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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

URBAN MKANDAWIRE v. THE REPUBLIC OF MALAWI

(APPLICATION No. 003/2011)

JOINT DISSENTING OPINION OF JUDGES GERARD NIYUNGEKO AND EL HADJI GUISSE

1. In its judgment of 21 June 2013 in the matter of *Urban Mkandawire v. the Republic of Malawi*, the Court concluded *proprio motu* that the application was not admissible due to failure to exhaust local remedies. We beg to disagree with the conclusion reached by the Court with regard to the exhaustion of local remedies; the Court's reasoning and position regarding its jurisdiction *ratione temporis;* as well as the structure of the judgment with regard to its jurisdiction and the admissibility of the application.

I.The structure of the judgment with regard to the Court's jurisdiction and the admissibility of the application

2. In its judgment, the Court successively dealt with the preliminary objection on its jurisdiction *ratione temporis* raised by the Respondent State (paragraph 32); the preliminary objection on the inadmissibility of the application drawn from the fact that the application had been submitted to the African

Commission on Human and Peoples' Rights (paragraph 33); the Court's jurisdiction pursuant to the Protocol (paragraphs 34 to 35); and lastly, the exhaustion of local remedies (paragraphs 37 to 40), which is once again relating to the admissibility of the application. In doing so, the Court mixed up the consideration of the jurisdiction of the Court with that of the admissibility of the application. This mixed consideration poses a problem and creates confusion between two separate legal issues.

3. Whereas indeed, jurisdiction concerns the *Court*, admissibility concerns the *application*, and naturally, it is necessary to treat these two issues separately without mixing them. On the order of consideration of these issues, it is clear from the general past practice of the Court, from logic and common sense, as well as from Rule 39 of the Rules of Court, that the Court has to first determine whether or not it has jurisdiction before considering the admissibility of the application[1].

4. In our opinion, in the instant case, the Court ought to *have first considered separately* all issues relating to its jurisdiction (both the preliminary objection and its jurisdiction pursuant to the Protocol), *and then* all issues relating to the admissibility of the application (both the preliminary objection and the question of exhaustion of local remedies). The judgment would only have been clearer[2].

II. Determining the *ratione temporis* jurisdiction of the Court

5. On the jurisdiction of the Court, the Respondent State had raised an objection on the *ratione temporis* jurisdiction of the Court, drawn from the fact that the alleged violation of articles 7 and 15 of the Charter occurred before the

[1] For further details, see the separate opinion of Judge Gerard Niyungeko, annexed to the judgment of 14 June 2013 in the matter of *Tanganyika Law Society & al. v. The United Republic of Tanzania*, paragraphs 2 to 7.

[2] In the matter of *Tanganyika Law Society & al. v. The United Republic of Tanzania* cited in the preceding paragraph, the Court had treated both issues distinctly, except that, in our opinion, it unduly reversed the order of treatment, *Ibidem*.

entry into force, with regard to Malawi, of the Protocol establishing the Court on 9 October 2008 (paragraph 30(2) of the judgment).

6. The Court overrules this objection on the grounds contained in the following passage:

"The Court notes that the Charter came into operation on 21 October, 1986 and the Respondent ratified the Charter in 1989. It is the view of the Court, therefore, that at the time of the alleged violation of the Applicant's rights in 1999, the Charter was already binding on the Respondent; the latter was under the duty to protect the Applicant's rights alleged to have been violated. Furthermore, the Court notes that the Applicant's case is that the alleged violation of his rights under Articles 7 and 15 is continuing. For the above reasons, the preliminary objection raised by the Respondent cannot succeed" (paragraph 32).

7. The first reason advanced by the Court (the prior ratification of the Charter) is incomprehensible and confusing, within the context of the specific objection raised by the Respondent. In fact, whereas the objection by the Respondent State is based, as far as it was concerned, on *the date of entry into force of the Protocol* to establish the Court, the Court's response is to invoke *the date of entry into force of the Charter* which was not an issue for the Respondent State. And one does not quite see what the Court draws as conclusion from the date of entry into force of the Charter, regarding the Respondent State's argument of non-retroactivity of the Protocol[3].

8. In our opinion, the Court ought to have been unequivocal on this point and should have indicated that though the Respondent State was already bound by the Charter, the Court lacks temporal jurisdiction with respect to it, as long as the Protocol conferring jurisdiction on it is yet to become operational, unless of course the argument of the alleged continuing violation is invoked.

[3] The same problem arose in the matter of the *Tanganyika Law Society &al. v. The United Republic of Tanzania*, the 14 June 2013 judgment. See the separate opinion of Judge Gérard Niyungeko, paragraphs 8 to 17.

9. Regarding the second reason given by the Court (the continuation of the alleged violations), the Court ought to have examined these allegations more closely and possibly establish a distinction between the "instantaneous" and the "continuous" facts, as it appropriately did in another judgment delivered on the same day, in the matter of the *Beneficiaries of late Norbert Zongo and al. v. Burkina Faso*[4]. It should have asked itself whether the alleged violation of Article 15 of the Charter (the dismissal of the Applicant by the University of Malawi) was not an "instantaneous" fact outside the *ratione temporis* jurisdiction of the Court, and whether on the contrary the alleged violation of Article 7 of the Charter (the manner in which the local Courts handled the matter) was not a "continuous" fact, which falls within its temporal jurisdiction. An indepth analysis of these issues would have enabled the Court to arrive at a more informed conclusion with regard to its jursdiction *ratione temporis*.

10. In our opinion, the Court therefore missed an opportunity to make clear jurisprudence on an issue which will likely resurface in the future.

III. The issue of exhaustion of local remedies

11. The most serious problem raised by the judgment of the Court however is its approach and decision on the question of exhaustion of local remedies. After a summary of how the various local Courts handled the matter on several occasions (paragraphs 21 to 28 and 39), the Court concludes in substance that the Applicant did not exhaust local remedies, because he did not argue the appeal which he had brought before the High Court against a decision of the Industrial Relations Court, and that under such conditions, he could not go to the Supreme Court of Appeal if he were not to be satisfied with the decision of the High Court regarding his claims for reparation for unlawful dismissal (paragraph 40.1).

[4] The 21 June 2013 judgment, paragraph 63.

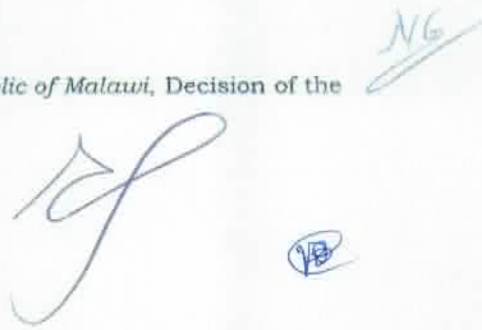
12. Firstly, it should be noted that the Court raised this issue *proprio motu* without the Respondent State raising a preliminary objection in that respect. On the contrary, before the African Commission on Human and Peoples' Rights, according to the latter, the Respondent State had earlier declared that "it does not dispute that the complainant exhausted all available local remedies and that as a matter of fact his claims before Malawi Courts were duly entertained..."[5]. The Commission itself concluded the consideration of the issue of exhaustion of local remedies in this matter, in the following terms:

"Thus, there is no contention regarding the exhaustion of local remedies by the Complainant from the Respondent State. In this regard, Article 56(5) has been duly complied with"[6].

13. Without doubt, the Court has the power and even the duty, under Rule 39 of its Rules, to consider the admissibility of an application even if the Respondent State did not raise any preliminary objection to that effect. But when the Respondent State itself -which is supposed to have a good knowledge of the remedies available in its judicial system and which has an interest in challenging the admissibility of the application- admits that the local remedies had been exhausted, when the Commission arrives at the same conclusion after examining the circumtances surrounding the matter, the Court must have very convincing reasons to go against this common position, and decide that local remedies had not been exhausted.

14. In the judgment of the Court, such convincing reasons are missing. Here is an Applicant who seized with the same matter the High Court on three occasions (once sitting as a constitutional Court), the Supreme Court of Appeal on three occasions, as well as the Industrial Relations Court, and the conclusion is that he has not exhausted local remedies because he could have

[5] Communication *357/2008 – Urban Mkandawire v. Republic of Malawi*, Decision of the Commission, paragraph 102.
[6] *Ibidem*



appealed again before the same High Court and the same Supreme Court of Appeal?

15. The subtile distinction between an action for unlawful termination of the contract of employment in terms of the contract itself, and an action for unlawful dismissal based on the rules of natural justice, which the Court seems to endorse (paragraph 40(1)), is not weighty enough compared to the general impression drawn from the handling of this matter by local Courts, and the acceptance by the Respondent State that local remedies had been exhausted. Under these circumstances, such technical subtility should not have been taken into account by a human rights Court as the sole and only basis for its conclusion for a matter as serious as the admissibility of the application.

16. Lastly, it seems to us that the Court, having taken the initiative of treating the issue of exhaustion of local remedies, it should have examined all its facets and ensure especially that the remedies it was referring the Applicant to, were still available and effective. However, since the issue was not discussed by the parties and since the Court itself raised no questions on the matter, no one knows, legally speaking, whether recourse to the High Court is still possible for the Applicant. Be it as it may, there is no guarantee that this remedy will be effective, especially as the Supreme Court of Appeal had decided in its judgment of 2007 that the principle of *res judicta* would applied to the case of the Applicant on unlawful dismissal[7].

17. The African Court therefore took its decision without any certainty on the availability of remedies and on their effectiveness. In our opinion, under the circumstances, it should at least have, pursuant to Rule 41 of the Rules of Court, requested parties to provide more information on the exhaustion of local

[7] The 11 October 2007 judgment: "We shall now deal with the first ground of appeal which is that his employment was unlawfully terminated. Upon regarding the judgement of this Court which was delivered on 12 July 2004 which we have partly cited earlier in this judgement, we are satisfied that the issue for determination and the parties to the appeal are the same. It is very clear that this case falls into a classic definition of ***res judicata***".

remedies, on their availability and effectiveness. By failing to do so, it took the risk of making a decision on a fragile basis.

18. As far as we are concerned, the Applicant may be considered as having exhausted local remedies, as recognized by the Respondent State itself, and as noted by the African Commission on Human and Peoples' Rights; consequently, we are of the opinion that the application is admissible.

19. Had the Court reached the same conclusion, it would have had the opportunity to examine the merits of the matter and to make a decision on alleged violations which fall within its jurisdiction, and to settle the matter. In the present situation, in our opinion, the judgment of the Court leaves regrettably, the impression of an uncompleted process.

Judge Gérard NIYUNGEKO

Judge El Hadji GUISSE

Robert ENO

Registrar