

Communication 321/2006 - Law Society of Zimbabwe et al/ Zimbabwe

Summary of facts

1. On 26 April 2006, the Secretariat of the Commission on Human and Peoples' Rights (the Secretariat) received the present Communication from the Complainants against the Republic of Zimbabwe (the Respondent State or Zimbabwe).¹ The Complainants in this Communication are: the Law Society of Zimbabwe, Zimbabwe Lawyers for Human Rights, SADC Lawyers Association, East African Law Society, Bar Council of South Africa, Swaziland Law Society, Law Association of Zambia, Law Society of Lesotho, Zanzibar Law Society, Tanganyika Law Society Messrs Tinoziva Bere and Merrs Dr. Cephas Lumina.
2. The Complainants are challenging an amendment to the Constitution of Zimbabwe and submit that, following the introduction in Parliament on 15 July 2005 of the Constitutional Amendment (No. 17) Bill, the legal profession both within Zimbabwe and within the region expressed their opposition to its promulgation. However, despite these interventions, the Bill was passed and the President of Zimbabwe assented to it on 14 September 2005.
3. The Complainants assert that they are primarily concerned with subsection 16B(3)(a) of the Constitutional Amendment (No.17) Act (CAA), which has the effect of ousting the jurisdiction of the Courts of Zimbabwe to entertain challenges against executive decisions to compulsorily acquire certain properties as described therein, in particular land. Additionally, the Complainants state that the CAA will and has been retrospectively applied contrary to principles of international human rights law.

¹ Zimbabwe ratified the African Charter on ..., and is therefore a State Party.

4. The Complainants argue that whereas it is the role of a competent, effective and independent judiciary to act as a check on the actions of the government and to ensure that the latter conduct is consistent with the principles enunciated in the constitution. In ousting the jurisdiction of the Courts to hear pending cases contesting the acquisition of property by the State, the Government of Zimbabwe grants itself the ability to exert unchecked power. This means therefore that all aspects of accountability and transparency in the manner in which the government acts and the officials conduct themselves is effectively removed as a result of the ouster.

Articles alleged to have been violated

5. The Complainants allege violations of Article 1, 3, 7 and 26 of the African Charter on Human and peoples' Right by Zimbabwe.

Prayer

6. The Complainants request the Commission to request the government of Zimbabwe:-

- to repeal Constitutional Amendment (No.17) Act;
- to publicly reaffirm its support for the judiciary and its independence as an effective check on the power, and as a necessary and integral institution in the democratic process; and
- to ensure that future constitutional charges are carried through as a holistic reform of the Constitution rather than piecemeal reforms as this will ensure certainty and predictability of the laws in Zimbabwe.

Procedure:

7. The present Communication was received by the Secretariat on 26 April 2006.
8. By letter dated 2 May 2006, the Secretariat acknowledged receipt of the Communication and informed the Complainants that it will be tabled for consideration during the 39th Ordinary Session of the Commission scheduled to take place from 11 to 25 May 2006 in Banjul, The Gambia.

9. During its 39th Ordinary Session held in Banjul, Gambia, from 11 to 25 May 2006, the Commission decided to be seized of the Communication.
10. By letter and Note Verbale, dated 31 May 2006, the Secretariat informed both Parties on the Commission's decision to be Seized of the Communication, and asked them to forward their arguments on Admissibility within three months in order for it to be examined at its 40th Ordinary Session, scheduled to take place from 15 to 29 November 2006 in Banjul, The Gambia.
11. At its 40th Ordinary Session, the Commission deferred the Communication to its 41st Session pending the submissions from both parties.
12. By letter and Note Verbale, dated 6 December 2006, both parties were informed of the Commission's decision.
13. By letter and Note Verbale, dated 4 January 2007, both parties were reminded to submit their arguments on Admissibility.
14. On the 7 February 2007, the Secretariat received the Complainants' submissions on Admissibility and transmitted the same to the Respondent State by Note Verbale, dated 12 February 2007.
15. By Note Verbale, dated 10 April 2007, the Respondent State was reminded to submit its arguments on Admissibility.
16. At its 41st Ordinary Session, the Commission considered the Communication and deferred consideration to its 42nd Ordinary Session to allow the Respondent State to submit its arguments on Admissibility.

17. By Note Verbale and letter, dated 10 July 2007, both parties were informed of the Commission's decision.
18. By Note Verbale and letter, dated 14 September 2007, the Respondent State was reminded to make their submissions on Admissibility.
19. At the Commission's 42nd Ordinary Session, the Communication was deferred to its 43rd Ordinary Session to allow the Respondent State to respond to the Complainants' submissions.
20. By Note Verbale and letter, dated 19 December 2007, both parties were informed of the Commission's decision.
21. At the 43rd Ordinary Session of the Commission, the Communication was deferred to the 44th Ordinary Session to allow the Respondent State to make its submissions on Admissibility.
22. By Note Verbale, dated 22 October 2008, the Respondent State was informed of the decision of the Commission and reminded to make its submission on Admissibility.
23. At its 44th Ordinary Session, the Commission decided to defer consideration of the Communication to the 45th Ordinary Session to allow the Respondent State to submit its arguments on admissibility.
24. By Note Verbale and letter, dated 11 December 2008, both parties were informed of the Commission's decision.
25. At its 45th Ordinary Session, the Respondent State submitted its arguments on Admissibility.

26. By Note Verbale and letter, dated 3 June 2009, the Complainants were given a copy of the Respondent State's arguments and to submit their arguments within two months thereto. By the same Note Verbale and letter, both parties were informed that a decision on Admissibility will be taken at the 46th Ordinary Session of the Commission.
27. At its 46th Ordinary Session held from 11 to 26 November 2009 in Banjul, The Gambia, the Commission considered the Communication and deferred its decision to its 47th Ordinary Session.
28. By letter and Note Verbale, dated 6 January 2010, both parties were informed of the decision of the Commission.
29. At its 47th Ordinary Session, the Commission considered the Communication and decided to defer its decision on Admissibility to its 48th Ordinary Session.
30. By letter and Note Verbale, dated 16 June 2010, both parties were informed of the Commission's decision to defer the Communication to its 48th Ordinary Session held from 10 to 24 November 2010 in Banjul, The Gambia.
31. The Commission considered the Communication during the 48th Ordinary Session and differed it to the 49th Ordinary Session. .
32. During the 49th Ordinary Session, held from 28 April - 12 May 2011, in Banjul, Gambia, the Commission considered the Communication and declared it Admissible. By Note Verbale and letter dated 15 November 2011 both parties were informed and were requested to submit on the Merits within 60 days of receipt of the correspondence.

33. During the 50th Ordinary Session held from 24 October to 5 November 2011, in Banjul, The Gambia, the Commission considered the Communication and decided to defer it to give time to the Complainant to submit its arguments on Merits.
34. By letter dated 18 May 2012, the Complainant was requested one last time to forward its submissions on the Merits.
35. During the 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro Cote d' Ivoire, the Commission considered striking out the Communication but decided to defer it, to allow time for the Complainants to provide proof of having transmitted their argument on the Merit as indicated in their letter to the Commission.
36. By a letter dated 8 November 2012, the Commission made reference to the Complainants letter dated 17 August 2012, and request it to provide proof of having transmitted its submissions on the Merit to the Secretariat within 15 days of the Present letter.
37. There were email follow-ups and to date the Complainants have not provided proof or even try to submit a brief on their Merit argument.

The Law on Admissibility

The Complainant's Submissions on Admissibility

38. The Complainants submit that they have fulfilled all the seven requirements laid down in Article 56 of the African Charter.
39. They argue that it is clear from the face of the Communication that Article 56(1) of the African Charter has been complied with.
40. The Complainants have further argued that by promulgating the CAA, the Respondent State has violated Articles 1, 3, 7, 26 and 56(5) of the African

Charter and that because the amendment ousts the jurisdiction of the courts to determine legal challenges relating to property rights, the facts and issues in dispute falls within the *rationae materiae* and *rationae personae* of the Commission.

41. It is further submitted by the Complainants that Article 3 (g) and (h) of Constitutive Act of the African Union recognizes the importance of good governance, the rule of law, the consolidation of democratic institutions and the protection of rights and thus impose a duty on Member States to observe these norms. They contend that because their petition raises issues that are relevant to the afore-stated norms, the Communication is therefore within the scope of implementation and operation of the Constitutive Act.
42. It is also argued by the Complainants that the alleged violation has taken the form of a legislative amendment in contravention of Article 1 of the African Charter, which makes it mandatory for States Parties to implement the Charter's rights through legislative and administrative measures and that the Respondent State cannot rely on domestic legislation to flout their obligations arising from supra national commitments.
43. The Complainants argue that the Communication is not written in disparaging language and also not based exclusively on news disseminated through the mass media as the allegations are founded on an existing piece of legislation.
44. The Complainants argue that one of the purposes of the exhaustion of local remedies requirement is to give the domestic Courts an opportunity to decide on cases before they are brought to the international forum thus avoiding contradiction of law at domestic and international levels.
45. The Complainants based their arguments on the Commission's decision in the case of Social Economic Rights and Action Centre (SERAC) & Another V.

Nigeria, the Complainants have argued that the ouster of jurisdiction provides an irrefutable and irrebuttable presumption of non availability of local remedies; that their only avenue of appeal had been foreclosed by the Amendment; and that the process amounts to a denial of effective remedy.

46. The Complainants argue that although Section 24 of the Zimbabwean Constitution provides for access to the Supreme Court when issues relating to the violation of the Bill of Rights arise, the Constitution makes no provision for the Complainants to challenge the introduction and subsequent enactment of the 17th Amendment. That any attempt to approach the Courts on the legality of the issue would have been impeded.

47. The Complainants also argue that the Communication was submitted within a reasonable time and that this matter has not been resolved nor is it pending before any other international settlement mechanism.

Respondent State Submission on Admissibility

48. In response to the above submissions, the Respondent State submitted that the Communication does not satisfy the provisions of Article 56 (2) of the African Charter, in that the Complainants have failed to indicate in what capacity they have filed this Communication.

49. The Respondent State argues that it is not sufficient for the Complainants to simply establish that they have an interest in the matter. The Complainants have to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to themselves.

50. It is argued that not having disclosed in which capacity, and the reason behind, the Complainants approaching the Commission; it should be resolved that the Complainants have no locus standi to institute this matter.

51. It is further argued by the Respondent State that the present Communication does not fall within the contended *rationae materiae* jurisdiction of the Commission.

52. The Respondent State submitted that there are numerous cases, including but not limited to the case *Associated Newspapers of Zimbabwe V. Minister of Information* in which aggrieved persons have successfully invoked the jurisdiction of the Supreme Court on matters affecting fundamental rights.

Competence of the Commission

53. In the present Communication, the Respondent State has raised a preliminary issue touching on the competence of the Commission to determine this Communication. The Respondent State avers that: “basically the facts and issues in dispute do not fall within the *rationae materiae* and *rationae personae* of the jurisdiction of the Commission”. This statement is a direct challenge on the jurisdiction of this Commission as it questions the Commission to deal with this Communication. The Commission will first deal with the preliminary issue of its competence to deal with this Communication as raised by the Respondent State.

54. In Communication 307/05² the Commission adequately addressed the meaning of its *rationae materiae* and *rationae personae* jurisdictions.

55. Article 45 (2) of the African Charter gives the Commission the mandate to ensure the protection of human and peoples’ rights in the African continent. Article 55 of the African Charter further empowers the Commission to receive and adjudicate on Communications touching on the violation of human and peoples’ rights in Africa.

² Para 39

56. Given the nature of the allegations contained in the present Communication, notably, allegations of violation of personal rights to own property, the Commission is of the view that the Communication raises material elements which may constitute human rights violation, and as such it has competence *rationae materiae* to entertain the matter, because the Communication alleges violations to human rights guaranteed and protected in the African Charter.
57. With regards to the Commission's competence *rationae personae*, it is important to underscore the fact that the principle of *locus standi* is a basic principle in both municipal and international law that qualifies a party with legal capacity to approach any judicial or quasi-judicial body and establishes a nexus between a party and a case. It is generally accepted to mean the "right to appear as a party" before any judicial or quasi-judicial body³ such as the Commission.
58. Although the provisions of Article 55 of the African Charter does not explicitly state those who are eligible to file complaints under this Article, the Commission has adopted the *actio popularis* approach, a flexible approach that allows everyone including non-victim individuals, NGOs⁴ and pressure groups⁵ with interest to file a Communication, for its consideration.
59. All that is required is for the Complainants to allege is the violation of a recognized Charter right. They need not show that they personally have any specific rights that have been violated.

³ Encyclopaedia of Public International Law, (EPIL), vol. IV, p. 594.

⁴ Communication No 31/89 , Baes V. Zaire, (ACHPR) 8th Annual Activity Report and Communication No. 109/93 Constitutional Rights Project et al V. Nigeria, (ACHPR) 12th Annual Activity Report respectively.

⁵Communication 260/2002, Bakweri Land Claims Committee V. Cameroon, (ACHPR) 36th Ordinary Session 23rd November to 7th December 2004- Dakar Senegal (Unreported)

60. The fact that the Communication indicates the name of the author, and relates to the alleged violation of a recognized Charter right which the Respondent State is committed to respecting and protecting, the Commission is of the view that the Complainants have *locus standi* to institute this Communication.

61. With regards to the Respondent State, the Commission notes that Zimbabwe has been a State Party to the African Charter since 1986. Therefore, both the Complainant and the Respondent State have *locus standi* before the Commission, and thus the latter has competence *rationae personae* to examine the Communication before it.

62. Having decided that it has competence *rationae materiae* and *rationae personae*, the Commission will now proceed to pronounce on the admissibility requirements and the contentious areas between the parties.

Commission's Analysis on Admissibility

63. The current Communication is submitted pursuant to Article 55 of the African Charter, which allows the Commission to receive and consider Communications, other than from States Parties. Article 56 of the African Charter provides that the Admissibility of a Communication submitted pursuant to Article 55 of the African Charter is subject to seven conditions.⁶ The Commission has stressed that the conditions laid down in Article 56 of the African Charter are conjunctive, meaning that if any one of them is not satisfied, the Communication will be declared inadmissible.⁷

⁶ See Article 56 of the African Charter on Human and Peoples' Rights.

⁷ See Commission on Human and Peoples' Rights Communications: 284/03 Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Republic of Zimbabwe, para. 81, and 299/05 Anuak Justice Council v. Ethiopia, para. 44.

64. The parties to the present Communication seem to agree that five of the conditions set out under Article 56 of the African Charter have been met. They are however in dispute over the application of two of the conditions – Articles 56 (2) and 56 (5) of the African Charter.
65. Article 56(2) of the African Charter requires that the Communication must be compatible with the Constitutive Act of the African Union and with the African Charter.
66. Article 56 (5) of the African Charter on its part requires that Communication brought under Article 55 shall be considered only if they “are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged”.
67. With respect to the Constitutive Act, the Commission will disallow any matter brought before it, which seeks a remedy or redress which if granted, will contravene any of the provision of the said Constitutive Act. Thus, in **Katangese’s Peoples’ Congress V. Zaire**,⁸ a redress which infringed on the doctrine of *Uti Possidetis Juris*⁹ enshrined in Article 3 of the OAU Charter and now in Article 4 (b) of the Constitutive Act, was rejected and the case declared inadmissible.
68. In *Kevin Mgwanga Ngumne et al V. Cameroon*,¹⁰ the Commission, drawing inspiration from its previous decisions affirmed that, the condition relating to compatibility with the African Charter, basically requires that: (a) The communication should be brought against a State party to the African Charter¹¹; (b) The communication must allege *prima facie* violations of rights protected by

⁸ Communication 75/92, (ACHPR) 8th Activity Report

⁹ A principle under International Law which states that, colonially inherited boundaries are inviolable

¹⁰ Communication 266/2003, paragraph 38, (ACHPR), 38th Session

¹¹ Communication 5/88, Prince J.N Makoge V. USA, (ACHPR)

the African Charter¹²;(c) The communication should be brought in respect of violations that occurred after ratification of the African Charter or where violations that began before the State Party ratified the African Charter have continued even after such ratification.¹³ To be in conformity with the African Charter also requires the petition to contain a certain degree of specificity, and that the allegations are not vague.¹⁴ The view that the petition should disclose violations of specific Charter rights have now been overtaken by the decision in *SERAC et al V. Nigeria*.¹⁵

69. A careful examination of the facts and arguments from both parties to the present Communication do not show that the instant Communication is at variance with any part of the Constitutive Act of the African Union or the African Charter. The Commission is therefore of the view that the instant Communication satisfies the provision of Article 56 (2) of the African Charter.

70. With regards to Article 56 (5) African Charter, it is obvious from the submissions of the Complainants that they have not attempted and do not intend to exhaust local remedies. The relevance of Article 56 (5) of the African Charter is to ensure that 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.

71. However it is now the rule that the Complainants will not be required to exhaust local remedies in cases where there are legislative or administrative provisions that operate to oust the jurisdiction of ordinary Courts from taking up cases both at first instance and or on appeal. In these circumstances, local

¹² Communication 1/88, *Frederick Korvah V. Liberia*, (ACHPR)

¹³ Communication 97/93, *John K. Modise (2) V. Botswana* (ACHPR)

¹⁴ Communication 35/89, *Seyoum Ayelle V. Togo*, Paragraph 2 (ACHPR) See also, Communication 142/94, *Muthuthurin Njoka V. Kenya*, Paragraph 4 (ACHPR)

¹⁵ *Social and Economic Rights Action Centre (SERAC) et al V. Nigeria*, (ACHPR)

remedies will be held as unavailable and non-existent. The case of Civil Liberties Organisation V. Nigeria¹⁶ is a leading authority on this point. In this case, the Commission held that, "...since the (military) decrees oust the jurisdiction of the courts to adjudicate their validity, it is reasonable to presume that domestic remedies will not only be prolonged, but are certain to yield no results."¹⁷

72. The above view was later upheld *mutatis mutandi* in the case of Kenule Beeson Saro-Wiwa V. Nigeria¹⁸ wherein the Commission, while dispensing with the duty of the authors to exhaust local remedies held *suo moto* that, "... the ouster clauses render local remedies non-existent, ineffective or illusory".¹⁹ In Zimbabwe Human Rights NGO Forum V. Zimbabwe²⁰ a Presidential Clemency Order which prevented the victims of human rights violations from pursuing a cause under the domestic Courts, the Commission held to be an exception to the fulfillment of this requirement. This is so because the Clemency Order constructively and effectively ousted the jurisdictions of the domestic courts from receiving such cases.

73. The submission of the Complainant only states that the jurisdiction of the Courts has been ousted to question any expropriation of land. It does not indicate that the jurisdiction of the Courts has been ousted to contest the validity of the Constitutional Amendment. This situation is quite different from that in Civil Liberties Organisation V. Nigeria in which, "... the (military) decrees oust the jurisdiction of the courts to adjudicate on their validity".

74. In view of the above the Commission declares the Communication Admissible

Merits

Analysis of the Commission to strike out

¹⁶ Communication 129/94, (ACHPR) 9th Activity Report

¹⁷ Ibid, Paragraph 9

¹⁸ Communications 137/94, 139/94, 154/97 and 161/97 International PEN, et al (on behalf of Ken Saro-Wiwa Jr) V. Nigeria (joined), (ACHPR) 12th Activity Report. [herein after referred to as the Ken Saro.. Wiwa Cases]

¹⁹ Ibid Paragraph 76

²⁰ Communication 245/2002, paragraph 50, (ACHPR) 21st Activity Report

75. Rule 108(1) of the Commission's Rules of Procedure establishes that once a Communication has been declared admissible, the Commission shall set a period of sixty (60) days for the Complainant to submit observations on the merits.
76. Rule 113 provides that when a deadline is fixed for a particular submission, either party may apply to the Commission for extension of the period stipulated. The Commission may grant an extension of time for a period not longer than one (1) month.
77. To date, the Complainant has not (i) made any submissions on the merits, (ii) responded to several requests from the Commission for submissions, including the last one dated **18 May 2012** (iii) has not requested for an extension of time to submit.
78. Consequently the Commission does not have sufficient evidence upon which to make a determination on the Merits of the Communication.
79. In view of the above, the African Commission on Human and Peoples' Rights Commission decides to strike out the Communication for lack of diligent prosecution.
80. In view of the above, the African Commission on Human and Peoples' Rights Commission decides to strike out the Communication for lack of diligent prosecution.

Done in Banjul, The Gambia, During the 13th Extra-Ordinary Session