**] After annexation, the right of the Richtersveld Community to indigenous law ownership could have been extinguished in a number of ways. The Richtersveld Community would have lost its indigenous law ownership if:

(a) the laws of the Crown expressly extinguished the Community's customary law ownership of the land;
(b) the laws of the Crown applicable to the Richtersveld rendered the exercise of any of the material incidents of the indigenous law right to ownership unlawful;
(c) the Community was granted limited rights in respect of the land by the Crown in circumstances where the only reasonable inference to be drawn is that the rights of indigenous law ownership were extinguished; or
(d) the land was taken by force.

This case is not concerned with the forcible taking of land. We must therefore decide whether the indigenous law ownership of the Richtersveld Community was extinguished by any law or conduct that had the consequence described in (a), (b) or (c) above.

[**71.**] Alexkor relied on the Crown Lands Acts of 1860 and 1887[72] (the Acts) in support of the proposition that the rights of the Richtersveld Community had been extinguished. All the submissions in relation to these two Acts were premised on the starting point that all annexed land had become Crown land by reason of the annexation. We have already held that this was not so. It was also contended that both the 1860 and the 1887 Acts were based on the assumption that all the land to which it applied was land owned by the Crown. However as pointed out by the SCA:

> At best for them it can be said that the legislature assumed that all and not allocated by means of the grant of title deeds belonged to the Crown but the implied assumption cannot be elevated to a legislative act with that consequence.[73]

[**72.**] In any event, there are indications in both the Acts and in the prior legislative measures that point decisively away from any

70 *Oyekan and Others v Adele* (n 42 above) 788E-I.
71 SCA judgment (n 4 above) para 61.
72 Crown Lands Act 2 of 1860 and Crown Lands Disposal Act 15 of 1887.
73 SCA judgment (n 4 above) para 66.

intention of the British Crown to extinguish the rights of the Richtersveld Community. As an initial matter, any doubt as to the competency of the indigenous people to purchase or possess land in the Cape Colony was removed by Ordinance 50 of 1828.[74] Significantly, the Ordinance also recognised the equality in this regard between the indigenous people and the British subjects.[75]

[**73.**] Furthermore, the Acts themselves clearly left open the possibility for recognition of the Richtersveld Communuity's claim to the subject land. Section 12 of the 1887 Act, which does not differ materially from the provision in the 1860 Act, provides:

> Land … occupied bona fide and beneficially without title deed at the date of the extension of the colonial limits beyond it … shall not be considered or treated as Crown land for the purpose of this Act, until the claim thereto, in each case, shall have been decided on by the Governor, who shall have the power of satisfying such claim, by grant of the land or compensation out of the purchase money when the said land shall have been sold or otherwise, as shall appear equitable: Provided, always, that due notice of the nature of the claim, and reasonable proof that it can be substantiated, be received at the office of the Commissioner in sufficient time to admit of the withdrawal of the lot from sale, and that the claimant use reasonable diligence to lay the proofs in support thereof before the person or persons to whom the question may be referred by the Governor.[76]

[**74.**] The Richtersveld Community was the indigenous law owner of the Richtersveld. Stated in the terms used in the Acts, members of the Community were, as at 1847, in *bona fide* and beneficial occupation of the land without title deed. Accordingly, under the Acts the Richtersveld was not to be considered or treated as Crown land until the claim thereto had been decided by the Governor. The Crown Lands Acts regulated the alienation of land. Section 12 of the 1887 Act in effect provided that occupied land such as the Richtersveld would be regarded as Crown land for the purpose of alienation only after any claim to that land had been decided upon by

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74 Sec 3 of Ordinance 50 of 1828 provided as follows: 'And whereas doubts have arisen as to the competency of the Hottentots and other free Persons of colour to purchase or possess land in this Colony: Be it therefore enacted and declared, That all Grants, Purchases, and Transfers of Land or other Property whatsoever, heretofore made to, or by any Hottentot or other free Person of colour, are and shall be, and the same are hereby declared to be of full force and effect, and that it is, and shall and may be lawful for any Hottentot or other free Person of colour, born, or having obtained Deeds of Burghership in this Colony, to obtain and possess by Grant, Purchase, or other lawful means, any Land or Property therein — any Law, custom, or usage to the contrary notwithstanding'.

75 Specifically, the Ordinance repealed laws that discriminated against the indigenous people describing such laws as containing 'certain obnoxious usages and customs which are injurious to those persons'. Ordinance 50 of 1828, sec I.

76 n 72 above.

the Governor. Although the Richtersveld Community consistently claimed the land occupied by it as its own,[77] we do not know whether it had made a formal claim in terms of one of the Crown Lands Acts in respect of the land occupied by it. What is certain though is that the Governor made no decision on the fate of the Richtersveld land. The SCA found that '[t]hese Acts accordingly manifested an intention to respect existing land rights and not to extinguish them.'[78] The conclusion that section 12 demonstrates that the Acts did not extinguish the Community's right of ownership is unassailable. In fact, the Acts created a mechanism for adjudication by the Governor of the Community's claim.

[**75.**] Contrary to the finding of the SCA, Alexkor contended that the grant of land had to originate with the British Crown. Alexkor placed much reliance upon the views expressed by some colonial government officials. These views, it was submitted, supported the conclusion that the colonial government regarded all land in the Cape Colony as Crown land unless it was held under a grant made by the Crown. The reliance upon the views of the colonial government officials is misplaced.

[**76.**] What matters is not the views of the colonial government officials but the law of the Cape Colony at the time of, and subsequent to, annexation. As we have held, the applicable law in the Cape Colony at the time of annexation respected and protected land rights of the indigenous people. No act of state or legislation extinguished the land rights of the Richtersveld Community subsequent to annexation but before 19 June 1913. The Crown Lands Acts relied upon by Alexkor did not have that effect. The views of colonial government officials cannot therefore prevail over the law that was applicable in the Cape Colony and which respected and recognised the land rights of the Richtersveld Community.

[**77.**] Apart from this, colonial government officials expressed conflicting views on the issue. Some officials recognised the land rights of the Richtersveld Community. In addition, the conduct of the Richtersveld Community was consistent with their ownership of the subject land. It granted grazing leases and mineral leases to outsiders. Indeed as late as 23 February 1910 Reverend Kling entered into a mineral lease on behalf of the Richtersveld Community whom he described as 'the owner of certain ground situated in the District

[77] The SCA, at para 68 of the judgment (n 4 above), said in relation to these claims: 'The Richtersveld people's claim to exclusive use and occupation of the whole of the Richtersveld was persisted in from annexation until their dispossession well into the 20th century. They made their claims expressly in correspondence with the Colonial authorities and also by conduct by requiring strangers to obtain their permission before settling or grazing their animals in the Richtersveld'.

[78] SCA judgment (n 4 above) para 65.

of Klein Namaqualand, in extent about seven hundred thousand morgen'.[79]

[**78.**] Moreover, the witnesses on behalf of the Richtersveld Community testified that it had been in occupation of the subject land at the time of annexation and continued to be until its eviction after the discovery of diamonds in the 1920s. This testimony is supported by the documentary evidence that showed, amongst other things, that the Richtersveld Community continued to occupy, claim and exercise rights of ownership over the whole of the Richtersveld.

[**79.**] Finally, Alexkor relied on the fact that, according to his report dated 30 June 1890, Mr Melvill, an Assistant Surveyor-General,

> ... proceeded to point out certain boundaries to which I requested [the Richtersveld people] to confine themselves, informing them at the same time that these were only provisional, and subject to the approval of the Government'.[80]

It was suggested that the Richtersveld Community lost its rights to the subject land, because it was excluded from the land demarcated by Melvill, on one of two bases. The first contention was that the members of the Community confined themselves within the limited area pointed out by Melvill and accordingly forfeited any right to the land.

[**80.**] The other basis was this: the Community was, at a later date, prepared to accept an arrangement in terms of which the tract of land identified by Melvill was officially and formally allocated to the Richtersveld Community by the government. However, the LCC found that the land demarcated in compliance with Melvill's suggestion was never formally or officially allocated to the Richtersveld Community.[81] The SCA also found that the Richtersveld Community maintained its rights to the subject land.[82] These arguments accordingly do not advance the case for the appellants.

[**81.**] The inevitable conclusion is that the indigenous law ownership of the Richtersveld Community remained intact as at 19 June 1913. No steps were taken to extinguish the rights of ownership prior thereto. No ticket or certificate of occupation or certificate of grant had been issued which had the effect of limiting the indigenous law ownership of the Community in any way. No law was passed to render unlawful the exercise of any right by the Richtersveld Community in respect of the land in terms of its own indigenous law. Many opinions were expressed, there was much debate about what was to be done, considerable effort was expended in investigating the position of the Richtersveld, many letters were written, many claims were made on both sides and not an inconsiderable number of reports were

79 Lease agreement between Kling and Wrensch, dated 23 February 1910.
80 Melvill's report dated 30 June 1890 para 58.
81 LCC judgment (n 2 above) para 27.
82 SCA judgment (n 4 above) paras 8 and 80.

compiled. But the Richtersveld Community in fact continued to occupy the whole of the Richtersveld including the subject land, to use it, to let it, to grant mineral rights in respect of it and to exercise all other rights to which it was entitled in accordance with its indigenous law ownership of the land.

[**82.**] In the result, we conclude that the annexation of Richtersveld did not extinguish the right of ownership which the Richtersveld Community possessed in the subject land and that such right was not extinguished prior to 19 June 1913.

### *(f) The steps taken by the state in respect of the subject land after 19 June 1913*

[**83.**] The position of the Richtersveld Community began to change from 1926 onwards with the discovery of diamonds on the subject land. It was common cause that, if the Richtersveld Community's rights survived beyond 1913, it was ultimately dispossessed of the land by the end of 1993. The Community has consistently contended

> ... that the Richtersveld community was dispossessed by a series of legislative and executive steps whereby, after the discovery of diamonds in the mid 1920's, state alluvial diggings were established on the subject land, the public, including the Richtersveld people, were excluded from the subject land, mineral rights in the subject land were granted to Alexkor and full ownership of the subject land was ultimately transferred to Alexkor.[83]

[**84.**] On 28 May 1926 and 1 June 1926, Parliament adopted a resolution establishing the Richtersveld Reserve 'for the use of the Hottentots and Bastards who are residing therein and of such other coloured people as the Government may decide.'[84] The Reserve was established on land which excluded the subject land but which was part of the Richtersveld and was about half the size of the whole of the area that had been owned by the Richtersveld Community and occupied by it. This resolution was clearly connected with the discovery of diamonds on the subject land. In the debate on the resolution the Minister of Lands said that there had been difficulty and

> ... that discoveries are being made in that part of the world, and speculators have instigated these people [the Richtersveld Community] to claim sovereign rights — to claim minerals and everything.[85]

However it is not clear whether the resolutions of Parliament were directly binding on the Richtersveld Community or whether they were part of the process required for the issue of the certificate of reservation that was issued four years later. We will assume for the purposes of this judgment that the resolutions themselves had no binding effect and that the rights of the Richtersveld Community were left undisturbed.

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83 SCA judgment (n 4 above) para 91.
84 Hansard (1926) 4322.
85 Hansard (1926) 4329.

[**85.**] The Precious Stones Act[86] (the Precious Stones Act) was passed in 1927, again as a direct consequence of the discovery of diamonds in the subject land. It made provision for a state alluvial digging to be established by Proclamation.[87] A state alluvial digging was indeed established on the subject land in 1928[88] and its area consistently extended by Proclamation until it covered the whole of the subject land in 1963.[89] All the Proclamations that relate to the subject land refer to it as 'unalienated Crown land' or 'unalienated state land'. In other words, the Proclamations announce that the subject land is in fact state owned land. In this respect, these Proclamations are different in content and effect from the Crown Lands Acts discussed earlier. The Proclamations expressly state that land described in each Proclamation is in fact Crown land.

[**86.**] There is another respect in which the Proclamations and the Crown Lands Acts differ. Read in the context of the Precious Stones Act, the Proclamations, unlike the Crown Lands Acts, make no provision for the determination of claims of *bona fide* occupiers without title. Each Proclamation read in the context of the Precious Stones Act expressly declares the state to be the owner of that part of the subject land to which it applies. In so doing, each Proclamation may well have extinguished the indigenous law ownership of the Richtersveld Community to that part of the subject land and rendered the state the owner of the land.

[**87.**] On 5 February 1930, before the state alluvial digging process in respect of the subject land had been completed, the land was reserved by a certificate of reservation issued in terms of the 1887 Crown Lands Act. According to this certificate, land three hundred and fifty thousand morgen in extent, which excluded the subject land, was reserved 'for the use of the Hottentots and Bastards who are residing therein and of such other coloured people as the Governor-General may decide.'[90] It is highly arguable that this certificate of grant, by necessary implication, deprived the Richtersveld Community of their indigenous law ownership of the whole of the Richtersveld and granted them limited rights of occupation in relation to that part of the Richtersveld described in it. It is unnecessary to follow that route.

[**88.**] The concept of dispossession in section 25(7) of the Constitution and in section 2 of the Act is not concerned with the technical question of the transfer of ownership from one entity to another. It is a much broader concept than that, given the wide definition of 'a right in land' in the Act. Whether there was

86 Act 44 of 1927.
87 Sec 26.
88 Proclamation 58 of 1928.
89 Proclamation 1 of 1929, Proclamation 250 of 1931, and Proclamation 158 of 1963.
90 Certificate of Reservation, issued in terms of sec 6 of Act 15 of 1887, 5 February 1930.

dispossession in this case must be determined by adopting a substantive approach, having due regard to the provisions of the Precious Stones Act and the conduct of the government in giving effect to them.

[**89.**] The Precious Stones Act did not recognise the rights of those, like the Richtersveld Community, who were at the time the owners of land under indigenous law. This was because their rights had not been registered. All land in respect of which no person was registered as the owner in the deeds registry was treated by the Act as unalienated Crown land. The rights of the Richtersveld Community, the indigenous law owner of the land, were ignored as if it had no rights in the land whatsoever. What is more, the Community fell foul of section 103(5) and (6) of the Act. Subsection (5) makes it an offence for any person to occupy, trade on or use proclaimed land for any purpose without permission or authority while subsection (6) makes a criminal of any person who uses water from any place in an alluvial digging unless that is allowed by the Precious Stones Act. The effect of this Act was that all occupants of the land except those who were registered surface owners, or those who occupied at the instance of the surface owners, lost their right to occupy and exploit the land.

[**90.**] This law in effect rendered the occupation of the subject land by the Richtersveld Community unlawful and dispossessed it of the rights it had as owner of the land. Everything that happened afterwards, except for the issue of the certificate of reservation, referred to in paragraph 87 above, was a mere consequence of the Richtersveld Community having been stripped of its rights of ownership by the Precious Stones Act and the Proclamations made pursuant to it.

[**91.**] The evidence shows that the state subsequently treated the subject land as its own, required the Community to leave it, exploited it for its own account and later transferred it to Alexkor. All this happened after 1913 and effectively dispossessed the Community of all its rights in the subject land. These rights included the right to occupy and exploit the subject land, including its minerals.

### *(g) Whether the dispossession was the result of racially discriminatory laws or practices*

[**92.**] Section 25(7) of the Constitution requires '[a] person or community [to be] dispossessed ... as a result of past racially discriminatory laws or practices' before that person is entitled to relief. As noted in paragraph 22, this is the constitutional provision repeated in the terms of the Act. The next question that arises is whether the dispossession that took place was a dispossession 'as a result of past racially discriminatory laws or practices'. We have seen that the Precious Stones Act and the Proclamations issued thereunder failed to recognise the indigenous law ownership of the Richtersveld

Community and rendered its occupation of the land unlawful. They excluded the Community from the subject land and from the right to exploit its mineral wealth.

[**93.**] The state implemented the Precious Stones Act, would not allow the members of the Richtersveld Community onto the land and ultimately fenced off the subject land. The certificate of reservation in effect meant that the members of the Richtersveld Community were restricted to the land reserve, and thus it constituted part of the process of their exclusion from the subject land.

[**94.**] Owners of land whose ownership was registered in the deeds office and on which state alluvial diggings were established were treated differently from those who held their land according to indigenous law, where no system of registration was required. Registered owners were allowed to have access to the land, to keep their homesteads and to share in the mineral wealth of the land. More specifically, they were entitled, amongst other things, to select between 50 and 400 claims free of charge depending on their location,[91] half the licence money[92] and the protection of their homesteads and water rights.[93]

[**95.**] Accordingly, the Precious Stones Act and its Proclamations failed to recognise indigenous law ownership and treated the subject land as state land. On the other hand, registered ownership was recognised, respected and protected. For the most part, whites held their land under the system of registered ownership, though there were some black people and black communities who did acquire title of this sort.[94]

[**96.**] However, given that indigenous law ownership is the way in which black communities have held land in South Africa since time immemorial, the inevitable impact of the Precious Stones Act's failure to recognise indigenous law ownership was racially discriminatory against black people who were indigenous law owners. The laws and practices by which the Richtersveld Community was dispossessed of the subject land accordingly discriminated against the Community and its members on the ground of race.

[**97.**] In this regard we, therefore, disagree with the conclusion of the LCC that neither the Proclamations nor the Precious Stones Act

91 Sec 19(1)(a).
92 Sec 22.
93 Sec 23.
94 For a comprehensive discussion of the question see L Platzky and C Walker *The Surplus People Forced Removals in South Africa* (Ravan Press, Johannesburg, 1985) especially 74-9 and 85. The Beaumont Commission's figures suggest that 1 002 039 morgen of land were held in freehold by African farmers in 1916 which included some land owned by coloured persons outside of the scheduled reserves (Report of the Natives Land Commission, UG 19-16, Vol 1 4).

were racially discriminatory laws.[95] In dismissing the claim of the Richtersveld Community, the LCC relied on its previous decision in *Slamdien*[96] which determined that racially discriminatory laws or practices, for the purposes of section 25(7) of the Constitution and section 2 of the Act, must be 'those that sought specifically to achieve the (then) ideal of spatial apartheid, with each racial and ethnic group being confined to its particular racial zone.'[97] The SCA held that this test was unduly restrictive.[98] We agree.

[**98.**] In our view, although it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader scope. In particular, its purpose is to provide redress to those individuals and communities who were dispossessed of their land rights by the government because of the government's racially discriminatory policies in respect of those very land rights.

[**99.**] In this case, the racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights. Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to 'spatial apartheid', its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognising, to a significant extent, the rights of registered owners. In our view, this is racially discriminatory and falls squarely within the scope of the Act. It follows that the test applied in *Slamdien* is too narrow in this regard.[99]

[**100.**] In effect what the state did was to treat the subject land as its own and to pass laws that excluded the Community from all benefits in it and ultimately to vest ownership of the subject land in Alexkor. Whether or not that was unlawful under the laws then prevailing is irrelevant; the question whether the Community after all these years could claim back the land under the common law is similarly irrelevant. The Community does not have to rely on the common law. It has rights under the Act and is asserting those rights.

[**101.**] It follows that it is not necessary in this case to fix the precise date or dates of dispossession. It suffices to find, as we do, that after

95 LCC judgment (n 2 above) para 97.
96 *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC).
97 Id para 26.
98 SCA judgment (n 4 above) para 97.
99 If our approach had been followed in Slamdien, the result would not necessarily have been different.

19 June 1913 the actions of the state, to which we have referred, resulted in the loss by the Richtersveld Community of its rights in the subject land and that this dispossession was complete by 1993.

## The order

[**102.**] In the order of the SCA[100] reference is made to the rights of the Richtersveld Community in the subject land being 'akin to that held under common-law ownership.' We have found that the Richtersveld Community held ownership of the subject land under indigenous law, which included the rights to minerals and precious stones. To this extent only we will amend the order of the SCA.

[**103.**] The following order is made:

1. The order of the Supreme Court of Appeal is amended to read as follows:

   In result the appeal succeeds with costs including the costs of two counsel. The orders of the LCC are set aside and replaced with an order in the following terms:

(a) It is declared that, subject to the issues that stand over for later determination, the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.

(b) The defendants are ordered jointly and severally to pay the plaintiffs' costs including the costs of three counsel.

2. The second appellant (the Government of the Republic of South Africa) is ordered to pay the costs of the condonation application in this Court, including the costs of two counsel, on the scale as between attorney and client.

3. Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel.

[100] SCA judgment (n 4 above) para 111.

# The Director of Public Prosecutions KwaZulu-Natal v P

**(2005) AHRLR 187 (SASC 2005)**

Supreme Court of Appeal of South Africa, 1 December 2005
Judges: Harms, Streichner, Mthiyane, Combrinck, Nkabinde
Previously reported: 2006 (1) SA 446 (SCA); (2006) 1 SACR 243 (SCA)

*Sentencing of girl who was 12 years old when she committed murder*

**Interpretation** (international law, 15, 16, 20)
**Children** (sentencing, 18; detained children to be kept separate from adults, 18, 23, 24; correctional supervision, 25)
**Personal liberty and security** (sentencing, proportionality, 22)

## Mthiyane JA
## Introduction

[**1.**] This is an appeal by the state, with the leave of this Court, against the sentence imposed by Swain J, sitting in the High Court, Pietermaritzburg, in KwaZulu-Natal, upon the conviction of P, a 14 year old girl (the accused), for the murder of her grandmother (the deceased) and theft. The passing of sentence was postponed for a period of 36 months on condition that the accused complies with the conditions of a sentence of 36 months of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977. These conditions include provisions relating to house arrest, schooling, therapy, supervised probation, and the performance of community service.

## The facts

[**2.**] During the evening of 14 September 2002, some time after 20:00, the accused, who was then 12 years and 5 months old, approached two men, Mr Vusumuzi Tshabalala and Mr Sipho Hadebe, who were under the influence of liquor, in the street in the vicinity of the house of the deceased and asked them to help her to kill her grandmother who, she alleged while crying, had killed both her parents. She promised that they could remove whatever they wished from the house and even promised the one to have sexual relations with him in return for killing the deceased. They followed her into the house, where she again asked them to kill the deceased who was lying on a bed asleep. The accused had earlier placed sleeping tablets in

tea that she had made for the deceased. The accused supplied them with kitchen knives. Hadebe strangled the deceased, resulting in her death, from what was described by the state pathologist, Dr Dhanraj Maney, in the post-mortem report as 'manual strangulation'. Not satisfied, the accused insisted that the throat be cut, which was done.

[**3.**] The accused gave Tshabalala and Hadebe some jewellery and permitted them to take a video recorder, a satellite decoder and clothing in return for having murdered the deceased. Tshabalala and Hadebe were arrested and charged with the murder of the deceased, to which they both pleaded guilty on 2 October 2002 and were each sentenced to twenty five years' imprisonment.

[**4.**] The accused's explanation for her participation in the killing was that she had done so on the instructions of an erstwhile boyfriend of the deceased's daughter, who offered her money to kill the deceased. Her evidence was that the plan how to kill the deceased had been hatched by this person. Swain J rejected the accused's version and found that she had acted of her own volition, with no external coercion. On the evidence as a whole there is no reason to doubt the correctness of this finding. Despite the rejection of her version, the accused persisted in it to the end. To this day her motive for the murder is not known. After her father had committed suicide she chose out of her own will to live with the deceased in preference to living with her mother. The only motive one can surmise is the fact that the deceased and she had an argument about her relationship with a man of 20, whom she phoned, running up a telephone bill of about R2 000 during one month.

[**5.**] On appeal the sentence was attacked by the state as being too lenient given the gravity of the offences committed by the accused. The state argued that the learned trial judge had failed to exercise his discretion properly and misdirected himself in a number of respects. It was submitted by counsel for the state that, given 'the compelling aggravating features peculiar to the murder', direct imprisonment should have been imposed upon the accused, notwithstanding her youth.

[**6.**] In the view which I take of the matter I do not consider it necessary to deal with each argument raised in this regard. Suffice it to say that, having had regard to the evidence and the trial judge's assessment of it, I am satisfied that the judge gave due and careful, if not anxious, consideration to the matter. I am not persuaded that, save in one material respect, he misdirected himself.

[**7.**] The trial judge, in my view, did not approach the evidence of the witnesses dealing with sentence with the necessary degree of objectivity and accepted their say-so without considering whether they had a factual basis for their opinion. This caused him to place

too much emphasis on the personal circumstances of the accused, under-emphasising the other material considerations. The evidence of Prof Sloth-Nielsen was in part inadmissible. Courts do not need professors of law to tell them what the law is or should be. The trial judge was especially taken in by the evidence of Mrs Joan van Niekerk who, without any factual basis, came to the conclusion that the accused's childhood had shaped her to commit the crimes in question. He also failed to consider that her evidence, as that of some of the others, was not objective and was based on what the accused had told them, while he knew (and they should have known) that the accused was a callous liar, prepared without compunction to concoct a version, create a false alibi and weave a web of falsehoods in order to implicate others. After the murder she was able for months on end to hide her complicity. This, according to the expert opinion of Mrs van Niekerk, was all due to the fact that her father had committed suicide, that the relations between the deceased and her mother were bad, that the grandmother led a not exemplary life and that the accused hated her grandmother, ignoring the fact that her version to others was that she loved her.

[**8.**] It might be the right opportunity to have regard again to the words of Rumpff CJ when he dealt with a related matter in *S v Loubscher*:[1] [*quotation in Afrikaans omitted – eds*]

[**9.**] The accused, in my view, and in spite of her age and background, acted like an 'ordinary' criminal and should have been treated as such. She had no mental abnormalities and, something the judge had noted, was able to pass herself off and in many respects acted like someone of about 18 years of age. That is what at least one witness thought her age was. All the guesswork about her mental and physical age in contradistinction to her actual age pales into insignificance.

[**10.**] That is, however, not the end of the matter. What troubles, is whether the sentence (if postponement of sentence can be regarded as a sentence) imposed was appropriate in the circumstances of this case. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate. (See *S v Rabie*).[2] Even in the absence of misdirection, it would still be competent for this court to interfere if it were satisfied that the trial court had not exercised its discretion reasonably[3] and imposed a sentence which was not appropriate.

1 1979 (3) SA 47 (a) 57.
2 1975 (4) SA 855 (A) 857D-F; See also *S v Pillay* 1977 (4) SA 531 (A); *S v Pieters* 1987 (3) SA 717 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).
3 *S v Pieters* 734H.

## The issue on appeal

[**11.**] In my view the issue on appeal can therefore be narrowed down to whether the sentence imposed by the trial court was appropriate, given that court's duty to have regard to the seriousness of the offence and the interests of society as well as the true character of the accused. This issue must of course now be considered not only with reference to the so-called traditional approach to sentencing but also with due regard to the sentencing regime foreshadowed in s 28(1)(g) of the Constitution and international developments as reflected in, for instance, instruments issued under the aegis of the United Nations.

[**12.**] There can be no question that at the best of times the sentencing of a juvenile offender is never easy and is far more complex than the sentencing of an adult offender (*S v Ruiters*[4]; SS Terblanche *The Guide to Sentencing in South Africa* (1999)[5]). It is even worse if the youthful offender concerned is a child,[6] as in this case. As pointed out in *Brandt v S*[7] our criminal justice system has never treated the sentencing of a child offender as a 'separate, self contained and compartmentalised' field of judicial activity. The youth of the offender has, however, always been recognised at common law as a mitigating factor for purposes of sentence. (*S v Jansen*;[8] *S v Lehnberg en 'n* Ander[9])

## The traditional approach

[**13.**] The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the 'triad consisting of the crime, the offender and the interests of society' (*S v Zinn*[10]). In the assessment of an appropriate sentence, the court is required to have regard to the main purposes of punishment namely, the deterrent, preventive, reformative and the retributive aspects thereof (*S v Khumalo*[11]). To these elements must be added the quality of mercy,[12] as distinct from mere sympathy for the offender. As noted by this court in *Brandt* 'the traditional aims of punishment have been affected by the Constitution'.

## The Constitution and the international instruments

[**14.**] With the advent of the Constitution the principles of sentencing which underpinned the traditional approach must, where

4 1975 (3) SA 526 (C) 531E-F.
5 (1999) ch 12 375.
6 Sec 28(3) states: 'child' means a person under the age 18 years.
7 [2005] 2 All SA 1 (SCA) para 14.
8 1975 (1) SA 425 (A).
9 1975 (4) SA 553 (A).
10 1969 (2) SA 537 (A) 540G.
11 1984 (3) SA 327 (A) 330D.
12 *S v Rabie* 861D-F and 866A-C.

a child offender is concerned, be adapted and applied to fit in with the sentencing regime enshrined in the Constitution, and in keeping with the international instruments which lay 'emphasis on *reintegration* of the child into society'.[13] The general principle governing the sentencing of juvenile offenders is set out in section 28(1)(g) of the Constitution. The section reads:

> Every child has the right –
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be – (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; **...**

[**15.**] Section 28 has its origins in the international instruments of the United Nations. Of relevance to this case is the United Nations Convention on the Rights of the Child (1989) which South Africa ratified on 16 June 1995[14] and thereby assumed an obligation under international law to incorporate it into its domestic law.[15] Various articles under the convention provide that juvenile offenders under the age of 18 years 'should as far as possible be dealt with by the criminal justice system in a manner that takes into account their age and special needs.'[16] Also of relevance is article 40(1) of the Convention which recognises the right of the child offender

> to be treated in a manner consistent with the promotion of a child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[17]

Section 28(1)(g) of our Constitution appears to be a replica of section 37(b) of the Convention which provides that children in conflict with the law must be arrested, detained or imprisoned 'only as a measure of last resort and for the shortest appropriate period of time'.[18]

[**16.**] The Convention has to be considered in conjunction with other international instruments. Most of these instruments are referred to extensively in *Brandt*.[19] Of particular relevance in this case, however, is the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) ('Beijing Rules'), in particular rule 5(1). The rule recommends that a criminal justice system should 'ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and

13 *Report on Juvenile Justice* (Project 106) 150.
14 In South Africa 16 June is recognised as Children's Day and is a public holiday.
15 *S v Kwalase* 2000 (2) SACR 135 (C) 138g.
16 *S v Kwalase* 138g.
17 *S v Kwalase* 138g.
18 *S v Kwalase* 138i.
19 Para 16.

the offence'.[20] The rule should, however, not be read in isolation because rule 17(1)(a) provides that:

> The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as the needs of the society.

The commentary notes that it is difficult to formulate guidelines because of the unresolved conflicts of a philosophical nature including rehabilitation versus just deserts, assistance versus repression and punishment, merits of the case versus protection of society in general and general deterrence versus individual incapacitation.

## The South African Law Commission

[**17.**] In July 2000 the South African Law Commission Project Committee on Juvenile Justice (Project 106) released a Discussion Paper embodying a draft Child Justice Bill. On the sentencing of child offenders there is unqualified support for the principle that 'detention should be a matter of last resort'.[21] It also recommended that 'the sentence of imprisonment for children below a certain age (14) years be excluded'. Following the Beijing Rules, in particular rule 17(1)(c) thereof the committee recommended that imprisonment should only be imposed upon children who have been convicted of serious and violent offences.[22] These recommendations have not as yet been adopted by Parliament and can have but peripheral value at this stage.

[**18.**] Having regard to section 28(1)(g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except, as a measure of last resort' and if detention of a child is unavoidable, this should be 'only for the shortest appropriate period of time'. This of course applies to a juvenile offender who is under the age of 18 years as provided for in section 28(1)(g) of the Constitution. Furthermore if the juvenile concerned is a child as described, he or she should be kept separately from persons over the age of 18 years and the sentencing court will have to give directions to this effect, if it considers that the case before it warrants detention. This follows from section 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child.

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20 *S v Kwalase* 139c-e.
21 SA Law Commission *Report on Juvenile Justice* (Project 106) 153 fn 16.
22 As above.

[**19.**] It must be remembered that the Constitution and the international instruments do not forbid incarceration of children in certain circumstances. All that it requires is that the 'child be detained only for the shortest period of time' and that the child be 'kept separately from detained persons over the age of 18 years.' It is not inconceivable that some of the courts may be confronted with cases which require detention. It happened in the United Kingdom not so long ago in the case of *R v Secretary of State for the Home Department, ex parte Venables*; *R v Secretary of State for the Home Department, ex parte Thompson*[23] where two boys aged ten were convicted of the murder of a two year old boy in appalling circumstances. Leaving aside the details relating to the appeal processes, they were sentenced to ten years.

[**20.**] I turn now to consider the facts relevant to the sentence of the accused. The strongest mitigating factor in favour of the accused is her youthfulness: she was 12 years and 5 months' old at the time of the offence. A second most important factor is that she has no previous conviction. This is an important factor because even the Beijing rules (rule 17(1)(c)) provide for incarceration of a child who has committed 'a serious act involving violence against another person or of persistence in committing other serious offences'[24] albeit as a measure of last resort and for the shortest period of time.

[**21.**] As against the above mitigating factors (to which of course her personal circumstances must be included) are the aggravating features of the case which prompted the trial judge to remark that if he were to look only at the gravity of the offence committed by the accused, there was no doubt that the imprisonment of the accused might be regarded as the only appropriate punishment. The accused arranged for the brutal murder of her grandmother at the hands of two strangers who now languish in prison, each serving sentences of imprisonment of twenty five years. The killing was particularly gruesome: the deceased had her throat cut in her bedroom and was slaughtered like an animal. The accused provided the killers with knives. She stood watching while the killers carried out her evil command and even callously allowed her six year old brother to enter the room when her sordid mission had been accomplished. Mercifully, the deceased was unaware of what was happening because the accused had drugged her by putting sleeping tablets in her tea. The murder was premeditated. One would expect a person of that age to have been remorseful. Not the accused. While the killers were still in the house after the murder she telephoned her boyfriend — a twenty year old – to try and fabricate an alibi. As if that was not bad enough she rewarded the killers with a number of household goods belonging to the deceased, as indicated earlier in the judgment. One can go on

[23] 23 [1997] All ER 97.
[24] n 21 above.

and on. Every chapter of this sordid tale reveals the evil mindedness of the accused. One of the more worrying aspects of the case is that no motive was given for the killing, which makes it imperative for this court to consider a sentence that would to some extent ensure that those who come into contact with her are protected.

[**22.**] Although Swain J gave anxious consideration to the matter, I agree with counsel for the state that he failed to have sufficient regard to the gravity of the offence. The postponement of the passing of sentence even when coupled with correctional supervision was, in my view, inappropriate in the circumstances and leaves one with a sense of shock and a feeling that justice was not done. Even in the case of a juvenile as already indicated the sentence imposed must be in proportion to the gravity of the offence. If this case does not call for imprisonment of a child, I cannot conceive of one that will. Admittedly in his judgment the learned judge did allude to the principle of proportionality but, I believe, he failed to give due and sufficient weight to it, and this court is therefore at large to interfere and impose what it considers to be an appropriate sentence. In *Brandt*[25] and *Kwalase*[26] the court reiterated that proportionality in sentencing juvenile offenders was required by the Constitution. Of course proportionality in sentencing is not meant to be in the sense of an 'eye for an eye' as was cautioned by Harms AJA in a dissenting judgment in *S v Mafu*[27] where he noted that proportionality does not imply that punishment be equal in kind to the harm that the offender has caused.

[**23.**] If I had been a judge of first instance I would have seriously considered imposing a sentence of imprisonment. The court below was very concerned about the accused's reintegration into society should she be sent to prison. It is a valid concern but the fact that she could not study what she wishes and that the schooling facilities are not ideal, are in my view factors of limited value. The present case is, however, far from simple. We know that the Department of Correctional Services, in detaining children, does not comply with either the Constitution or the provisions of its Act. There is also no indication that, in this case, it would. There appears to be a general unwillingness to accept the fact that there are children that have to be detained in prison-like facilities, and there are none for their purposes. All the other detention options are as bad or non-existent. The court below was told that there is some kind of provincial facility in the Western Cape but it will not accept children from other provinces unless those are prepared to pay, which the relevant province apparently cannot or will not.

25 Para 19.
26 139f.
27 1992 (2) SACR 494 (A) 497d.

[**24.**] Although prison conditions are generally not a matter with which a sentencing court should concern itself — since it is a matter for the government, the Ministry of Correctional Services and the prison authorities to rectify — and although it is not for the sentencing court to first undertake an investigation as to whether there is accommodation available in prison for a juvenile offender each time it considers passing a custodial sentence, we cannot close our eyes to the facts as we know them.

[**25.**] In spite of my reservations about the duty of a sentencing court to investigate prison conditions and the like, I have to refer to the fact that the witnesses from Correctional Services misled the court below. When correctional supervision was introduced, courts embraced it enthusiastically as a real sentencing option, something that will have a substantial effect on the prison population in this country. As time went on courts became more sceptical but I am now completely disillusioned. We asked for a report from Correctional Services to determine the nature and scope of their supervision since the judge had requested that the accused should be visited at least four times per week at irregular intervals. Without proper supervision house arrest has no value. The affidavit indicates that although the accused was sentenced on 17 December 2004, there were no visits during the festive season, in January there were 9, in February 3, in March 2, then one per month and, suddenly when the appeal was enrolled, there were 6 during October. Although a telephone had been installed, there were six telephone contacts in all. More disturbing is the fact that the visits and contacts were all during office hours, leaving the accused free to do what she wishes after hours and during week-ends. We have invited counsel for the state to provide us with proposals of how to make the house arrest effective, but they have failed to file any suggestions. However, one cannot fault the trial judge for having imposed this sentence, carefully crafted as he did, and it has to stand subject to minor amendments that speak for themselves.

[**26.**] It is the postponement of sentence that has to be reconsidered. It is too late to impose a sentence of direct imprisonment but the interests of justice will be served by imposing a term of imprisonment but suspending it on certain conditions, which if breached might result in the accused having to serve time in prison. In this way, I believe, recognition will be given to the interests of society in the sense that it would be protected against her, and she against society, which might wish to seek revenge.

[**27.**] Since the state was substantially successful, the accused is not entitled to an award of costs.

[**28.**] In the result the appeal is allowed. The sentence imposed by the trial court is replaced with the following:
The accused is sentenced to:

1. Seven years' imprisonment, the whole of which is suspended for five years on condition that the accused is not again convicted of an offence of which violence is an element, committed during the period of suspension and for which she is sentenced to a term of imprisonment without the option of a fine.
2. Thirty-six months of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act on the following conditions:

a. that she be placed under house arrest, in the care and custody of her mother and legal guardian for the duration of thirty-six months, on the conditions set out below;

b. that she be confined to the flat occupied by her mother save and except in the following circumstances: (i) that she attend school during 'normal school hours'. For these purposes 'normal school hours' means one (1) hour prior to the commencement of school and one (1) hour after the conclusion of school, for the purpose of travelling to and from school; (ii) that she attend official school activities falling outside of 'normal school hours' as sanctioned by the principal of the school; (iii) that she attend the NICRO program known as 'Journey', other life skills training and therapeutic courses, activities or counselling as prescribed by Mrs Joan van Niekerk and/or the correctional officer; (iv) that she receive medical and/or dental treatment as determined by a medical doctor or dentist; (v) that she be in the building of which the flat forms a part, but outside the confines of the flat itself for one hour between 16:00 and 17:00 during school term, and for two (2) hours in total respectively between 10:00 and 11:00 and between 15:00 and 16:00 during school holidays;

c. that she receive regular support therapy from Mrs Joan van Niekerk, or any other suitable professional designated by her, and that she co-operate fully in receiving such therapy;

d. that she render one hundred and twenty (120) hours per year of community service, as approved by Mrs Joan van Niekerk and the correctional officer, in addition to her school curriculum activities, when she attains fifteen (15) years of age;

e. that she be permitted visitors at the flat where she lives, as approved by the accused's mother and Mrs Joan van Niekerk, only in the presence of her mother;

f. Mrs Joan van Niekerk or the correctional officer are requested to submit quarterly reports to the Director of Public Prosecutions, briefly setting out the progress being made by the accused and the general compliance by the accused with the terms of this order;

g. that correctional officer is ordered to visit the flat where the accused will be living at least four times per month, including weekends and after office hours, at irregular intervals to ensure compliance by the accused with the terms of her confinement. The correctional officer is also ordered to telephone the accused, once a telephone has been installed in the flat, at irregular intervals and after hours to ensure compliance by the accused;

h. the Director of Public Prosecutions, Mrs Joan van Niekerk and/or the correctional officer, are given leave to approach this Court at any time, for a variation of the terms of this order;

i. In the event of any breach by the accused of any of these conditions, the correctional officer is directed to immediately report such breach on affidavit to the Director of Public Prosecutions who may then apply for the necessary relief.

# UGANDA

## Kigula and Others v The Attorney-General

**(2005) AHRLR 197 (UgCC 2005)**

*Susan Kigula & 416 Others v The Attorney-General*
Constitutional Court, 10 June 2005, constitutional petition 6 of 2003
Judges: Okello, Mpagi-Bahigeine, Twinomujuni, Byamugisha, Kavuma
Extract: Judgment of Okello. Full text on www.chr.up.ac.za

*Mandatory death penalty unconstitutional*

**Interpretation** (constitutional interpretation, 13, 37, 38, 78)
**Life** (death penalty, 38, 49, 64)
**Fair trial** (constitutional provisions non-exhaustive, 66; mandatory death penalty, 75-82; independence of judiciary, 77)
**Equality before the law** (mandatory death penalty, 81; rights of prisoners, 109, 110)
**Cruel, inhuman or degrading treatment** (death row phenomenon, 116-120)

### Judgment of GM Okello, JA

[**1.**] This petition was brought under article 137(3) of the Constitution of the Republic of Uganda challenging the constitutional validity of the death sentence. The 417 petitioners were, at the time of filing the petition, on death row, having been convicted of offences under the laws of Uganda and were sentenced to death, the sentence provided for under the laws of Uganda.

[**2.**] Briefly, the petitioners contend that the imposition of the death sentence on them was unconstitutional because it is inconsistent with articles 24 and 44 of the Constitution which prohibit cruel, inhuman or degrading punishment or treatment. According to them, the various provisions of the laws of Uganda which prescribe death penalty are themselves inconsistent with the said articles 24 and 44 of the Constitution. The petitioners contend in the first alternative that the various provisions of the laws of Uganda which provide for mandatory death sentence are inconsistent with articles 20, 21, 22, 24, 28 and 44 of the Constitution. According to them, though the Constitution guarantees protection of the rights and freedoms such as, equal treatment before the law, right to a fair

hearing etc, the provisions which provide for mandatory death sentence contravene those constitutional provisions: a convict who is sentenced under such a mandatory provision is denied the right to appeal against sentence only.

[**3.**] In the second alternative, the petitioners contend that a long delay between the pronouncement of the death sentence and the carrying out of the sentence, allows for a death row syndrome to set in. Carrying out of the death sentence after such a long delay constitutes a cruel, inhuman and degrading treatment prohibited by articles 24 and 44 of the Constitution.

[**4.**] In the third alternative, the petitioners contend that section 99(1) of the Trial on Indictments Act (Cap 23 Laws of Uganda) which provides for hanging as the legal mode of carrying out death sentence, was cruel, inhuman and degrading as it contravenes articles 24 and 44 of the Constitution. They accordingly sought the following reliefs:

*(a) Declaratory orders*

(i) that the death penalty in its nature, and in the manner, process and mode in which it is or can be implemented is a torture, a cruel, inhuman or degrading form of punishment prohibited under articles 24 and 44(a) of the Constitution;

(ii) the imposition of the death penalty is a violation of the right to life protected under articles 22(1), 20 and 45 of the Constitution;

(iii) sections 23(1), 23(2), 23(3), 23(4), 124, 129(1) 134(5) 189, 286(2), 319(2) and 243(1) of the Penal Code Act (Cap 120 of Laws of Uganda) and Sections 7(1)(a), 7(1)(b), 8, 9(1), and 9(2) of the Anti Terrorism Act (Act 14 of 2002) and any other laws that prescribe a death penalty in Uganda are inconsistent with and in contravention of articles 20, 21, 22(1), 24, 28, 44(a) 44(c) and 45 of the Constitution to the extent that they permit or prescribe the imposition of death sentences;

(iv) section 99(1) of the Trial on Indictments Act (Cap 23) and the relevant sections of and provisions made under the Prisons Act and referred to therein, are inconsistent with articles 24 and 44(a) of the Constitution;

(v) that section 9 of the Magistrates Court (Amendment) Statue (6 of 1990) in so far as it repeals part XV of the Magistrates Court Act of 1970, is inconsistent with articles 28 and 44(c) of the Constitution;

(vi) that the carrying out of a death sentence is inconsistent with articles 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45 of the Constitution;

(vii) that the time limitation of 30 introduced under rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, Directions 1996 is in contravention of article 137 of the Constitution;

(viii) that in the alternative, sections 23(1), 23(2), 189, 286(2), 319(2) of the Penal Code Act Cap 120 of the Laws of Uganda and section 7(1)(a), the Anti Terrorism Act (Act 14 of 2002) and any other laws that prescribe mandatory death sentences are inconsistent with articles 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45 of the Constitution to the extent that they provide for the imposition of a mandatory death sentences;

(ix) that section 132 of the Trial on Indictments Act to the extent that it restricts the right of appeal against the sentencing component where mandatory death sentences are imposed is inconsistent with

articles 20, 21, 22(1), 24, 28, 44(a), 44(c) and 45 of the Constitution.

*(b) The following redresses*

(i) that the death sentences imposed on your humble petitioners be set aside;

(ii) that your humble petitioners' cases be remitted to the High Court to investigate and determine appropriate sentences under article 137(4) of the Constitution;

(iii) that your humble petitioners be granted such other reliefs as the court may feel appropriate.

[**5.**] The petition was supported by a number of affidavits sworn by some of the petitioners and diverse categories of other deponents.

[**6.**] The respondent filed in his answers in which he denied all the allegations contained in the petition. He also supported his answers by some affidavits. After the pleadings were concluded, counsel for both parties held a scheduling conference before the Registrar of this Court on 5 May 2004. At the conference, the parties agreed on some facts and the issues to be determined by this Court. Some of the facts they agreed on were:

(1) That death penalty is a cruel form of punishment or treatment.

(2) That the petitioners who are convicted of offences which carry mandatory death sentences did not have a right to appeal against their sentences.

[**7.**] However, on 11 November 2004 counsel for the respondent in writing notified his learned friends for the petitioners that he intended to renege on the above agreed facts. When we met counsel for both parties in chambers on the morning of 19 January 2005 before we entered court to start the hearing of this petition, learned counsel for the respondent reiterated their decision to renege on those facts. In their submission, they in fact treated the above two facts as being in issue and needed to be proved by the petitioners.

[**8.**] In their reply, counsel for the petitioners strongly opposed that conduct and urged court not to allow counsel for the respondent to renege on the facts which they had agreed on during the scheduling conference. That would be prejudicial to the petitioners' case and would set a very dangerous precedent to the lower courts.

[**9.**] Scheduling conference is not provided for in the Modifications to The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996. (Legal Notice 4 of 1996). It is invoked in the proceedings before this court by virtue of rule 13 of Legal Notice 4 of 1996. This rule empowers this Court to apply with the necessary modifications, the practice and procedure in accordance with the Civil Procedure Act and the rules made under the Act relating to the trial of a suit in the High Court. Scheduling conference is provided for in Order XB of the Civil Procedure Rules as amended by Statutory Instrument 26 of 1998. The purpose of scheduling conference is to save time of the court by sorting out points of agreement and disagreement so as to expedite disposal of cases. Like any other rules

of procedure, this is a handmaid of justice. It is not intended to be an obstacle in the path of justice.

[**10.**] Counsel for the respondent informed us from the bar that when they admitted those facts during the scheduling conference, they had not yet fully studied the case and the relevant authorities. They did not, therefore, appreciate the implications of their admission. When they later studied the case and the relevant authorities more fully, they decided to renege on their admission. That was why they wrote the letter to counsel for the petitioners indicating their intention to renege on their admission.

[**11.**] Article 126(2)(e) of the Constitution of this country enjoins courts to administer substantive justice without undue regard to technicalities. I think that counsel for the respondent gave to counsel for the petitioners reasonable notice of their intention to renege on their admission. This is the spirit of fair play. That notice gave counsel for the petitioners ample time to assemble the necessary evidence to prove the facts whose admission the respondent wanted to renege on. I am satisfied in the circumstances of this case, that the change of mind by counsel for the respondent on the admission of the facts did not occasion a miscarriage of justice to the petitioners. On the contrary, to insist that the respondent sticks to the admission would be contrary to the spirit of article 126(2)(e) above.

[**12.**] The issues that were agreed upon by the parties at the scheduling conference for determination of the court were as follows:

1. Whether the death penalty prescribed by various laws of Uganda constitutes inhuman or degrading treatment or punishment, contrary to article 24 of the Constitution;

2. Whether the various laws of Uganda that prescribe the death penalty upon conviction are inconsistent with or in contravention of articles 24 and 44(a) or any other provisions of the Constitution;

3. Whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44 or any other provisions of the Constitution;

4. Whether section 99(1) of the Trial on Indictments Act which prescribes hanging as the legal method of implementing the death penalty is inconsistent with and in contravention of articles 24 and 44 and any other provisions of the Constitution;

5. Whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24 and 44, or any other provisions of the Constitution;

6. Whether your petitioners are entitled to the remedies prayed for.

[**13.**] The task which this Court is faced with in this petition is, therefore, to interpret the relevant provisions of the Constitution to answer the questions posed above. It is, I think, appropriate at this stage, to point out briefly, the principles of constitutional interpretation that will guide me in the task at hand. These are:

1. It is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of

constitutional provisions. The widest construction possible, in its context, should be given according to the ordinary meaning of the words used. (*The Republic v El Mann* (1969) EA 357).

2. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other (*Paul K Ssemogerere and 2 Others v Attorney-General* Const Appeal 1 of 2002.)
3. All provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument (*South Dakota v North Carolina* 192 US 268 (1940) LED 448).
4. A constitution and in particular that part of it which protects and entrenches Fundamental Rights and Freedoms are to be given a generous and purposive interpretation to realise the full benefit of the right guaranteed.
5. In determining constitutionality both purpose and effect are relevant (*Attorney-General v Salvatori Abuki*, Constitutional Appeal 1 of 1998)
6. Article 126(1) of the Constitution of the Republic of Uganda enjoins courts in this country to exercise judicial power in conformity *with law and with the values, norms and aspirations of the people* (emphasis added.)

[**14.**] It is not surprising that article 126(1) of the Constitution of this country enjoins courts to have regard to the values, norms and aspirations of the people when exercising judicial powers. The reason can be discerned from the preamble of the Constitution. The preamble laments the history of this country that was characterised by political and constitutional instability.

[**15.**] Through their Constitution, the people resolved to break from their past in order to build a better future based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. With the above principles in mind, I shall now proceed to consider the above issues.

## Issues nos 1 and 2

[**16.**] I shall consider these two issues together for convenience. The gist of the petitioners' case in these issues is that death penalty is inconsistent with articles 24 and 44(a) of the Constitution. They contend that these two articles read together, show that death penalty can not be imposed on any person under the Constitution of this country because it is cruel, inhuman and or degrading. The laws which prescribe death penalty are therefore, they submitted, unconstitutional and should be struck down for being inconsistent with those two articles.

[**17.**] Mr John W Katende argued these issues for the petitioners. He contended that the words in article 24 were to be read disjunctively and given their ordinary plain meaning. He cited the judgment of

Oder JSC in *Attorney-General v Salvatori Abuki*, Constitutional Appeal 1 of 1998. He stated that the disjunctive approach meant that the petitioners would need to prove only one of the mutations stated in article 24 to succeed. Further, that once the court adopted that ordinary plain meaning approach, it would come to an irresistible finding that death penalty is a cruel, inhuman and degrading form of punishment. He pointed out that in the Tanzanian case of *Mbushu and Another v Republic* (1995) 1 LRC 216 and in the South African case of *State v Makwanyane* (1995) 1 LRC 269, the respective courts have held that death penalty is inherently cruel without any evidence.

[**18.**] In the instant case, however, learned counsel submitted, that the petitioners have adduced affidavits evidence for example, that of Anthony Okwonga (affidavit 2 vol 1), Ben Ogwang (affidavit 3 vol 1) etc to show that death penalty is inherently a very cruel, inhuman and degrading punishment.

[**19.**] He pointed out that the Supreme Court had found in *Abuki*'s case (*supra*) that banishment was a cruel, inhuman and degrading punishment. Further, that this Court had also found in *Simon Kyamanywa v Uganda*, Constitutional Reference 10 of 2000, that corporal punishment was a cruel, inhuman and degrading punishment. He argued that since banishment and corporal punishment were found to be cruel, inhuman or degrading form of punishment or treatment, this court should find no difficulty to find that death penalty is a cruel, inhuman and degrading punishment.

[**20.**] Learned counsel contended that death penalty is not only cruel but it is also inhuman. He cited cases to show that deliberate putting to death of a human being, that human being ceases to be a human. His humanity is taken away.

[**21.**] That death penalty is degrading in that it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.

[**22.**] In counsel's view, article 22(1) did not save death penalty, nor did it qualify or provide exception to article 24. If the legislature wanted that to be the position, it would have stated so expressly. There is however, he argued, an apparent conflict between articles 22(1) and 24, which this Court has jurisdiction to harmonise. Once it is held that death penalty is cruel, inhuman and degrading and that article 24 outlaws such a punishment, then article 22(1) must give way. He pointed out that in the Tanzanian case of *Mbushu* (*supra*), despite the fact that death penalty was found to be inherently cruel, inhuman and degrading, it was not declared unconstitutional. This was because it was saved by article 30(2) of their Constitution.

[**23.**] He stated that, that scenario was not applicable to Uganda because of article 44(a). Article 44(a) was a Ugandan unique innovation in the 1995 Constitution. It was not present in the 1967

Constitution. The purpose was in view of our chequered history, to protect at any cost, those important and sacred fundamental pillars contained therein. The language of the article is clear. He stated that the Supreme Court had held in *Abuki*'s case (*supra*) that there were no conceivable circumstances or grave facts by which the rights protected in article 44 can ever be altered to the disadvantage of anyone even if he or she was charged or convicted of a serious offence. He referred us to *Zachery Olum v Attorney-General* (case 7) where this Court (Twinomujuni JA) had held that the language of article 44(a) admits of no other construction. It prohibits any derogation from the enjoyment of the rights set out therein regardless of anything else in the Constitution.

[**24.**] Mr John W Katende pointed out that though article 126(1) enjoins courts to exercise judicial power in conformity with law and aspirations of the people, that article does not override article 44. Clear language of the Constitution must prevail over opinion of the people.

[**25.**] On resolving the apparent conflict between articles 22(1) and 24, Mr Katende contended that the holding in the Nigerian case of *Kalu v State*, should not be followed because its approach conflicts which the plain ordinary meaning approach adopted by our Supreme Court in *Abuki*'s case (*supra*). He finally submitted that once it is held that death penalty is a cruel, inhuman and degrading punishment, contrary to article 24, then on the authorities of the Supreme Court and this Constitutional Court cited above, death penalty is outlawed by article 44 and should be declared unconstitutional. The provisions of the various legislations specified in paragraph 1(a) of the petition which prescribe death penalty should also be declared unconstitutional.

[**26.**] Mr Benjamin Wamambe submitted for the respondent on these issues. He contended that death penalty and the various provisions of the laws of Uganda which prescribe death penalty are not unconstitutional. Article 24 must be construed in the context of the Uganda Constitution, applying a dynamic and progressive principle of constitutional interpretation, keeping in mind the historical background of this country and the aspirations of the Ugandan people. He stated that once that approach is adopted, death penalty will not be found to be cruel, inhuman and degrading. He rejected the 'plain ordinary meaning' approach stated in *Abuki*'s case (*supra*). According to him, both *Abuki*'s case and *Kyamanywa* (*supra*) were distinguishable from the instant case. In *Abuki* and *Kyamanywa*, courts were interpreting statutory provisions against a constitutional provision. In the instant case, the Court is faced with the task of interpreting one constitutional provision against another. In *Abuki* and *Kyamanywa* banishment and corporal punishment respectively were not provided for in the Constitution. Death penalty on the other

hand, is provided for in article 22(1), which came before article 24. It is his contention that the framers of the Constitution could not have intended articles 24 and 44 to apply to death penalty. There is a well known rule of interpretation that to take away a right given by a statute, the legislature must do so in clear terms devoid of any ambiguity. He submitted that if the framers of the Constitution had intended to take away, by article 24, the right recognised in article 22(1), they would have done so in clear terms and not by implication. Article 24 was enacted when article 22(1) was still fresh in the minds of the framers

[**27.**] He submitted that death penalty is neither a torture, nor a cruel, inhuman or degrading punishment or treatment within the context of articles 24 and 44. Articles 24 and 44 were intended to address the bad history of this country, which was characterised by torture and arbitrary extra-judicial killings. Now under article 22(1), death penalty is limited to specific situation. It follows a conviction in a fair trial by a court of competent jurisdiction in respect of a crime in Uganda, where both the conviction and sentence have been confirmed by the highest appellate court in Uganda. This provision satisfies all the essential requirements for a law derogating from basic rights because it provides:

(a) Adequate safeguard against arbitrary decision;
(b) Effective control against abuse by those in authority when using the law and
(c) Complies with the principle of proportionality. The limitation imposed on the fundamental right to life is no more than reasonably necessary to achieve the legitimate object of the various laws of Uganda, which prescribe death penalty. The laws only net the targeted members of the society. He relied on *Mbushu and Another v Republic* case 9 vol 1 of petitioners list of authorities.

[**28.**] According to Mr Wamambe, when interpreting article 24, the court should bear in mind article 126(1) which lays emphasis on the norms and aspirations of the people of Uganda. He pointed out that Justice Odoki's Constitutional Commission Report, 1992 and Professor Sempebwa's Constitutional Review Commission Report, 2003 both show that the majority of Ugandans still favour retention of death penalty. Because of this, death penalty is not yet viewed in Uganda as a cruel, inhuman and degrading punishment. He relied on the second limb of the decision in *Mbushu*'s case (*supra*) where the Tanzanian Court of Appeal observed that it was necessary to influence public opinion to abolish death penalty.

[**29.**] He contended that the various provisions of the laws of Uganda, which prescribe death penalty are not inconsistent with articles 24 and 44(a) of the Constitution. They are constitutional under articles 22(1), 28, 43 and 273 of the Constitution. He rejected

the argument that article 44 was a super article. In his view, this article is only super in respect of the rights mentioned therein. The right to life is not included in that article. The reason is that the framers did not view the right to life as non-derogable.

[**30.**] He stated that the South African case of *State v Makwanyane and Another* (1995) 1 LRC 269 was not relevant to the instant case because under the South African Constitution, the right to life is unqualified. Under the Uganda Constitution, the right to life is qualified. Death penalty is, therefore, validated as an exception to article 24. He also rejected the decision in the Tanzanian case of *Mbushu and Another* (*supra*) that death penalty is inherently cruel, inhuman and degrading punishment as not applicable to Uganda because the Tanzanian Constitution does not have the equivalent of our article 22(1).

[**31.**] According to him, the relevant authority is the Nigerian decision in *Kalu v State* (1998) 13 NIUL R54 because the constitutional provisions it considered are in *pari materia* with our articles 22(1) and 24 of the Constitution. He also relied on *Bacan Singh v State of Punjab* (1983) (2) SCR 583 where article 21 of the Indian Constitution which is similar to our article 22(1) was considered and the Supreme Court of India held that the right to life under the Indian Constitution was qualified. In those circumstances, the death penalty was constitutionally valid.

[**32.**] He invited us to hold that death penalty under Uganda Constitution does not constitute cruel, inhuman or degrading punishment within the context of article 24 and that the various laws of Uganda that prescribe the death penalty are not inconsistent with and do not contravene articles 24 and 44 or any other provisions of the constitution.

[**33.**] I must emphasise that from the submissions of counsel on both sides on these issues, the point for determination by this court is the constitutionality of death penalty in Uganda and the constitutionality of the various provisions of the laws of Uganda which prescribe death penalty. Determination of these questions hinges on the interpretation to be given to article 24. To better appreciate the arguments in this regard, it is necessary to reproduce the text of articles 22(1), 24 and 44 of the Constitution because they relate to the same issue. They are:

> 22(1) No person shall be deprived of life intentionally, except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.
>
> 24. No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.
>
> 44. Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms:

> (a) freedom from torture, cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to fair hearing; (d) the right to an order of *habeas corpus*.

[**34.**] Mr John Katende urged us to apply the 'ordinary plain meaning' principle of interpretation when interpreting article 24 because this was decided so by the Supreme Court of this country in *Abuki*'s case (*supra*). In that case, the passage cited was from the judgment of Oder JSC. They were considering article 24 of the Constitution and he said:

> It seems clear that the words italicised have to be read disjunctively … The treatment or punishment prescribed by article 24 of the Constitution are not defined therein. They must, therefore, be given their ordinary and plain meaning.

[**35.**] Clearly, according to the above passage from the decision of the Supreme Court, which is binding on this court, the words in article 24 are to be read disjunctively and given their ordinary and plain meaning. What did the learned Justice of the Supreme Court mean when he said 'given their ordinary and plain meaning'?

[**36.**] It was stated in *Jaga v Donges* 1950 USA 653, a case cited in *Makwanyane*'s case (*supra*) thus:

> The often repeated statement that words and expressions used in a statute must be interpreted according to their *ordinary meaning* is the statement that they must be interpreted in the light of their context (emphasis added).

[**37.**] It is clear from the above passage that what the learned Justice of the Supreme Court meant when he said that the words in article 24 be given their *ordinary and plain meaning* is that those words must be interpreted in the context of the Constitution in which they are used, but not in an abstract. In this regard, I agree, with respect, to Mr Wamambe, that article 24 must be construed in the context of the Constitution.

[**38.**] Article 22(1) recognises death penalty in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court in Uganda. This is an exception to the enjoyment of the right to life. To that extent, death penalty is constitutional. Article 24 outlaws any form of torture, cruel, inhuman or degrading treatment or punishment. The imposing question to answer is whether the framers of our Constitution intended to take away, by article 24, the right they recognised in article 22(1)?

[**39.**] A similar question had earlier been considered in other jurisdictions. Their approach to the question, though only persuasive, may offer us some guidance, more so, when these decisions are from the common law jurisdictions, like us. In *Makwanyane*'s case (*supra*) to which counsel for the petitioners referred us, the Constitutional Court of South Africa found death penalty to be inherently cruel,

inhuman or degrading and, therefore, unconstitutional. Under the Constitution of South Africa, the right to life is unqualified.

[**40.**] In *Mbushu*'s case (*supra*), which was also cited to us by counsel for the petitioners, the Court of Appeal of Tanzania, though it found that death penalty is inherently cruel, inhuman or degrading, declined to declare it unconstitutional. Their reason was that it was saved by article 30(2) of their Constitution. The right to life under the Tanzanian Constitution is, therefore, like under our Constitution, qualified.

[**41.**] In the *Catholic Commission for Justice and Peace v Attorney-General* (1993) 2 LRC 279, the Supreme Court of Zimbabwe held death penalty as well as the mode of carrying it out by hanging to be constitutional. The right to life under the Zimbabwean Constitution is also qualified.

[**42.**] The Nigerian case of *Kalu v State* (1998) 13 NWR 531 is of particular interest to me here because the provisions of the Nigerian Constitution considered therein by their Supreme Court are in *pari materia* with our articles 22(1) and 24 now in question. Section [33(1)] of the Nigerian Constitution provides:

> Every person has a right to life and no one shall be deprived intentionally of his life, save in execution of a sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

That provision is in *pari materia* with our article 22(1) which provides that:

> No person shall be deprived of life intentionally, except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

[**43.**] Section [34(1)] of the Nigerian Constitution provides thus: 'Every individual is entitled to respect for dignity of his person, and accordingly: (a) no person shall be subjected to torture or to inhuman or degrading treatment'. Section [34(1)(a)] of the Nigeria Constitution is in *pari materia* with our article 24 which provides thus: 'No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment'.

[**44.**] It is clear from the above provisions that the right to life under the Nigerian Constitution, like under our own Constitution, is qualified. The Supreme Court of Nigeria had no difficulty finding that death penalty which is expressly recognised in section [33(1)] of their Constitution is constitutional. If the legislature had intended to take away by section [34(1)(a)] the right it recognised in section [33(1)] of the Constitution, it would have done so by clear terms and not by implication. The Supreme Court of Nigeria followed the Jamaican decisions in *Noel Riley and others v Attorney-General for Jamaica*

*and Another* (1983) 1 AC 719 (PC) and *Earl Pratt and Another v Attorne-General for Jamaica and Another* (1994) 2 AC (PC).

[**45.**] In those cases, death penalty was held to be constitutional because the right to life under the Jamaican Constitution is qualified.

[**46.**] I endorse the approach adopted in *Kalu's* case. I am, of course, aware of the strong criticism made by Mr John Katende of the manner that case was handled.

[**47.**] His reasons were that in *Kalu*: (1) the judgment was carelessly written; (2) decided when the judiciary in Nigeria was not independent; (3) it did not apply ordinary and plain meaning principle of interpretation; (4) Nigeria Constitution does not have the equivalent of our article 44 and (5) it cited and discussed an American case as a Hungarian case.

[**48.**] With respect, I am not persuaded by those reasons. It was not shown how the manner of writing the judgment affected the *ratio decidendi* of the case. No iota of evidence was led to show that when the case was decided, the judiciary in Nigeria was not independent. It is not shown that the decision is wrong in law. The case was decided on the basis that under Nigerian Constitution, the right to life is qualified.

[**49.**] In our case, article 22(1) recognises death penalty as an exception to the enjoyment of the right to life. There is a well known rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. It is important to note that the right to life is not included in article 44 on the list of the non derogable rights. Accordingly, articles 24 and 44 could not have been intended to apply to death penalty permitted in article 22(1). When articles 24 and 44 were being enacted, article 22 was still fresh in the mind of the framers. If they (framers of our Constitution) had wanted to take away, by article 24, the rights they recognised in article 22(1), they would have done so in clear terms, not by implication. Imposition of death penalty therefore, constitutes no cruel, inhuman or degrading punishment. The various provisions of the laws of Uganda which prescribe death sentence are, therefore, not inconsistent with or in contravention of articles 24 and 44 or any provisions of the Constitution.

[**50.**] In the result, I answer issues 1 and 2 above in the negative.

[**51.**] This now leads me to issue 3 which is couched as follows:

> Whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44(c) or any other provisions of the Constitution.

[**52.**] This issue is argued in alternative to issues 1 and 2 above. Professor Sempebwa who argued this issue for the petitioners contended that if the court found issues 1 and 2 in the negative, it

should find issue 3 in the affirmative. In his view, the various laws of Uganda which prescribe mandatory sentence are inconsistent with or contravene articles 21, 22(1), 24, 28, 44(c) and 126(1) of the Constitution. His reasons are that:

1. Mandatory sentence gives different treatment to a convict under that section from that given to a convict under a non-mandatory section in contravention of article 21 which guarantees equality before and under the law.
2. It denies a convict under mandatory sentence a fair hearing on sentence in contravention of articles 22(1), 28(1) and 44(c).
3. It violates the principle of separation of powers provided in article 126(1).

[**53.**] He pointed out that the right to a fair hearing contained in articles 22(1) and 28(1) and entrenched in article 44(c) would require that:

(a) A convict be accorded opportunity to present to court any mitigating circumstances and any special facts relating to the offence when it was committed, to distinguish it from the other offences in the same category in order to persuade the court in those circumstances that death penalty is not the appropriate sentence in his case;
(b) The convict would exercise a right of appeal against sentence only;
(c) The trial court would exercise discretion to determine the appropriate sentence in each case;
(d) The appellate court would also exercise discretion to confirm or not to confirm the sentence.

[**54.**] He submitted that all the above are denied the petitioners convicted under a mandatory sentence. They are not given opportunity to show cause why death sentence is not the appropriate sentence in their individual cases. These denials render the hearing on sentence unfair and unconstitutional as it contravenes articles 22(1), 28(1) and 44(c). To emphasise this point, Professor Sempabwa cited the Indian case of *Mithu v State of Punjab*. (1983 Sol Case 26).

[**55.**] He further submitted that the trial court is also not given the chance under a mandatory death sentence provision, to exercise its discretion to determine an exact appropriate sentence based on the circumstances of each case and each offender. Even the highest appellate court, in case of those petitioners who have exhausted their right of appeal, did not have the chance to exercise its discretion whether or not to confirm the sentence. It will not also have that chance in the case of those petitioners who are yet to exhaust their right of appeal. In effect, there is no rational decision on sentence under a mandatory sentence provision. He submitted that failure to give the court opportunity to consider the circumstances of each case

and offender to determine the appropriate sentence, but merely to impose a sentence on a class of crime renders the hearing on sentence unfair and the imposition of sentence arbitrary. He cited the case of *Mithu v State of Punjab* (*supra*), *Reyes v The Queen* (2002) 2 AC 235 (case 15 vol 2).

[**56.**] He stated that the principle of separation of powers allocates to the legislature the duty to define offences and prescribe possible sentences for each offence. The determination of the exact appropriate sentence and imposition thereof is the duty of the judiciary under article 126(1) of our Constitution. He submitted that a statute which prescribes a mandatory sentence is an intrusion into the realm of the judiciary and a violation of the principle of separation power. It is thus unconstitutional. To emphasise this point, learned counsel cited a number of decisions from other jurisdictions:

1. *Mithu v State of Punjab* (*supra*)
2. *R v Hugh* (17 vol 2)
3. *Downer Tracey v Jamaica* (15 vol 2)
4. *Robert v Luciano* (20 vol 2)
5. *Lockie v State of Ohio* (21 vol 2)

[**57.**] He stated that the sum effect of these cases is that mandatory sentence of death constitutes cruel, inhuman and degrading punishment. It does not allow consideration by the court of the circumstances of the offender and of the offence. It denies the convict a fair hearing on sentence, and that such a sentence is not confirmed by the highest appellate court as required by article 22(1). It also intrudes into the realm of the judiciary. He urged us to declare all those statutory provisions which prescribe mandatory death sentence as unconstitutional.

[**58.**] For the respondent, Mr Wamambe did not agree with the above submissions. He contended that mandatory death sentence is just like any other sentence under the laws of Uganda. The fact that they are mandatory does not make them unconstitutional. They are not inconsistent with articles 21, 22(1), 24, 28, 44(c) as submitted by counsel for the petitioners. He pointed out that clause 5 of article 21 is very clear on this point. It provides that nothing shall be taken to be inconsistent with article 21 which is allowed to be done under any provision of this Constitution. Since death penalty is allowed under article 22(1), the various laws of Uganda that prescribe mandatory death penalty upon conviction are not inconsistent with article 21. He also referred us to clause 4(b) and (c) of article 21 which empowers Parliament to make laws that are necessary for providing for things required or authorised to be made under this Constitution, or to provide for any matter acceptable and demonstrably justified in a free and democratic society.

[**59.**] He submitted that mandatory death sentence provision is authorised under article 22(1). Therefore, the various laws of Uganda that prescribe mandatory death sentence upon conviction are not inconsistent with article 21 or any other provisions of the Constitution.

[**60.**] He contended in the alternative that mandatory death sentence is acceptable and demonstrably justified in Uganda within the context of articles 21(4)(c) and 43 because the majority of Ugandans approve of it. They view it as a fair penalty for heinous crimes. They accept it as a way of demonstrating their disapproval of such crimes. If the majority of Ugandans want violent crimes to be punished by death without any excuse so be it. It is consistent with article 21(4)(c). Therefore, prescribing mandatory death sentence is not inconsistent with article 21.

## Fair hearing

[**61.**] Mr Wamambe contended that the elements of a fair hearing in Uganda are exhaustively listed in article 28. Once these are complied with, then a fair hearing requirement will have been observed. Our criminal system observes them. Article 28(12) empowers Parliament to define offences and prescribe sentences for them. It does not prohibit Parliament from prescribing mandatory death sentence.

[**62.**] The requirement of confirmation of conviction and sentence under article 22(1) shows that both conviction and sentence are opened to automatic review on appeal. The conviction and sentence are inseparable. It is unfortunate to argue that mandatory sentences deprive courts of their discretion to determine appropriate sentences and that appellate courts merely rubber stamp the decision of the trial courts on sentences. Courts in Uganda have absolute and unqualified discretion to decide on:

1. Whether or not a case has been proved to the required standard;
2. To take into account all available defences whether raised or not by the accused;
3. To acquit or convict on lesser offence where the evidence so proves and
4. To call upon a person found guilty to show cause why the sentence should not be passed on him or her according to law. (Section 98 of the Trial on Indictments Act Cap 23).

[**63.**] He likened criminal system in Uganda to a pyramid. Many are charged, but few are convicted and sentenced. Still further, very few sentences imposed are confirmed by the highest appellate court. All these, he submitted, are a result of a fair hearing as stated in Olubu's affidavit.

[**64.**] I have already found on issues 1 and 2 above that death penalty is recognised under our Constitution in article 22(1) as an exception to the enjoyment of the right to life and as an exception to article 24. It is permissible in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. The criteria for death sentence to be constitutionally permissible under this Constitution are therefore, that:

(a) The sentence must be passed in a fair trial;
(b) in respect of offence under the laws of Uganda and
(c) the conviction and sentence have been confirmed by the highest appellate court.

[**65.**] The term 'fair trial or hearing' has not been defined in our Constitution. Mr Wamambe submitted that the elements of a fair hearing have been exhaustively listed in article 28 of the Constitution and that once those elements are complied with, then for Uganda's purpose, the requirement of a fair hearing will have been observed. Article 28 provides thus:

> (1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.
>
> (2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society
>
> (3) Every person who is charged with a criminal offence shall: (a) be presumed to be innocent until proved guilty or until that person has pleaded guilty; (b) be informed immediately, in a language that the person understands of the nature of the offence; (c) be given adequate time and facilities for the preparation of his or her defence; (d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice; (e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to a legal representation at the expense of the state; (f) be afforded, without payment by that person, the assistance of an interpreter if that person can not understand the language used at the trial; (g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.
>
> (4) Nothing done under the authority of any law shall be held to be inconsistent with: (a) paragraph (a) of clause (3) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts; (b) paragraph (g) of clause 3 of this article, to the extent that the law imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused are to be paid their expenses out of public funds.
>
> (5) Except with his or her consent, the trial of any persons shall not take place in the absence of that person, unless that person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person.

(6) A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.

(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

(8) No penalty shall be imposed for a criminal offence that is more severe in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

(9) A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence, shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(10) No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

(11) Where a person is being tried for a criminal offence, neither that person, nor the spouse of that person shall be compelled to give evidence against that person.

(12) Except for contempt of court, no person shall be convicted of a criminal offence, unless the offence is defined and the penalty for it prescribed by law.

[**66.**] It is clear from the above that article 28 has not exhaustively listed the elements of a fair hearing. Notably absent from that list is the right of the convict to be heard in mitigation before sentence is passed on him or her. Conspicuously absent from that article is also the right of the court to make inquiries to inform itself before passing the sentence, to determine the appropriateness of the sentence to pass.

[**67.**] In other jurisdictions, mandatory death sentence has been held to be unconstitutional because:

1. It does not provide a fair hearing because it does not permit the convict to be heard in mitigation before sentence.
2. It violates the principle of separation of power, as it does not give the court opportunity to exercise its discretion to determine the appropriateness of the sentence to pass. The court passes the sentence because the law compels it to do so.

[**68.**] *Mithu v State of Punjab* (*supra*) is a case in point. In that case, the constitutionality of section 303 of the Penal Code of India was challenged. It was alleged that the section was inconsistent with article 21 of the Constitution of India which provides: 'No person shall be deprived of his life or personal liberty, except according to fair, just and reasonable procedure established by valid law'.

[**69.**] The said section 303 prescribed mandatory death penalty for murder committed by a person serving a life sentence. It was argued for the challenger that section 303 was wholly unreasonable and arbitrary and thereby it violates article 21. The procedure by which

section 303 authorises the deprivation of life was unfair, unjust and accordingly, the section was unconstitutional.

[**70.**] Accepting the above argument, the Supreme Court of India observed thus: 'it is a travesty of justice not only to sentence a person to death, but to tell him that he shall not be heard why he should not be sentenced to death'.

[**71.**] The Supreme Court further said:

> If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels court to impose that sentence.

[**72.**] The Supreme Court struck down the said section 303 of the Indian Penal Code as being unconstitutional for being unfair and unjust because:

1. It did not permit the life-convict to be heard in mitigation before sentence was passed on him.
2. It also did not give the court opportunity to exercise its discretion to determine the appropriateness of the sentence it passed. The court passed the sentence of death because the law compels it to impose it.
3. Denying the court to exercise its judicial discretion to determine the appropriateness of the sentence was an intrusion into the realm of the judiciary and thus, a violation of the principle of separation of powers.

[**73.**] In [*Reyes v The Queen*], the Board was asked to consider the constitutionality of mandatory sentence of death for murder by shooting. The Board was satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction for murder by shooting without affording him opportunity before sentence, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate, was to treat the defendant as no human being would be treated. It was unconstitutional.

[**74.**] In Uganda, section 98 of the Trial on Indictments Act provides the procedure to be followed by court after entering a conviction and before sentence. The procedure permits the court to make inquiries before passing sentence to inform itself on the appropriateness of the sentence to pass. The section provides, as far as is relevant, as follows:

> The court, before passing any sentence *other than a sentence of death*, may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed and may inquire into the character and antecedents of the accused person ... (emphasis added).

[**75.**] That provision makes a distinction between a person convicted under a mandatory sentence of death provision and those convicted under other provisions. It denies the court the chance to inform itself

as to the appropriateness of the death sentence. In other words, a convict of an offence under a mandatory sentence of death provision is told that he or she can not be heard on why in all the circumstances of his or her case, death sentence should not be imposed on him or her. I can think of no possible rationale at all for that distinction yet, a person facing death sentence should be the most deserving to be heard in mitigation.

[**76.**] Mr Wamambe submitted that in view of article 126, if the majority of the people of Uganda want violent crimes to be punished by death without any excuse so be it. While I agree with Mr Wamembe that the norms and aspirations of the people must be taken into consideration when interpreting this Constitution, the language and spirit of the Constitution must not thereby be compromised. Article 22(1) permits death sentence in execution of a sentence passed in a fair trial. That is clear. A fair hearing must basically mean hearing both sides. Refusing or denying a convict facing death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. It is neither consistent with the principle of equality before and under the law guaranteed in article 21, nor with the right to a fair hearing guaranteed in articles 22(1), 28 and entrenched in article 44(c).

[**77.**] That procedure which denies the court opportunity to inform itself on any mitigating factors regarding sentence of death, deprives the court the chance to exercise its discretion to determine the appropriateness of the sentence. It compels the court to impose the sentence of death merely because the law directs it to do so. This is an intrusion by the legislature into the realm of the judiciary. Our Constitution has spelt out the powers of the three organs of the state; namely, the executive, the legislature and the judiciary. It gives the judiciary the power to adjudicate. Therefore, for the legislature to define the offence and prescribe the *only* sentence which the court must impose on conviction without affording the court opportunity to exercise it discretion to determine the appropriateness of the sentence, is clearly a violation of the principle of separation of power. A similar conclusion was arrived at by the Supreme Court of India in *Mithu v State of Punjab* (*supra*).

[**78.**] Article 22(1) requires that both conviction and sentence of death be confirmed by the highest appellate court. Mr Wamambe submitted that conviction and sentence under a mandatory sentence of death provision are inseparable. Once the conviction is confirmed, the confirmation of sentence follows automatically. With respect, I am not persuaded by that argument. A generous purposive interpretation of article 22(1) does not bring out that meaning. Instead, it conveys the meaning that conviction and sentence be confirmed by the highest appellate court. I am inclined to agree with

Professor Sempebwa that this confirmation would require exercise of discretion by the appellate court on whether or not to confirm the sentence. This would be done upon consideration of the circumstances of the offence and of the offender, since the circumstances of murders or aggravated robbery and of their offenders are not exactly the same. Those differences determine the appropriateness of the sentence to be imposed in each case.

[**79.**] As pointed out above, this problem is caused by the procedure provided in section 98. It does not permit the convict under a mandatory sentence of death provision to be heard in mitigation before he or she is sentenced. The court is also not permitted to inform itself on the appropriateness of the sentence to pass in the case of mandatory death sentence. The sentence is not strictly confirmed within the spirit of article 22(1).

[**80.**] Section 132(1)(b) of the Trial on Indictments (Cap 23) provides:

> Subject to this section ... (b) an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law ...

[**81.**] The above provision denies a person who is convicted and sentenced under a provision where sentence is fixed by law to appeal against sentence only. Yet article 21(1) of the Constitution guarantees equal protection before and under the law. There is no justifiable reason for denying a convict who is sentenced to a sentence fixed by law to appeal against sentence only, for example, death sentence for murder or aggravated robbery to appeal against sentence only but allow others whose sentences are not fixed by law. This, in my view, is repugnant to the principle of equality before the law and fair trial.

[**82.**] In the result, I find that the various provisions of the laws of Uganda which prescribe mandatory death sentence are unconstitutional. They are inconsistent with articles 21, 22(1), 24, 28, 44(a) 44(c) of the Constitution.

[**83.**] I now turn to issue 4 which reads thus:

> Whether section 99(1) of the Trial on Indictments Act which prescribes hanging as the legal method of implementing the death penalty is inconsistent with and in contravention of articles 24, 44 and any other provisions of the Constitution.

[**84.**] Mr Sim Katende argued this issue for the petitioners. He stated that this issue too was being argued in alternative to issues 1 and 2. He contended that the manner of carrying out death penalty by hanging was inconsistent with the Constitution. The law that prescribes the mode of carrying out death sentence by hanging was inconsistent with articles 24 and 44(a). The method of execution by hanging is cruel, inhuman and degrading and, therefore, inconsistent with articles 24 and 44(a). These two articles, he stated, read together, bar cruel, inhuman and degrading punishment or

treatment. He adopted the argument made for the petitioners on issues 1 and 2 about the definition of the terms cruel, inhuman and degrading and approach to their interpretation. That the words in article 24 be read distinctively and given their ordinary plain meaning as was decided in *Abuki*'s case (*supra*). He cited *Republic v Mbushu & Another* (1994) 2 LRC 335; *Mbushu & Another v Republic* (1995) 1 LRC 216; *State v Makwanyane* (1995) 1 LRC 269; *Campell v Wood* 18 F 3rd 662 US 9th Circuit Court of Appeals to show that execution by hanging had been held in other jurisdictions to be inherently cruel, inhuman and degrading. No evidence had been adduced to prove the same.

[**85.**] Learned counsel pointed out that in the instant case, the petitioners have adduced several affidavits evidence to show that hanging is cruel, He cited the affidavits of Anthony Okwanga, affidavit 2 (vol 2); of Ben Ogwang, affidavit 4 (vol 2) paragraph 7; of Mugerwa Nyansio, affidavit 6 (vol 2); of Edward Mary Mpagi, affidavit 5 (vol 2); of Tom Balimbya, affidavit 14 (vol 3); of Vincent Oluka, affidavit 5 (vol 2) and of David Nsalasata, affidavit 9 (vol 2) to support the cruelty of death by hanging.

[**86.**] He also cited the affidavits of Dr Albert Hunt, affidavit 5 (vol 10) and of Dr Herold Hilman, affidavit 4 (vol 10) to emphasise that execution by hanging is cruel, inhuman and degrading. These last two deponents are medical doctors. Dr Hillman had been a Director of Unity Laboratory of Applied Neurobiology USA, while Dr Hunt had practised as a Forensic Pathologist in the UK for 45 years. Their opinion is that death by hanging is cruel, inhuman and degrading as by that method death was not always instantaneous. It was long, unnecessarily torturous and painful. In the process of execution by hanging, the victim often defecates on himself and his eyes popes out of the sockets. At times, the condemned is decapitated in the process when the machine goes bad.

[**87.**] Learned counsel prayed that in view of the cases cited above and the evidence adduced, court should find that section 99(1) of the Trial on Indictments Act is inconsistent with articles 24 and 44(c) and should, therefore, be declared unconstitutional.

[**88.**] Mr Chibita submitted for the respondent on this issue. He contended that since death penalty was saved by article 22(1) and is, therefore, constitutional, it was necessary to provide for the mode of implementing it. Section 99(1), therefore, provided the needed mode. It is also constitutional. The legislature must have, in its wisdom, found this method to be the best. He denied that hanging was done in public as suggested in Anthony Okwanga's affidavit, nor was it opened to other prisoners. He stated that if Okwanga ever witnessed any hanging, it was when he was a prison officer, not when he is now on the death row.

[**89.**] He discarded *Abuki*'s case (*supra*) as well as *Kyamanywa*'s case (*supra*) both as not relevant because they materially differ from the instant case. In both cases, the court was not interpreting one provision of the Constitution against another as it is in the instant case, nor was it interpreting it in light of the Trial on Indictments Act.

[**90.**] He also discarded the decisions from foreign jurisdictions cited to us as being irrelevant. For *Mbushu*'s case (*supra*) he stated that the Tanzanian Constitution does not contain an equivalent of our article 126(1). He discarded the *ratio decidendi* in *Mukwanyane*'s case because the right to life under the Constitution of South Africa where the case was decided, is different from the one under our own Constitution. In South Africa, the right to life is unqualified, but in Uganda, the right to life is qualified. He prayed that this issue be answered in the negative.

[**91.**] The issue raised here is whether the method of execution by hanging as prescribed by section 99(1) of the Trial on Indictments Act constitutes a cruel, inhuman or degrading punishment and, therefore, violates our Constitution. The starting point is that I have already found on issues 1 and 2 above that death penalty is recognised under article 22(1) of our Constitution as an exception to the right to life. I also found that in a proper interpretation, articles 24 and 44(a) were not intended to apply to death penalty permitted under article 22(1).

[**92.**] In other jurisdictions, like Nigeria and Jamaica, where the right to life under their Constitutions was, like ours, qualified, hanging as a method of execution was held to be constitutional. A close study of the Jamaican case of *Earl Pratt and Another v Attorney-General for Jamaica and Another* (*supra*) shows that sections 14(1) and 17(1) of the Constitution of Jamaica which the court considered in the above case are in *pari materia* with our articles 22(1) and 24 respectively. That made the right to life under the two Constitutions the same – both qualified. Our Constitution, however, does not contain the equivalent of section 17(2) of the Jamaican Constitution which provides thus:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

[**93.**] Lord Griffith, who delivered the judgment of the Privy Council held in the above case that hanging which was a lawful method of execution in Jamaica before independence was saved by section 17(2). It could not, therefore, be held to be an inhuman mode of punishment for murder.

[**94.**] Notwithstanding the absence in our Constitution of an article equivalent to section 17(2) of the Jamaican Constitution, the right to life under the constitutions of both countries is qualified. Execution by hanging may be cruel, but I have found that articles 24 and 44(a)

were not intended to apply to death sentence permitted in article 22(1). Therefore, implementing or carrying out death penalty by hanging can not be held to be cruel, inhuman and degrading. Articles 24 and 44(a) do not apply it. Punishment by its nature must inflict some pain and unpleasantness, physically or mentally to achieve its objective. Section 99(1) of the Trial on Indictments Act is therefore, constitutional as it operationalises article 22(1). It is not inconsistent with articles 24 and 44(a). In the result, issue 4 would be answered in the negative.

[**95.**] The next to consider is issue 5 which is couched as follows:

> Whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with articles 24, 44 or any other provisions of the Constitution.

[**96.**] Professor Sempebwa who argued this issue on behalf of the petitioners stated that the issue was argued in a further alternative to issues 1 and 2. He contended that the petitioners' long delay on the death row rendered carrying out of the otherwise lawful sentence a cruel, inhuman and degrading punishment. He pointed out that the evidence on record, affidavit of Sam Serwanga vol 4, annexure B, shows that the longest on the death row, Ben Ogwang, at the time of filing this petition on 4 September 2003, had been on there for 20 years since sentencing. The average length on the death row in Uganda is between five and six years.

[**97.**] He stated that the aspect of evidence adduced paints grim picture of the conditions in the death row. They are characterised by anguished expectation of death at any time at the hand of the state. That reduces the petitioners into 'living dead' suffering from death row syndrome. They go through very harrowing experience whenever they see their mates separated from them and later they received chits from their separated mates as their will.

[**98.**] Executions are carried out early morning and within the hearing of the other condemned inmates. This adds to the anguish. For these factual situations, Professor Sempebwa relied on the evidence of Ben Ogwang, affidavit 3 vol 2 and of Mpagi, affidavit 4 vol 2.

[**99.**] Learned counsel submitted that even if the court were to find that death sentence was recognised under article 22(1) and therefore, lawful, the petitioners still had a right not to be subjected to cruel, inhuman or degrading treatment resulting from death row syndrome. He pointed out that death row phenomenon was recognised worldwide. Even our own Supreme Court had recognised it in *Abuki*'s case (*supra*). He relied on the case of the *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* (1993) 2 LRC 279 where the Supreme Court of Zimbabwe agreed that the petitioners' five years delay on the death row, in demeaning physical conditions, since the pronouncement of their sentences, went beyond what was constitutionally permissible. The

delay caused prolonged mental suffering and was inordinate when compared with the average length of delay in carrying out execution in Zimbabwe. The Supreme Court accordingly, set aside the petitioners' death sentences and substituted them with a sentence of life imprisonment.

[**100.**] Learned counsel also cited *Earl Pratt and Morgan v Attorney-General of Jamaica and Others* (case 27 vol 3) 210 of 1986 and 225 of 1987. In that case, the Privy Council stated that for Jamaica where there is only one appeal step, a protracted appeal process beyond two years was tending towards unreasonable delay. If there was inordinate delay in executing the sentence of death, the condemned prisoners, had the right to come to court to examine whether, owing to the delay, the sentence of death should be carried out.

[**101.**] The Privy Council decided that the death sentence of the appellants should not be carried out because they had delayed on the death row for a long time suffering from death row syndrome.

[**102.**] Relying on the above cases, learned counsel urged us to find that those petitioners who have been on the death row for five years and above since the pronouncement of their respective sentences of death have waited too long. The long delay coupled with the anguish had rendered the execution of those petitioners a cruel, inhuman and degrading punishment.

[**103.**] Mr Wamambe did not see anything in articles 24 and 44(a) of our Constitution which outlaws delay on the death row for a long time. He submitted that no time limit had been prescribed either in the Constitution or in any statute within which a death sentence has to be executed. The term 'a very long time' was subjective.

[**104.**] According to him, article 121 sets out an Advisory Committee on Prerogative of Mercy to advise the President on when to grant a pardon etc or to remit part of the sentence imposed. This article also does not prescribe or set a time frame within which to exercise those powers. Had the framers of the Constitution wanted, they would have expressly set the time frame within which a sentence of death should be executed: Courts have no powers to legislate on time limit. The President must be given a chance to exercise his discretion unhindered.

[**105.**] On the anguished expectation of death by the petitioners all the time, Mr Wamambe submitted that all of us must think about death, not only the petitioners. Just because the petitioners think about death every day should not lead us to think that death is cruel, inhuman or degrading. The death sentence imposed on the petitioners was after a fair trial and it is lawful. The petitioners should be thankful to live a few days longer.

[**106.**] He pointed out that there are a number of affidavits on record which show that those on the death row make peace with their

creators. That is the aspiration of many, the world over. Yet this opportunity is never availed to most victims of murders.

[**107.**] He stated that the *Catholic Commission for Justice and Peace in Zimbabwe* (*supra*) and *Pratt and Morgan* (*supra*) were not relevant authorities. They are distinguishable from the instant case on their facts. In those cases warrants for the petitioners' execution had already been issued, but in the instant case, no such a warrant has been issued yet. The petition is, therefore, premature. He stated that the petitioners should have waited until their warrants for execution were signed to petition. According to him, the affidavit of Anthony Okwonga shows that once death warrant was signed, the condemned prisoner was given one week within which to prepare himself and contact his relatives. Mr Wamambe submitted that, that one week's, period, would give the condemned prisoner ample time to petition the court.

[**108.**] He invited us to decline to rule on this issue as the Supreme Court of Nigeria did in *Kalu*'s case (*supra*).

[**109.**] The question that arises from the arguments of counsel of both parties is — do condemned prisoners have any fundamental rights and freedoms left to be protected before they are executed? This question was answered in the *Catholic Commission for Justice and Peace in Zimbabwe* (*supra*) in this way:

> Prisoners did not lose all their constitutional rights upon conviction, only those rights inevitably removed from them by law either expressly or by implication. Accordingly a prisoner who was sentenced to death still enjoyed the protection of section 15(1) of the Constitution of Zimbabwe in respect of his treatment during confinement.

[**110.**] I respectfully agree with the above. Section 15(1) of the Zimbabwean Constitution is in *pari materia* with our article 24. Condemned prisoners, therefore, did not lose all their constitutional rights and freedoms, except those rights and freedoms that have inevitably been removed from them by law, either expressly or by necessary implication. I have stated earlier in this judgment that death sentence is recognised under article 22(1) of the Constitution of Uganda and, therefore, constitutional. Nevertheless, the condemned prisoners are still entitled to the protection of articles 24 and 44(a) of the Constitution in respect of their treatment while they are in confinement before execution. They are not to be subjected to cruel, inhuman or degrading treatment.

[**111.**] The burden is of course, on the petitioners to prove that their fundamental rights and freedoms have been violated. The principle of interpretation of constitutional provisions relating to fundamental rights and freedoms would apply. Such provisions are interpreted liberally.

[**112.**]It was submitted for the petitioners that the intervening long delay on the death row, coupled with the harsh and difficult

conditions in the death row, sets in what is known as 'death row phenomenon' which renders the carrying out of the otherwise lawful sentence of death a cruel, inhuman or degrading punishment prohibited by articles 24 and 44(a). The question raised here is, what is the effect of delay on the death row on the condemned prisoners?

[**113.**] In other jurisdictions, for example, Zimbabwe in the *Catholic Commissioner for Justice and Peace in Zimbabwe* (*supra*), and in Jamaica in *Earl Pratt and Morgan* (*supra*), that question was answered that prolonged delay on the death row had adverse effect on the condemned prisoners' physical and mental state as a result of what is known as 'death row syndrome'. Death row syndrome amounts to a cruel, inhuman or degrading treatment. Death row syndrome arises from the harsh conditions and anguish in the death row. It is recognised worldwide. Uganda as a member of the global village can not shut its eyes to the fact of death row phenomenon.

[**114.**] Ben Ogwang, the third petitioner herein, deponed that he had lived in the condemned section of Luzira Prison since 1983. He has been transferred to Kirinya prison — Jinja in April 2003. He still remains the longest surviving prisoner on the death row having lived there for 20 years. He deponed of the conditions in the condemned section (death row) of Luzira Prison, as follows:

> The living conditions are extremely depressing. When I was first brought to the condemned section, I and my fellow death row inmates were only allowed 48 minutes a day out of our cells. 24 minutes of this in the morning and the remainder in the evening. This time was normally used for us to empty and clean our chamber pots/buckets. I and my fellow death row inmates spent over 23 hours a day in our cells. In 1991, after Mr Joseph Etima became Commissioner of Prisons, the period we were allowed out of our cells was increased and inmates in Luzira are now confined for approximately only 16-18 hours each day in our cells. Inmates in Kirinya Jinja Prison are only allowed two hours of exercise each day, one hour in the morning and one hour in the evening.
>
> The lights in the cells are left on all nights, making it difficult for us to sleep properly. This normally leaves us in a permanent state of tiredness, lethargy leading to lack of concentration, insomnia and virtually makes us walking zombies.
>
> The cells are very cold at night. There are no provisions to keep out mosquitoes and I and my fellow death row inmates very often suffer from malaria, from which some die.
>
> I and my fellow death row inmates do not have night clothes. Since in most cases I and my fellow death row inmates only have one set of sometimes threadbare and tattered uniform, most of us are forced to sleep naked. This compounds our degradation and humiliation.
>
> When I and my fellow death row inmates lie in our overcrowded cells, there is barely enough room to move around. This makes it easy for contagious diseases like tuberculosis, common cough, colds and other infections in prison to become chronic epidemics.
>
> Sometimes, when prisoners on death row get sick, the hospital staff are reluctant to give us proper medicines and medical attention. The medical staff sometimes tell us that since I and my fellow death row inmates are going to be hanged anyway, they do not need to waste the scarce drugs on us. This increases the depression among prisoners on death row.

The cells in Luzira have no toilet facilities. Because I and my fellow death row inmates spend most of the day inside these cells, our urination and defecation happen in open chamber pots. It is very degrading to human dignity for a human being to be forced to defecate or urinate in the presence of others. This is even more humiliating when one is suffering from diarrhea and has to use the chamber pots frequently.

The resentment of our cellmates when they see us urinating and defecating in the chamber pots, frequently makes our living conditions intolerable, especially if the pots accidentally spill or fill up. There is no toilet paper provided by the prison authorities.

In addition to the indignity of using the chamber pots with others watching, is the additional indignity of having to watch others defecate or urinate in your presence. This is extremely revolting and shocking to ones senses, and difficult to explain to people who do not live with it every day of their lives. Sometimes, this takes place when I and my fellow death row inmates are eating. Then I and my fellow death row inmates have to sleep with an open bucket full of faeces and urine next to us. This is extremely inhuman and degrading treatment. Human beings were not meant to be confined in such circumstances.

The meals are often inadequate and poorly prepared. Many prisoners' stomach can not cope with them. The timing of meals is extremely erratic. Sometimes the last meals of the day is served in the morning hours and I and my fellow death row inmates have to cope until the next morning. The quality and quantity of the meals is extremely bad. I and my fellow death row inmates normally have one lump or *posho* and a few beans a day, sometimes served together, and at other times served separately in an erratic, random order.

Life in the condemned section revolves around talking about our impending fate. The gallows are never far from our minds, and horrific stories around in both the prison community and from the guards about previous executions. This adds to the terror I and my fellow death row inmates are forced to confront on a daily basis.

l and my fellow death row inmates are under surveillance at all times and I and my fellow death row inmates are subject to impromptu spot checks.

While I have been in the condemned section, very many inmates have died of diseases related to physical and metal anguish, physical hardship, poor feeding, depression and many other causes. Very many death row prisoners have died within the condemned section in such circumstances, before their executions were carried out. A list of some of those inmates who died is hereto attached and marked as annexure 'A'.

The presence of the gallows in the condemned section serves as a constant reminder that I and my fellow death row inmates are in prison to be executed.

I have been an inmate of the condemned section of Luzira prison for the past 20 years and hence, I was present when the 1989, 1991, 1993, 1996 and 1999 executions were respectively carried out.

[**115.**] He deponed to the conditions in the condemned prison a week before and immediately after the execution process as follows:

When there is going to be an execution, I and my fellow death row inmates suffer a living hell on earth. I can describe the circumstances as best as I can below:

While I and my fellow death row inmates are on death row, I and my fellow death row inmates are never informed of when an execution is due to take place or who is going to be executed. At all times, I and my fellow death row inmates, therefore, do not know when they are coming

for us. This practice of being left in suspense adds to our constant daily fear, mental anguish and torture.

In the past 20 years, every time an execution was going to take place, I and my death row inmates were left guessing and worried. The signs that indicate to us that an execution is going to take place are any unusual activity. For example, if I and my fellow death row inmates are locked in our cells beyond the usual time, or every time new guards or strange faces emerge, I and my fellow death row inmates immediately break in to a panic thinking that an execution is going to take place. There is no other way I and my fellow death row inmates can know when an execution is going to take place or who is to be executed. So I and my fellow death row inmates live in constant fear to any unusual activity. This means that the slightest thing that is different from our normal routine causes us all to become sick and scared. I and my fellow death row inmates face this for several years. This state of fear is based on the condemned prisoners experience just before each previous execution.

Sometimes, while I and my fellow death row inmates are outside exercising, the guards suddenly call for lock up before the usual time. After I and my fellow death row inmates have been locked up in our cells, the guards come and call out names at random. This is an extremely terrifying event, and a person needs to live it to believe it. At times, I and my fellow death row inmates are all very scared and are praying hard that they do not call our names. If a guard comes and stops outside a condemned prisoner's cell door, the said prisoner usually immediately feels his bowels opening up and ends up soiling himself. In such circumstance, the prisoner is so scared that they have come to arrest him for execution. This experience is like going through death yourself. I have endured this excruciating experience very many times and I still have recurring nightmares about it.

Those who are marked for death and called out of their cells in the above circumstances are literally dragged out of their cells. Many are taken while they are wailing, kicking and screaming and this adds to our total fear, shock and horror. They are hand cuffed and legs irons are put on their legs. At that time I and my fellow death row inmates see them for the last time and I and my fellow death row inmates know that they are being led to their death. This is very tormenting on our souls as I and my death row inmates watch in horrific spectre. They are then led upstairs to the death chambers. I and my fellow death row inmates then hear them crying, wailing and singing hymns. Immediately, a funeral atmosphere engulfs in the entire condemned section. Because these are the only people who I and my fellow death row inmates live with and interact with in our lives for several years, when they are called to their death, it is as though they are going to kill our nearest and dearest relatives and their death inevitably reminds us of our impending fate. While I and my fellow death row inmates are going through the pain and suffering of our colleagues, I and my fellow death row inmates are also contemplating our own death in this cruel, inhuman and degrading fashion and I and my fellow death row inmates feel as though I and my fellow death row inmates are the ones being hanged from the neck until I and my fellow death row inmates die. This is made particularly worse in that while most death occur in sudden and unexpected fashion, I and my fellow death row inmates know that the condemned prisoner is going to be executed and the said prisoner is going to suffer a very painful and deliberately cruel death. This experience reminds the rest of us that our day of execution is not far at hand and can come at anytime. One can not describe adequately the horror that goes on in our minds at this time.

The execution process normally takes up to three days and during these days I and my fellow death row inmates are not allowed out of our cells. I and my fellow death row inmates are only allowed out of our cells when all the prisoners due to be executed have actually been executed and certified dead.

> During this period of forced confinement, I and my fellow death row inmates can hardly move. I and my fellow death row inmates are forced to live, sleep and eat in the same confined a conditions, with human excrement overflowing, and there is virtually no appetite for food. One can not sleep or even converse with cellmates. There is normally a dead silence and each of us is forced to silently contemplate our impending death and grapple with our upcoming fate privately. This is cruelty beyond description.

[**116.**] The above evidence has not been controverted. It portrays a very grim picture of the conditions in the condemned section of Luzira Prison. They are demeaning physical conditions. Such conditions coupled with the treatment meted out to the condemned prisoners during their confinement, as depicted by the above evidence, are not acceptable by Ugandan standard and also by the civilised international communities. Inordinate delays in such conditions indeed constitute cruel, inhuman or degrading treatment prohibited by articles 24 and 44(a) of the Constitution of Uganda.

[**117.**] To determine whether there has been an inordinate delay, the period when the condemned prisoner has spent on the death row, in my view, should start from when his/her sentence has been confirmed by the highest appellate court. Appeal process for a prisoner convicted of a capital offence is mandatory. In Uganda, there is a two steps appeal system. An appellant has no control over the time the appeal process should take. While the appeal process is on, a condemned prisoner has hope of his conviction and sentence being reversed. It is the time taken between the confirmation of his/her sentence and execution, when the condemned prisoner has virtually lost all hopes of surviving execution, that should determine whether or not there has been an inordinate delay.

[**118.**] In Uganda, article 121 of the Constitution sets up an Advisory Committee to advise the President on the exercise of his discretion on prerogative of mercy. The Committee is under the chairmanship of the Attorney General. That article is operationalised by section 102 of the Trial on Indictments Act and section 34 of the Prisons Act. They provide procedure to be followed to seek prerogative of mercy. Neither the Constitution, nor those statutory provisions have set up a time frame within which the prerogative of mercy process should be completed. The prerogative of mercy is an executive process that comes after the judicial process is concluded.

[**119.**] The evidence available shows that the average delays on death row among the petitioners who have exhausted their appeal process is between five and six years. The uncontraverted evidence of Ben Ogwang above shows that from 1989 to 1999, there had been executions in Luzira Prison after every three years. A good numbers of the petitioners had already been on the death row after their sentences had been confirmed by the highest appellate court, but the Advisory Committee did not consider their cases. It is important that

the procedure for seeking pardon or commutation of the sentence should guarantee transparency and safeguard against delay.

[**120.**] The spirit of our Constitution is that whatever is to be done under it affecting the fundamental rights and freedoms must be done without unreasonable delay. Section 34(2) of the Interpretation Act (Cap 3) Laws of Uganda, provides that 'where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay.' A delay beyond three years after a condemned prisoner's sentence has been confirmed by the highest appellate court would tend towards unreasonable delay. I, would therefore, agree with Professor Sempebwa that those condemned prisoners who have been on the death row for five years and above after their sentences had been confirmed by the highest appellate court have waited longer than constitutionally permissible.

[**121.**] In the result, I would answer issue 5 in the affirmative. Consequently, I would allow the petition in part.

[**122.**] Finally, I now turn to issue 6, namely, whether the petitioners are entitled to the remedies sought. The remedies sought are spelled out at the beginning of this judgment. I shall, therefore, not repeat them here.

[**123.**] Clause 4 of article 137 of the Constitution of Uganda provides as follows:

> Where upon determination of the petition under clause (3) of this article, the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may: (a) grant an order of redress; or (b) refer the matter to the High Court to investigate and determine the appropriate redress.

That provision clearly gives this court wide discretion on the matter of redress in addition to the declarations sought.

[**124.**] In the instant case, having regard to my findings on issues 1, 2 and 4 above, I would decline to grant the declarations sought in paragraphs 3(a)(i), (ii), (iii) and (iv) namely:

(i) That the death penalty in its nature, and in the manner, process and mode in which it is or can be implemented is a torture, a cruel, inhuman or degrading form of punishment prohibited under articles 24 and 44(a) of the Constitution.
(ii) That the imposition of the death penalty is a violation of the right to life protected under articles 22(1) of the constitution.
(iii) That the various provisions of the laws of Uganda that prescribe death penalty are inconsistent with and in contravention of articles 21, 22(1), 24, 28, 44(a), 44(c) of the Constitution.
(iv) That section 99(1) of the Trial on Indictments Act (Cap 23 of Laws of Uganda) and the relevant sections of and provisions made under the Prisons Act, that prescribe hanging as the legal method of carrying out the death sentences are inconsistent with articles 24 and 44(a) of the Constitution.

[**125.**] However, in view of my findings on issues 3 and 5 above, the following declarations would be made:

(a) The various provisions of the laws of Uganda that prescribe *mandatory* death sentences are inconsistent with articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution. The affected provisions are sections 23(1), 23(2), 189, 286(2), 319(2) of the Penal Code Act (Cap 120 of Laws of Uganda) and section 7(1)(a) of the Anti Terrorism Act 14 of 2002 and any other laws that prescribe *mandatory* death sentences.

(b) Section 132 of the Trial on Indictments Act (Cap 23) that restricts the right of appeal against sentence where mandatory sentences are imposed is inconsistent with articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution.

(c) That inordinate delay in carrying out the death sentence after it has been confirmed by the highest appellate court is inconsistent with articles 24 and 44(a) of the Constitution. A delay beyond three years after the highest appellate court has confirmed the sentence is considered inordinate.

## Orders

1. For the petitioners whose appeal process is completed and their sentence of death has been confirmed by the Supreme Court, the highest appellate court, their redress will be put on halt for two years to enable the executive to exercise its discretion under article 121 of the Constitution. They may return to court for redress after the expiration of that period.
2. For the petitioners whose appeals are still pending before an appellate court: (a) shall be afforded a hearing in mitigation on sentence; (b) the court shall exercise its discretion whether or not to confirm the sentence; (c) thereafter, in respect of those whose sentence of death will be confirmed, the discretion under article 121 should be exercised within three years; (d) each party would bear his own costs as this petition was taken as a matter of public interest.

[**126.**] As Twinomujuni and Byamugisha (JJA) both agree, the petition stands allowed in part by a majority of 3 to 2 on the terms stated here above.

# ZIMBABWE

## Kachingwe and Others v The Minister of Home Affairs and Others

**(2005) AHRLR 228 (ZwSC 2005)**

*Nancy Kachingwe, Wellington Chibebe & Zimbabwe Lawyers for Human Rights v The Minister of Home Affairs & The Commissioner of Police*
Supreme Court, SC 145/04, 18 July 2005
Judges: Chidyausiku, Sandura, Cheda, Malaba, Gwaunza

*Conditions in police holding cells held to be inhuman and degrading*

***Locus standi*** (non-citizen, 27, 28)
**Interpretation** (international standards, 50-71)
**Cruel, inhuman or degrading treatment** (conditions of detention, 72)

### Chidyausiku CJ

[**1.**] This application is brought in terms of section 24(1) of the Constitution of Zimbabwe. Section 24(1) of the Constitution provides that any person who alleges that the Declaration of Rights has been, is being, or is likely to be, contravened in relation to him that person may apply to the Supreme Court for redress. The relief sought by the applicants in this matter is set out in the draft order which provides as follows:

It is declared

1. That police holding cells at police stations in Zimbabwe are degrading and inhumane and unfit for holding criminal suspects.

It is ordered

1. That the 1st and 2nd respondents are directed to take all necessary steps and measures within their power to ensure that:
   (a) police holding cells are of reasonable size for the number of persons they are used to accommodate
   (b) police holding cells should have good ventilation
   (c) police holding cells should have lighting sufficient to read by
   (d) police holding cells should be equipped with a means of rest such as a fixed chair or bench
   (e) each person obliged to stay overnight in police custody should be provided with a clean mattress and blankets
   (f) police holding cells should have clean and decent flushing toilets with toilet paper in a sanitary annex in the police cell
   (g) police cells should have full sanitary provision for women who are menstruating at the time of the detention and should, on

request, be permitted to buy personal necessities with their own money
(h) police cells should have clean, decent and adequate washing facilities including soap
(i) police cells should have running water available in the cell
(j) police cells should have good drinking water available in the cell
(k) persons in holding cells should be given wholesome food at appropriate time and should, on request, be permitted to buy food and refreshments with their own money
(l) police holding cells should be cleaned daily and a good standard of hygiene maintained in the police holding cells
(m) persons detained in police holding cells should have reasonable access to medical treatment

2. The 1st and 2nd respondents are directed to publish regulation in the Government Gazette governing the treatment and maintenance of persons detained in police holding cells
3. The 1st and 2nd respondents are directed to publish regulations in the Government Gazette permitting and regulating the inspection of police holding cells by magistrates and official visitors
4. That the 1st and 2nd respondents pay the costs of this application

[**2.**] The relevant facts of this care are to a large extent common cause. The first and second applicants (hereafter referred to as Kachingwe and Chibebe respectively) were arrested by the police and detained in police cells overnight in respect of Kachingwe, and for two days in respect of Chibebe. The third applicant is Zimbabwe Lawyers for Human Rights, a non-governmental organisation with capacity to sue and be sued in accordance with the laws of Zimbabwe. The third applicant has not filed a separate draft order but avers in its supporting affidavit that it seeks an order declaring all police holding cells throughout Zimbabwe as degrading and inhuman.

[**3.**] The first respondent is the Minister of Home Affairs, who is being sued, in his official capacity, as the government Minister to who is assigned the administration of the Police Act (Chapter 11:10).

[**4.**] The second respondent is the Commissioner of Police who has command, superintendence and control of the Zimbabwe Republic Police.

[**5.**] On Friday, 13 June 2003 at about 3.30am Kachingwe was driving home along Enterprise Road. When she turned right into Ardnalea Road, she noticed a white pick-up truck on the side of the road. There were three or four men in the vehicle. The pick-up was driving very slowly on the edge of the road. When she drove past the pick-up it picked up speed and followed her. She turned into Sunninghill Close and the pick-up truck also turned after her. She immediately became concerned that the occupants of the pick-up truck could be car jackers. The road was deserted and Sunninghill Close was a dead end. She decided to stop at Seasons Restaurant which is at the corner of Sunninghill Close and Ardnalea Road because she knew that these premises were guarded. When she stopped her motor vehicle the pick-up also came to a stop and the men inside got out and surrounded her car. She blew her motor horn and a woman

came out of the restaurant. She explained to the women why she had stopped outside the restaurant. It turned out that that very night there had been a burglary at the restaurant and that the men in the pick-up truck had been driving around trying to see if they could locate the burglar before he went far.

[**6.**] There were also two officers from the Zimbabwe Republic Police at the restaurant. The two police officers came out and Kachingwe explained to them the circumstances of her stopping her vehicle outside the restaurant. The police officers were satisfied with the explanation of Kachingwe and allowed her to proceed to her home. She drove off and the police officers watched her turn into the gate of her residence at 309 Sunninghill Close.

[**7.**] On Thursday, 19 June 2003, a detective constable Charamba (hereafter referred to as 'Charamba') drove to Kachingwe's house and obtained personal details of Kachingwe from her housekeeper. He thereafter telephoned Kachingwe round about mid-day. Charamba informed Kachingwe that he was a police officer and that he wished to interview her at Highlands Police Station. Kachingwe consulted her lawyer, Ms Cathrine Chitiyo. It was arranged between them that Chitiyo would accompany her to Highlands Police Station. Kachingwe thereafter telephoned Charamba to re-arrange the time for their meeting at the Police Station and to advise him that she would be accompanied by her legal practitioner. According to Kachingwe the involvement of a legal practitioner infuriated Charamba who insisted that Kachingwe comes to the Police Station before 4 pm that day.

[**8.**] At about 4pm Kachingwe, in the company of her legal practitioner, arrived at Highlands Police Station. Her legal practitioner identified herself to the police officers at the reception. Charamba was standing near the reception at the entrance of the Criminal Investigations Department Office. He identified himself as the officer whom Ms Chitiyo and Kachingwe had come to see. According to Kachingwe, Charamba immediately launched into a tirade about Kachingwe's refusal to see him immediately upon his request and that he was incensed with Kachingwe for coming to the police station accompanied by her legal practitioner. He advised Kachingwe that he was not prepared to interview her in the presence of her legal practitioner. Charamaba advised Kachingwe that he wanted to interrogate her in connection with the theft that had recently occurred at Seasons Restaurant in Glen Lorne, but that he would only do so the following morning. Kachingwe was told that she would have to spend the week-end in police custody and would be taken to Remand Court on Monday 16 June 2003. Ms Chitiyo and Kachingwe protested at this turn of events to no avail.

[**9.**] Chamba then directed that Kachingwe be detained in a police cell. Before being taken to the police cell, a policewomen led her into another office where she was instructed to remove her shoes, her T-

shirt, her jacket and her bra, and these, and other personal belongings were placed in a safe.

[**10.**] The police informed her that she could only have one layer of clothing in the police cell and that she therefore had to choose one item of clothing from among the T-shirt, the jumper and the jacket. She elected to wear the jumper as she thought that it was warmer than the jacket. This was in June when the weather is fairly cold. The police officer accompanied her barefoot to the police cell. The police cell wherein she was detained is in an outbuilding at the rear of the police station. She alleges that the cell was pitch black. She further alleges that as she stepped into the cell she was greeted by a foul choking stench of human excreta. She also found three other women in the cell. The floor of the cell is concrete and it being in the midst of winter the cell was very cold. She contends that there was one small dirty torn blanket in the cell which the police expected all the inmates to share. She denies the contention by the police that she was given a blanket and some bedding facility.

[**11.**] At about 7 pm her legal practitioner, Ms Chitiyo, arrived back at the police station with a warm cardigan and food. She was permitted to swap the jumper for the warmer cardigan. She was also allowed to eat the food that was brought by Ms Chitiyo and she shared the food with other women in the cell. She contends that the police never offered her any food and refused her request for more blankets.

[**12.**] Later on in the evening one woman was admitted into the cell bringing the total number to five. It was Kachingwe's contention that the five of them were forced to suffer the indignity of huddling together under a single blanket in order to keep warm. She estimated that the temperature that night was in the region of 7° C.

[**13.**] When she woke up the following morning the police cell was no longer dark because it was now daylight and she observed that there were no windows in the cell. She looked around the cell and made the following observations. The cell was about 3 meters wide and 8 meters long. The cell did not have a flushing toilet. The only toilet facility was a toilet bowl on a raised concrete platform on which one squats. The toilet bowl had faecal matter close to the brim and that caused the whole cell to stink. It appeared to her that the toilet bowl is evacuated at the pleasure of the police officers at the police station. She also observed a pool of water that had collected around the bottom of the platform. The concrete platform on which the toilet bowl is set is not partitioned from the rest of the cell and no provision is made for the use of the toilet bowl in privacy. As a result the occupants of the police cell are forced to use the toilet bowl in the full view of the other occupants of the cell much to the disgust and humiliation of everyone forced to endure such indecency. There was no toilet paper in the cell. There was no soap, no hand basin and

no shower in the cell. There was no running water in the cell and no drinking water either. It was her observation that the floor and the walls of the cell were dirty and dusty. The holding cell had no electric light.

[**14.**] At about 6 am the following day Kachingwe's legal practitioner brought her a wet towel and a fresh change of clothing and some breakfast. She was permitted to change her clothing and freshen up with the towel. She thereafter had her breakfast in the fenced enclosure where she observed litter of rubbish and scraps of food eaten by previous occupants of the cell.

[**15.**] It was Kachingwe's contention that the police did not offer the women detained with her any breakfast. Kachingwe's office hired another legal practitioner to assist her. A Mr Gula-Ndebele of Gula-Ndebele and Partners arrived at the Highlands Police Station between 9 am and 10 am. Kachingwe was then interviewed in the presence of her new legal practitioner and she denied any knowledge of the theft at the Seasons Restaurant. She was eventually released at about 12 pm.

[**16.**] In brief the contention of Kachingwe is that the conditions under which she was detained constitute inhuman and degrading treatment and violated her fundamental right conferred by section 15(1) of the Constitution. She particularised the condition that constituted the inhuman and degrading treatment as follows:

(1) The cell in which she was detained was filthy as human excrement and urine collected in a open toilet bowl causing her much distress
(2) The toilet bowl was not partitioned off from the rest of the cell and therefore there was no privacy in the use of the toilet
(3) The cell was unhygienic as there was no toilet paper, no soap, no running water and no shower
(4) The cell had no windows and therefore there was no natural light in the cell
(5) There was no lighting in the cell and therefore at sunset the occupants are in the dark all the time
(6) She was required to be barefoot in the cell that was filthy and in spite of the low temperatures in the cell
(7) There was no bedding in the cell
(8) The cell did not have clean drinking water
(9) She was forced to wear one layer of clothing in spite of the temperature in the cell being very low

[**17.**] There is a striking resemblance between the treatment accorded Kachingwe and that of Chibebe. I will, therefore, not recount it in any detail as that will amount to recounting a similar story.

[**18.**] Chibebe was arrested on 9 December 2002 and was detained in police cells at Matapi Police Station. Before being detained in the police cell he was ordered to remove his shoes, socks, jacket, tie, belt and watch. He was left with only his shirt and trousers. The conditions of the cell at Matapi Police Station were very similar to the conditions at Highlands Police Station as described by Kachingwe.

[**19.**] He too alleges that upon entering the cell he was assaulted by the choking smell of human faeces and urine. He was detained in the same cell with seven other inmates. There was insufficient bedding for each prisoner in the cell and that he and his companion, Mr Shambare, spent the better part of the night standing against the wall and that the inmates had to share a few blankets in the cell. Shortly after being detained he learnt that the stench in the cell emanated from the toilet inside the cell. The toilet was not a flushing toilet and consisted of a hole in a corner of the cell. Owing to the fact that there was no light in the cell the prisoners were forced to use their bare feet to locate the hole in the floor. In a situation where one is naturally fearful of soiling one's feet people attempted to relieve themselves around the toilet hole instead of the hole itself.

[**20.**] He also discovered that the toilet hole was not partitioned off for privacy and that if the inmates want to relieve themselves they had to do so in the full view of the other inmates. Chibebe contends that the police cell was most unhygienic because there was no running water, no soap, no hand basin, no shower and no toilet paper. There was no drinking water in the cell.

[**21.**] Chibebe and the other inmates were allowed out of their cell into the fenced enclosure for about 10 minutes per day. Chibebe contends that while detained he received no food and the police cells were never cleaned. The inmates had to clean it themselves during the period they were allowed out into the fenced enclosure for exercise. Chibebe contends that his treatment while in detention was inhuman and degrading for substantially the same reasons as Kachingwe.

[**22.**] The third applicant is cited as a human rights organisation whose object is to encourage the growth and strengthening of human rights at all levels of Zimbabwean society. It is a *universitas* that can sue and be sued. The third applicant contends that all the police cells in Zimbabwe are much the same as those described by Kachingwe and Chibebe. On that basis the third applicant, in its affidavit, is seeking a declarator that all police cells throughout Zimbabwe are unfit for the holding of criminal suspect and that the first and second respondents be ordered to take the necessary corrective measures to right the violation of the Constitution of Zimbabwe, or any other relief.

[**23.**] Members of the court visited the police holding cell in question at Highlands Police Station. Kachingwe's description of the police holding cell is consistent with the observation made by the members of the court. In particular it was observed that the toilet is not partitioned off from the rest of the cell to provide for privacy to the users. There was no toilet paper, no wash-basin, no drinking water, no sitting place. The toilet is flushed from outside and windows were broken. The police holding cell in question is old having been built in 1935.

[**24.**] The criticism relating to the structural conditions of the detention cell, such as the failure to partition off the toilet area, the absence of a wash-basin and a shower are irrefutable. The respondents however, contend that Kachingwe and Chibebe were provided with food and blankets. The respondents also averred that the holding cells were cleaned regularly in compliance with standing orders. The respondents also pleaded scarcity of resources for the failure to provide better facilities in the holding cells.

[**25.**] Counsel for the respondents also raised a point *in limine*, namely that Kachingwe has no *locus standi* to bring these proceedings on two grounds. Firstly it was argued that she is a foreigner and as such, is not entitled to any protection under the Constitution, in particular section 15. Secondly, it was argued that she is not entitled to the relief set out in the draft order as it was too wide and did not relate to her.

[**26.**] Dealing with the first objection, section 15(1) of the Constitution provides that: 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.' While section 24(1) of the Constitution provides that:

> If any person alleges that the Declaration of Rights has been, is being, or is likely to be contravened in relation to him ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ... may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

[**27.**] It is quite clear from the language of section 15(1) of the Constitution that there is no distinction between a citizen and a non-citizen in respect of the protection availed under that section. Section 15(1) prohibits the subjection of any person, irrespective of the status of that person, to torture, or to inhuman or degrading treatment. I see nothing in the language of section 15(1) that the lawmaker intended to limit the protection provided therein to citizens only.

[**28.**] I am, therefore, satisfied that a resident such as Kachingwe is entitled to approach this Court in terms of section 24(1) of the Constitution and seek redress for the alleged violation of her constitutional right conferred by section 15(1) of the Constitution. It is also quite clear from the language of section 15(1) of the

Constitution that it applies to both citizens and non-citizens. This point, *in limine*, therefore fails.

[**29.**] Turning to the second ground of objection, namely that the applicant Kachingwe is not entitled to the relief sought in the draft order filed of record. I accept that there is substance in this objection. The relief sought by the three applicants in the draft order is wider than what they are entitled to on the evidence. The applicants seek a *mandamus* compelling the respondents to do all the things set out in the draft order. Mr Mudara submitted that Kachingwe has no interested in obtaining such a general order. He argued that for Kachingwe to have *locus standi* she must have direct and substantial interest in the relief sought. In this regard it was submitted that the Court must be satisfied that her interest in the relief sought in the draft order satisfies the following criteria:

(a) a direct interest that is not too remote from the relief sought;
(b) a substantial interest that is not too abstract or academic;
(c) a real interest not a hypothetical one;
(d) a sufficient or patrimonial interest

[**30.**] In support of the above submissions the following authorities were cited: *Dalrymple and Ors v Colonial Treasurer* 1910 TS 372 at 379; *De Waal and Ors v Van Der Horst & Ors* 1981 TPD 277 at 284; *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 101; Ex *parte Mouton and Another* 1955 (4) SA 460 (A) at 464 A-B; *Cabinet of the Transitional Government for the Territory of South West Africa vs Eins* 1988 (3) SA 369 at 387-389D.

[**31.**] On the facts of this case I am satisfied that neither Kachingwe nor any of the other applicants have established any of the above interests to entitle them to the general relief sought in the draft order. Apart from this the only evidence before this Court relates to two specific police holding cells. There is no evidence regarding the condition of police holding cells throughout Zimbabwe. Although Kachingwe and Chibebe do not seek, in the draft order, a declarator that their constitutional right conferred by section 15(1) of the Constitution was violated by the respondents, that is the essence of their complaint in the founding affidavits. In my view section 24(4) confers jurisdiction on this Court to enable it to make an order to address this complaint even through it is not specifically sought in the draft order.

[**32.**] In regard to the alleged degrading and inhuman treatment the respondents' stance is that although section 15(1) of the Constitution prohibits inhuman and degrading treatment Kachingwe's and Chibebe's treatment did not amount to inhuman and degrading treatment. It was argued that the conditions of the police holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person.

[**33.**] In support of this submission, counsel for the respondents referred the court to the remarks of Gubbay CJ in the case of *Blanchard and Ors v Minister of Justice, Legal and Parliamentary Affairs* 1999 (2) ZLR 24 (S) at 30E-F. The learned Chief Justice had this to say:

> The lawful incarceration of the applicants causes the necessary withdrawal or limitation of many privileges and rights previously enjoyed in a free and democratic society. Persons in custody simply do not possess the full range of freedoms of un-incarcerated individuals.

[**34.**] Counsel also referred to us to the dicta of Justice Rehnquist in *Bell v Wolfish* 41 US 520 (1979) which was cited with approval in *Blanchard, supra* wherein the learned judge (as he then was) stated as follows at 537:

> Once the government has exercised its conceded authority to detain a person, pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial centre, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment'.

[**35.**] Mr Mudura further submitted that the order sought by the applicants was of an administrative nature which the courts are unable to regulate. In support of this proposition he relied on the remarks of Gubbay CJ in *Blanchard supra*, wherein he stated at 34C-D:

> It is not appropriate for this Court to direct, as requested on the applicants' behalf, that the food supplied should not first be tasted by the person delivering it. The power to examine the food and the method employed is not the sort of administrative procedure that courts are inclined to interfere with. To do so would amount to an unnecessary intrusion into the sphere of those charged with and trained in the running of penal institutions.

[**36.**] It was further argued that similar sentiments were expressed in the case of *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) wherein Chaskalson P made the following remark at 1705-1706, paragraph 29:

> The provincial administration which is responsible for health services in Kwazulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters.

[**37.**] In conclusion Mr Mudura submitted that the obligations sought by the applicants from the respondents are dependent upon the resources available for such purposes and that the corresponding

rights themselves are limited by reason of lack of resources. The respondents further submitted that the application was fraught with many practical difficulties and that it is not clear from the papers what the applicants want to be remedied or rectified. It was also argued that the relief sought was vague and unenforceable and that on that basis the application should be dismissed.

[**38.**] While the relief as set out in the draft order presents the applicants with some difficulty in that the applicants have no *locus standi* to demand such relief and that no evidence was placed before the Court to justify the grant of such relief, that does not preclude the Court from determining whether the treatment meted out on Kachingwe and Chibebe constitute degrading and inhuman treatment. The issue in this regard is whether or not Kachingwe and Chibebe were subjected to inhuman and degrading treatment contrary to section 15(1) of the Constitution, and whether Kachingwe and Chibebe, as detainees, are entitled to any protection in terms of section 15(1) of the Constitution, and, if so, was such right violated by the respondents? As already stated section 15(1) of the Constitution provides that no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

[**39.**] I entertain no doubt that the law maker intended as section 15(1) of the Constitution to protect all persons irrespective of whether or not they are imprisoned or detained in police cells. Indeed detained and imprisoned persons must have been in the forefront of the lawmaker's mind when he enacted section 15(1) of the Constitution. Incarcerated persons are particularly vulnerable and in need of such protection as they are liable more than anyone else to torture, inhuman and degrading treatment. Indeed this Court has held that convicted persons are not, by the mere fact of their conviction, denied the constitutional rights they otherwise possess and that no matter the magnitude of their crime they do not forfeit the protection afforded them by section 15(1) of the Constitution of Zimbabwe. See *Conjwayo v Minister of Justice Legal and Parliamentary Affairs and Ors* 1992 (2) SA 56 (ZSC) and *Woods and Ors v Minister of Justice, Legal and Parliamentary Affairs and Ors* 1995 (1) SA 703 (ZSC).

[**40.**] I am persuaded by the applicants' further submission that the legal principles enunciated in the case of *Conjwayo supra*, and *Woods, supra*, extend equally to persons who are detained in police holding cells on suspicion of having committed criminal offences. On this basis I am satisfied that section 15(1) of the Constitution of Zimbabwe applies to people like Kachingwe and Chibebe who are held by the police in holding cells on suspicion of having committed an offence.

[**41.**] Having come to that conclusion the next issue that falls for determination is whether the treatment Kachingwe and Chibebe

received whilst under detention constitutes a violation of their constitutional right guaranteed by section 15(1) of the Constitution.

[**42.**] The following facts are common cause in this case.

1. That the police cells in which both Kachingwe and Chibebe were detained measured roughly 24 square meters
2. That inmates had to relieve themselves in the full view of others
3. That the toilet could only be flushed from outside the cell
4. There was no toilet paper
5. There was no wash-basin
6. There was no soap
7. There was no running water in the cell and there was no drinking water either
8. There was no electric light in the cell
9. That the detainees were allowed out of the cells for only a short period of time per day
10. That there were several inmates in one cell.

[**43.**] Kachingwe and Chibebe make further allegations regarding the denial or failure to provide food, blankets, the cleanliness of the cells, etc. These allegations are disputed by the respondents. The respondents contend that Kachingwe and Chibebe were provided with food, blankets, bedding and that this was done in terms of the standing orders and directives regulating conditions of detained persons in police custody.

[**44.**] It is common cause that police standing orders promulgated under section 9 of the Police Act (Chapter 11:10) make provision for adequate food to be given to prisoners, that prisoners should be given sufficient bedding, refreshments, and ration's etc. In terms of these police standing orders every detainee is supposed to be issued with three clean blankets which are required to be returned to the police upon his release. The police standing orders also require that the blankets should be cleaned, dried and folded. They provide that blankets issued to a prisoner who remains in police custody for a lengthy period shall be washed and dried after seven days. The standing orders provide that a general hand should scrub each police cell daily with detergent and disinfectant. The cell cleaning should take place during the daily exercise whenever possible.

[**45.**] Further the police standing orders provide that the member-in-charge should arrange for cells to be checked daily after scrubbing out by the general hand. The standing orders also provide that the exercise yards and cells surrounding should be swept out daily by the general hand and should be inspected simultaneously with the cells inspection, etc.

[**46.**] There is a dispute of fact on the papers on whether the police complied with the requirements of the police standing orders on the days the first and second applicants were in detention.

[**47.**] The respondents contend that they did while the applicants' contend that whilst they were in detention the police did not carry out their duties as required of them by the police standing orders. This dispute of fact, in my view, cannot be resolved on the papers. However, this matter can be determined without resolving these factual disputes for the following reasons.

[**48.**] The question of whether the police carried out their duties as set out in the police standing orders or not is essentially an administrative issue and not a constitutional issue. The question of whether or not the police have complied with what is required of them in terms of the standing orders is more of a matter for review than a constitutional issue. I, however, accept that police compliance with the standing orders is of some relevance to this application but not critical for its determination.

[**49.**] I now turn to deal with the issue of what constitutes torture, inhuman or degrading punishment or treatment and whether the first and second applicants were subjected to treatment or conditions that constitute torture, inhuman or degrading punishment or treatment.

[**50.**] Counsel for the applicants submitted that the court can derive some guidance in determining his issue from decisions of some international tribunals on human rights that have adjudicated on this issue and the reports of the African Commission on Human and Peoples' Rights. The American Convention on Human Rights, in article [5], prohibits torture, inhuman and degrading punishment. The African Charter on Human and Peoples' Rights also prohibits torture, inhuman and degrading punishment in articles 1 and 5. The International Covenant on Civil and Political Rights also outlaws torture, inhuman and degrading punishment. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also prohibits torture, inhuman or degrading punishment and sets out minimum standards, for the treatment of detained persons. One can safely say that torture, inhuman or degrading punishment is universally proscribed.

[**51.**] In the case of *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, Inter-American Court of Human Rights Series C No 94 (21 June 2002), the Inter-American Court of Human Rights found that the conditions under which the applicant were held were inhuman and degrading because the cells received little or no natural light, lacked sufficient ventilation, the sanitation facilities were primitive and degrading, the cells were tiny and overcrowded, exercise was very limited and medical facilities were virtually non-existent. The cells were so overcrowded that some of the prisoners

had to sleep sitting or standing up and the inmates were confined to those conditions for long periods of at least twenty-three hours a day.

[**52.**] The Court also found that the applicants suffered these conditions for an extensive period of time and concluded that the state had failed to ensure respect for the dignity inherent in all human beings as well as their right not to be subjected to cruel, inhuman or degrading treatment or punishment.

[**53.**] The Court declared that the detention conditions in Trinidad and Tobago were completely unacceptable and that that was sufficient to constitute a violation of article 5(1) and 5(2) of the Convention.

[**54.**] In the course of its judgement the Inter-American Court of Human Rights also stated that any person deprived of his liberty has the right to be treated with dignity and the state had the responsibility and the duty to guarantee the detained person's integrity while detained. The court also observed that the state, being responsible for the detention faculties, is the guarantor of the rights of detainees.

[**55.**] In the case of *Kalashnikov v Russia* (2003) 36 EHRR 34 the European Court of Human Rights ruled that the detention of the complainant in a cell that was overcrowded, poorly ventilated, infested with cockroaches and ants, with a lavatory that provided insufficient privacy, with no bedding material and other necessary items constituted inhuman and degrading treatment contrary to the provisions of article 3 of the European Convention which provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[**56.**] There are striking similarities between *Kalashinikov's* case, *supra*, and this case. In particular, the defence raised by the Russian government are similar to the defence raised by the respondents in this case. There is also a similarity in what is alleged to constitute inhuman and degrading treatment in the two cases. Kalashnikov alleged that he was subjected to inhuman and degrading treatment in the following respects:

1. The cell in which he was detained was overcrowded and [u]nsanitary
2. The cell measured between 17 and 20 square meters and each bed in the cell was used by two or three in-mates and, at any given time, there was between 0.9 and 1.9 square meters of space per inmate in the applicant's cell. Inmates took turns to sleep on the basis of 8 hours of sleep per person. In this regard the Court observed that the European Committee for the Protection from Torture, Inhuman or Degrading Punishment had set 7 square meters per prisoner as an approximate and desirable guideline of the detention cells.
3. There was inadequate ventilation
4. That the inmates were allowed 3 to 4 hours of outdoor activity per day.
5. The cell was infected with pests.

6. Toilet facilities were inadequate in that only a partition measuring 1.1 meters high separated the lavatory pan in the corner of the cell from a wash stand next to it but not from the living area. There was no screen at the entrance of the toilet. The applicant had to use the toilet in the full view of other inmates.
7. The applicant was detained for a long period of time under the above conditions. He was detained for 4 years and 10 months.

[**57.**] The Russian government submitted that it was doing it best but did not have adequate resources to provide better facilities. In this regard it was common cause that for economic reasons conditions of detention in Russia were very unsatisfactory and fell far below the requirements set out for penitentiary establishments in member states of the Council of Europe. However, the government of Russia contended that it was doing its best to improve conditions of detention in Russia and that it had adopted a number of programmes aimed at the construction of new pre-trial detention facilities, the reconstruction of the existing ones would lead to the elimination of diseases within the prisons. It was also accepted that the implantation of programmes being undertaken would allow for a two-fold increase of space for prisoners and for the improvements of sanitary conditions in pre-trial detention facilities.

[**58.**] It was further accepted by the Court that the Russian government had taken measures to improve the detention facilities where the applicant's cell was located and the Court was satisfied that the Russian government had no positive intention of humiliating or debasing the applicant and that although such intent is a factor to be taken into account, the absence of any such intent does not necessarily exclude a finding of violation of article 3 which prohibits torture, inhuman or degrading punishment.

[**59.**] On the basis of the above factors the Court concluded that the applicant's condition of detention, in particular, the severely crowded and insanitary environment and its detrimental effect on the applicant's health and well-being combined with the length of the period during which the applicant was detained in such conditions amounted to degrading treatment. The Court, accordingly, concluded that there has been a violation of article 3 of the Convention, that is to say, that the applicant had been subjected to cruel, degrading and inhuman treatment.

[**60.**] Mr Matinenga also argued that the provision of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (hereinafter referred to as the 'African Charter' and the 'ICCPR') are part of our national law and that in terms of these international instruments inhuman and degrading punishment is prohibited. In this regard he argued that the Constitution of Zimbabwe Amendment (7) Act 1987 (23 of 1987) which came into effect on 31 December 1987, amended the Constitution of Zimbabwe by inserting a new section 111B which provided:

Any international convention, treaty or agreement which –
(a) has been entered into or executed by or under the authority of the President; and
(b) imposes fiscal obligations upon Zimbabwe
Shall be subject to ratification by the House of Assembly

[**61.**] The House of Assembly was later repealed and substituted by Parliament. He argued that the effect of that amendment to the Constitution in 1987 was that international conventions and treaties that were signed or acceded to, by, or under the authority of the President and that did not impose a fiscal obligation on Zimbabwe were integrated in the domestic national law of Zimbabwe without explicit legislation, as they did not require the approval or ratification of Parliament.

[**62.**] He further argued that section 111B was, however, later amended by the Constitution of Zimbabwe Amendment (12) Act, 1993 (4 of 1993) so that any convention, treaty or agreement which was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which, immediately before that date, did not require approval or ratification by Parliament, remained part of the law of Zimbabwe after the 1993 amendment.

[**63.**] He submitted that Zimbabwe signed and ratified the African Charter and the ICCPR in 1986 and 1991, respectively. On that basis, he submitted that by assenting to the African Charter and the ICCPR Zimbabwe is bound by the provisions of these treaties which are part of our national law. In support of this proposition he relied on the case of *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* (1977) 1 All ER 881 (CA) at p 888F-G. He also relied on the case of *S v Petane* 1988 (3) SA 51 (CPD) at p 56F-G in which the court held that the attributes of customary international laws which are directly operative in the national sphere are those that are either universally recognised or have received the assent of the country

[**64.**] This contention was not disputed by the respondents. I have no doubt that, in all probability, Mr Matinenga is correct in this regard. However I feel that this point was not sufficiently argued for me to make a firm determination of this point. The determination of that point of law is not necessary for the determination of this case.

[**65.**] In any event the provisions proscribing torture, inhuman and degrading punishment as set out in those international instruments are almost identical to the wording of section 15(1) of the Constitution of Zimbabwe that proscribes torture, inhuman or degrading punishment.

[**66.**] Mr Matinenga also referred us to a number of reports of the African Commission which was established to promote human and peoples' rights and to ensure their protection in Africa. I agree with Mr Matinenga that these reports are persuasive. The following are some of the reports which Mr Matinenga cited. He cited the case of

*Huri-Laws v Nigeria* 225/98 [(2000) AHRLR 273 (ACHPR 2000)] reported in the 14th Annual Activity Report 2000-2001. At p 300 of the above-mentioned compilation the complainant, a non-governmental organisation had alleged, amongst other things, that a member of the Civil Liberties Organisation, another human rights non-governmental organisation, had been detained in a sordid and dirty cell under inhuman and degrading conditions where he was denied medical attention and access to his family and lawyer, and also denied access to journals, newspapers and books.

[**67.**] The African Commission ruled in paragraph 41 at p 306 that the detention of the member in a sordid and dirty cell, in health threatening conditions and in which access to medical attention and the outside world was denied amounted to cruel, inhuman and degrading treatment in violation of article 5 of the African Charter.

[**68.**] Similarly in the case of Civil *Liberties Organisation v Nigeria* 151/96 [(2000) AHRLR 243 (ACHPR 1999)] reported in the 13th Annual Activity Report: 1999-2000 at p 266 of the above-mentioned compilation, a complaint was filed against the detention of various persons in dark cells, with insufficient food, no medicine or medical attention. The African Commission made a finding in paragraph 25 at p 270 that the deprivation of light, insufficient food and lack of access to medicine or medical attention constituted a violation of article 5 of the African Charter.

[**69.**] In the case of *Ouko v Kenya* 232/99 [(2000) AHRLR 135 (ACHPR 2000)] reported in the 14th Annual Activity Report: 2000-2001 at p 144 of the abovementioned compilation the complainant alleged that throughout the period of his detention he was detained in a 2 by 3 metre basement cell with a 250 watts electric bulb which was left on throughout his 10 months' detention and that he was denied bathing facilities and was subjected to both physical and mental torture. The African Commission ruled that the conditions of the complainant's detention were a violation of the complainant's right to respect of his dignity and amounted to inhuman and degrading treatment in violation of article 5 of the Charter. The African Commission further ruled that the treatment and conditions of Ouko's detention ran contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment particularly principles 1 and 6.

[**70.**] Principle 1 of the United Nations Body of Principles provides as follows: 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.' Principle 6 of the United Nations Body of Principles provides:

> No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a

justification for torture or other cruel, inhuman or degrading treatment or punishment.

[**71.**] The above international norms provide a useful guideline for the determination of this case.

[**72.**] I have no doubt, in my mind, that the holding cell that the Court inspected at Highlands Police Station, the same holding cell in which Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, the failure:

(a) to screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private;
(b) to provide a toilet flushing mechanism from within the cell;
(c) to provide toilet paper;
(d) to provide a wash-basin; and
(e) to provide a sitting platform or bench;

constitute inhuman and degrading treatment prohibited in terms of section 15(1) of the Constitution. The evidence clearly establishes that Chibebe was subjected to similar treatment

[**73.**] The third applicant has alleged that conditions in the police holding cells throughout Zimbabwe are the same as those described by the first and second applicants. This may be the case but the matter cannot be determined on the basis of the third applicant's mere say so. Accordingly the Court cannot grant the relief sought in the draft order but will make the following declaration and order:

1. That the first and second applicants, that is Katchingwe and Chibebe, were detained under conditions that constituted inhuman and degrading treatment in violation of section 15(1) of the Constitution.
2. That the conditions of detention in police cells at Highlands and Matapi police station are inhuman and degrading.
3. The respondents are directed to take immediate measures to ensure that the holding cells at Highlands and Matapi police stations have toilets that are screened off from the living area, with flushing mechanisms from within the cells, wash-basins and toilet paper.
4. The first and second applicants are awarded costs but there will be no order as to costs in respect of the third applicant.