

**Communication 335/2006- Dabakorivhuwa Patriotic Front v the Republic of South Africa<sup>1</sup>**

**Summary of the Complaint:**

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received this Communication on 19 December 2006, pursuant to Article 55 of the African Charter on Human and Peoples' Rights (the African Charter or the Charter).
2. The Complainants are Mr. Tshifhiwa Samuel Makhale, the President of Dabakorivhuwa Patriotic Front (DPF), and the DPF. The Communication is brought against the Republic of South Africa, alleging violation of the basic indigenous and labour rights of the Vhavenda people.
3. The Venda people are from Venda (presently part of South Africa), which had the status of a self-governing state as at 1979. It is alleged that the Venda Government, passed the Venda Government Service Pension Act 4 of 1979, dealing with retirement benefits for male and female employees.
4. The Complainants allege that for the purpose of implementing the Act, provision was made for the establishment, control and administration of a pension fund for permanent employees and for a Superannuation Fund for temporary employees and married women. The former fund was known as the Venda Government Service Pension Fund while the latter was named the Venda Government Service Superannuation Fund. They are however both referred to as the "Venda Pension Fund" in this Communication.

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<sup>1</sup> The Republic of South Africa ratified the African Charter on Human and Peoples' Rights on July 9, 1996 and consequently became a State Party to the African Charter in October 1996.

5. It is further alleged that the pension fund was better funded than any other pension fund in the Republic of South Africa, compared to other homeland funds and the fund of the Apartheid National Government of South Africa. However due to a coup by the Venda military, a new government headed by Brigadier Gabriel Ramushwana replaced the old government and a Council of National Unity took control of the Venda Government.
6. The new government brought an amendment to the Venda Pension Fund Act on 14 February 1992, by way of Proclamation 2 of 1992, by the insertion of a Section 10A. This Section provided that any active member of the pension fund, whose pensionable emoluments exceeded an amount, as determined from time to time by the Director General for the Department of Finance and Economic Affairs, would have the right to elect to have his accrued benefit transferred in his name to a private investment plan providing retirement benefits. It further provided that on payment or transfer of a person's accrued benefit and interest thereon, such person's membership of the pension fund would be regarded as terminated. This is regarded as the "first privatisation scheme".
7. The Complainants state that this first privatisation scheme was amended in April 1992 providing that members having exercised their option to withdraw shall automatically rejoin the existing pension fund as a new member. After a number of members elected to participate in the privatisation scheme, it was officially suspended on September 1992, in terms of Proclamation 20 of 1992, by the erstwhile Government of Venda. This was due to a mass action by civil servants who objected to the fact that the younger members of the fund, whose emoluments were below the amount determined by the Director General, were being disadvantaged in the privatisation process.

8. The Complainants state that a Commission of Enquiry was appointed. The report of the Commission, dated 31 May 1993, revealed that the more senior members were gaining an unfair advantage over the junior/younger ones to the detriment of the latter.
9. The Complainants state that a new Proclamation was subsequently published by the Council of National Unity, on 28 June 1993 amending the first privatisation scheme in Section 10(A)(1). The new Section 10(A) (1) provided that all active members of the pension fund were given the right to elect that his or her “actuarial share<sup>2</sup>” of the fund be transferred by means of a lump sum payment for his or her benefit in his or her name to any investment plan or be paid to him or her free of tax. This is referred to as the “second privatisation scheme”.
10. The Complainants state that Section 7 of Proclamation 9 of 1993, provided that “payment of benefits shall be made in accordance with the revised actuarial formula which shall be based on parameters that are consistent with the valuation to be performed by an independent actuary”, which revised formula “shall be published in the Government Gazette on the date it is received from the independent actuary”.
11. The Complainants state that in an attempt to give effect to the provisions of Section 4 of the second privatisation scheme, a further Proclamation was published on 23 February 1994, amending Proclamation 9 of 1993 and empowering the Councillor of any Department to place on leave without pay, any active member who failed to re-pay an amount allegedly overpaid to him/her. The Proclamation further deprived the Court of its jurisdiction in respect of any action against such member. The Complainants state that on that

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<sup>2</sup> “Actuarial share of the fund” was defined for purposes of the second privatisation scheme as “the value of each member’s share of the pension fund or superannuation fund and stabilization account as at March 1992”.

same day (23 February 1994), a revised formula for privatisation in respect of the pension fund was introduced with retroactive effect from 29 June 1993, and was published in the Government Notice 3 of 1994.

12. The Complainants state that the revised formula introduced by the Proclamation, was not compiled by an independent actuary after an evaluation of the fund as envisaged by Section 7 of Proclamation 9 of 1993, but appears to be a formula proposed by the actuarial sub-committee of the Commission of Enquiry. The Complainants submit that this formula is inaccurate and does not accurately reflect a member's actual and/ actuarial interest in the pension fund.
13. The Complainants state that a Mr. Schoonraad, an actuary carried out actuarial evaluations and it appears that the fund had a deficit of R109.1 million, while the Venda Government Service Superannuation Fund had a deficit of R28.586 million. Subsequently, the Government released a press statement, which showed that all was well and that there were no deficits in any of the pension funds. The Complainants state that the Government records that "every member's full benefit is absolutely secure".
14. The Complainants state that an application was brought before the Venda High Court to set aside Proclamation 1 of 1994. The application was successful and the judgment of the Court has been reported in the South Africa Law Reports as *Malaudzi and Others v Chairman, Implementation Committee and Others 1995 (1) SA 514 (V)*. The Court order rendered both Proclamation 1 of 1994 and Government Notice 3 of 1994 to be of no force and effect. This judgment was handed down in June 1994, though it was argued in March 1994.
15. The Complainants state that in April 1994, Venda was incorporated into the Republic of South Africa (the Respondent State). As a result of this incorporation,

and by virtue of Section 14 of Proclamation 21 of 1996, all assets and liabilities of the Venda Pension Fund became the assets and liabilities of the Government Pension Fund, a juristic person and the successor of the Venda Service Pension Fund and the Venda Government Service Superannuation Fund.

16. The Complainants state that, presumably to remedy the situation arising from the Court's order in the Malaudzi matter, the office of the President of the Respondent State, issued Proclamation 56 of 1995, where he made regulations under Section 11 of the Venda Government Pensions Act 1979. In the preamble, it is recorded that the State President, acting under the powers vested on him under Section 235 (7) of South Africa's then Interim Constitution, makes the regulations under Section 11. This Proclamation fixed a funding level for the Venda Pension Fund at a level 75%, being a lower level than the level on which the June 1994 payments were made. The Complainants submit that any pension fund established needs to be funded at a level of 100%, and in the event of any shortage, it believes it to be equitable for the Respondent State to make an extraordinary contribution to the fund to remedy any deficit.
17. The Complainants state that after incorporation, a further round of payments was made to all members who participated in the second privatisation scheme. In spite of the fact that the Government's attention had been drawn to the fact that there was no logical basis and no existing legislation authorizing these payments. Majority of the members, who privatized, received 83% of their share of accrued benefits. Such payments were inadequate compared to approximately 91% received by members who participated in the first privatisation scheme.
18. The Complainants also state that the amounts paid to members in 1992 following the first privatisation scheme were inaccurately calculated on the basis that members were entitled to 91% of the present value of the benefits which they

expected to become entitled to. Some members however received more and some less than the amounts they were entitled to, due to the fact that the wrong data was used in calculating their benefits.

19. The Complainants state that on 19 April 1996, the President of the Respondent State in terms of Proclamation 21 of 1996 promulgated the Government Employees Pension Law, 1996. in which Section 14(1)(a) provided that any previous fund (including the erstwhile Venda Pension Fund) was to be discontinued from a date to be determined in respect of that fund by the Minister of Finance of the Respondent State. The Minister decided that 1 May 1996, was the date from when the Venda Pension Fund would be discontinued.
20. The Complainants state that Section 4(3) of Proclamation 21 of 1996 provides that members of any previous pension fund shall with effect from that date be a member of the Government Employees Pension Fund.
21. The Complainants state that categories of members of the erstwhile Venda Pension Fund; the first category are active members whose annual pensionable emoluments exceeded the amount determined by the Director General, who elected to have their accrued benefits transferred into an investment plan (first privatization scheme). The second category are members of the fund as at March 1992, whose actuarial share of the fund was either transferred into an investment plan or paid out in cash, free of tax (second privatisation scheme). The third were those members who remained members of the fund and did not participate in either the first or second privatisation schemes. The Complainants state that it is not being alleged that these last category are in any way prejudiced.
22. The Complainants also state that as regards the first category of members, some of them received 91% of their accrued benefits while others receives 75% or 83%,

and the unfortunate ones received from 0% to 91% of their accrued benefits. The second category of members received anything from 0% to 83% of the amount to which they were entitled.

23. The Complainants also state that due to these unresolved issues regarding the Venda Pension Fund, it was agreed by the members of the Pension Fund Scheme to form a movement styled the Dabalorivhuwa Pension Forum, which was later registered as a political party. This was done in order to further their claims for a lawful and equitable distribution of the pension benefits due to them under the Venda Government Service Pension Fund
24. The Complainants state that a complaint was lodged with the Public Protector, a public watch-dog body in November 1996. The Complainants allege that the Public Protector dragged its feet and in five years failed to complete its investigation and to report thereon. Accordingly, an application was lodged to the High Court of South Africa in 2001, under which an order was sought to compel the Public Protector to complete its investigation, where after it did in 2002.
25. The Complainants state that the report of the Public protector urged that participants of the first scheme be paid 100% of their actuarial interest. It also found that those in the second scheme were paid according to the funding level that was applicable to them at the time and that no improper prejudice has been established in their case.
26. The Complainants allege that in July 2004, they took the case before the High Court of South Africa Transvaal Provincial Division, for an order declaring that Proclamation 56 of 1995 is unconstitutional because it did not treat the members of the pension scheme equally, and that it is of no force and effect. The Court

dismissed the application of the Complainants based on reasons among which was unreasonable delay of seven years, in bringing the application to the Court and the fact that necessary data required to decide on the matter was lost, a fact which was likely to cause prejudice to the Government of South Africa.

27. The Complainants then took the matter before the Supreme Court of Appeal of South Africa in November 2005. The Supreme Court dismissed the application, upholding the decision of the High Court for unreasonable delay in bringing the application, because of loss of data which could have helped the case and the expense involved in retrieving these lost data.

28. The Complainants then took the matter before the Constitutional Court of South Africa requesting for leave to appeal the decision of the Court of Appeal. The Constitutional Court dismissed the application for leave to appeal, on the ground that it is not in the interest of justice to grant leave to appeal because of the absence of prospects of success in the appeal.

29. The Complainants allege the violation of the individual, civil and labour rights of the Vhavenda people especially those who are involved in the privatization scheme.

#### **Articles alleged to have been violated**

30. The Complainants allege the violation of **Articles 2, 3, 13, and 15** of the African Charter on Human and Peoples' Rights.

#### **Prayers of the Complainants**



31. The Complainants urge the Commission to arbitrate between the Venda People and the Government of South Africa with a view to resolving this matter.

### **The Procedure**

32. This Communication was received by the Secretariat of the African Commission on 19 December, 2006.
33. The Secretariat acknowledged receipt of the Communication by letter; ACHPR/LPROT/COMM/335/2006/RWE dated 12 February 2007, informing the Complainants that the Communication has been registered and will be considered for Seizure by the African Commission at its 41<sup>st</sup> Ordinary Session to be held from 16-30 May 2007 in Accra, Ghana.
34. During the 41<sup>st</sup> Ordinary Session of the African Commission in Accra, Ghana, held from 16-30 May 2007, the African Commission decided to be seized of the Communication.
35. The Secretariat wrote to the State and Complainants, by Note Verbale, dated 15 June 2007, and letter dated 14 June 2007, respectively, informing the parties of the decision of the Commission, and requesting them to forward their submissions on Admissibility to the Secretariat within three months.
36. On 23 August 2007, the Secretariat received the Complainants' submission on Admissibility and this submission was acknowledged by letter dated 30 August 2007. The Complainants' submission was transmitted to the State, attached to Note Verbale ACHPR/LPROT/COMM/335/07/RE, dated 30 August 2007.

37. On 27 September 2007, the Secretariat received a Note Verbale, dated 27 September 2007, to which the submission of the State on Admissibility was attached. This submission was acknowledged by the Secretariat by Note Verbale ACHPR/LPROT/COMM/335/07/RSA/RE, dated 28 September 2007.
38. The submission of the Respondent State was forwarded to the Complainants attached to letter ref: ACHPR/LPROT/COMM/335/07/RE, dated 11 October 2007, requesting the Complainants to send their comments if any, on the submissions of the State.
39. The Complainants responded by email on 25 October, 2007, requesting that the Commission to proceed with the information it already has.
40. At its 42<sup>nd</sup> Session, the Commission decided to defer the Communication to its 43<sup>rd</sup> Ordinary Session to give the Secretariat time to prepare the draft decision on Admissibility. The Secretariat informed the parties by Note Verbale and letter ref: ACHPR/LPROT/COMM/335/07/RE, dated 19 December 2007, informing the parties of the decision of the Commission.
41. The Commission deferred the Communication during its 43<sup>rd</sup> Ordinary Session to the 44<sup>th</sup> Session, to give the Secretariat time to prepare the draft decision on Admissibility. The Secretariat informed the parties by Note Verbale and letter ref: ACHPR/LPROT/COMM/335/07/SA, dated 26 August 2008, informing the parties of the decision of the Commission.
42. At its 44<sup>th</sup> Session, the Commission decided to defer the Communication to its 45<sup>th</sup> Ordinary Session to give the Secretariat time to prepare the draft decision on Admissibility. The Secretariat informed the parties by Note Verbale and letter ref: ACHPR/LPROT/COMM/335/07/SA, dated 15 December 2008, informing

- the parties of the decision of the Commission. The Communication was subsequently deferred to allow time for the drafting of a decision on Admissibility.
43. The Communication was declared admissible at the admissible at the 49<sup>th</sup> Ordinary Session and the parties were informed and requested to submit on the Merits.
44. On 28 July 2011, the Complainants requested that their initial Complaint be considered as submissions on the merits. This was communicated to the Respondent State which subsequently filed its submissions on the Merits, which were also forwarded to the Complainant.
45. At the 50<sup>th</sup> Ordinary Session, the Respondent State made oral submissions before the Commission, the contents of which were forwarded to the Complainants. The Communication was deferred to the 52<sup>nd</sup> Ordinary Session to allow time for the drafting of a decision on the merits.

## **The Law**

### **Admissibility**

#### **Complainants' Submission on Admissibility**

46. The Complainants submit that the Communication fulfills all the requirements of Article 56 of the African Charter.
47. The Complainants submit that the Communication indicates the author, which is Tshifhiwa Samuel Makhale and Dabalorivhuwa Patriotic Front, and the details of the author are indicated in paragraph 1.2 of the Communication.

48. The Complainants also submit that the dates of these violations, and the group of victims against whom these violations occurred have been stated. It also states that it is not possible to list the names of every one of the victims of the violation, due to the fact that there are thousands of them, but that the class of victims has been stated.
49. The Complainants state that the Communication is compatible with the Charter of the Organisation for African Unity (Now the Constitutive Act of the AU) and the African Charter, and that the Communication is not written in insulting or disparaging language.
50. The Complainants also state that the Communication is not based exclusively on news disseminated through the mass media and all information given is within its personal knowledge and is true and correct. The Complainants go further to state that any news disseminated through mass media on the matter, was done at their instance.
51. The Complainants state that all remedies available to them in South Africa have been exhausted; that a complaint was made to the Public Protector in November 1996, and after then the matter was brought before the Transvaal Provincial Division of the High Court of South Africa in July 2004. It was later brought before the Supreme Court of Appeal of South Africa in November 2005 and finally it was taken to the Constitutional Court of South Africa in February 2006.
52. The Complainants allege that after all these domestic remedies have been exhausted; there is no other judicial remedy available in South Africa to which the Complainants can take the complaint.

53. The Complainants state that this Communication has not been brought before, nor is being considered by any other international human rights body.

### **Respondent State's Submission on Admissibility**

54. The Respondent State challenges the Admissibility of the Complainants' submission. The Respondent State submits that the Communication does not fulfill the requirements set out in sub- Articles 2 and 5 of Article 56 of the African Charter, and should be declared inadmissible.

55. The Respondent State submits that the Communication does not fulfill the requirement of Article 56 (2) because it is not compatible with the African Charter. It supports this claim by stating that the Communication pertains to events which took place outside the period of application of the African Charter. It went further to cite the Commission's decision in *Amnesty International v. Sudan*<sup>3</sup>, where the Commission held that it would consider Communications pertaining to events that took place prior to the entry into force of the Charter, where "there are continuing violations". The Respondent State argues that the Communication does not show that there is such continuing violation and that there is in fact no such continuing violation of human rights.

56. It also went further to cite other International human rights jurisprudence, especially that of the Human Rights Committee. The Committee, in deciding on the admissibility of the case of *Gueye v France*<sup>4</sup>, involving human rights violations which occurred before the entry into force of the International Covenant on Civil and Political Rights (ICCPR), interpreted "continuing

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<sup>3</sup> African Commission's decision in Communication 48/90, 50/90, 52/90, 89/90.

<sup>4</sup> Human Rights Committee decision in Communication 196/1985.

violation" as violation which has effects which themselves constitute a violation of rights

57. The Respondent State argues that the Complainants claim that the effect of Government Notice 3 of 1994 which contained the revised formula for determining payouts in respect of the second privatization scheme was inaccurate. The Respondent State, submits that this Notice was published on 23 February 1994, and that the Republic of South Africa deposited its instrument of accession to the African Charter in July 1996 and only became a party to the Charter in October 1996, more than 2 years after the events complained of, therefore falling outside the time in which the Charter applied. According to the Respondent State, for this reason the Communication is inadmissible *ratione temporae*.

58. The Respondent State further argues that even if the applicants argue that the relevant date for determining the violation of rights is 5 June 1995, on which date the President of the Republic of South Africa enacted Proclamation 56 of 1995, this argument would still not be helpful because first, the enactment merely served to re-enact the formula in Government Notice 3 of 1994. Secondly, this date still falls before the entry into force of the Charter for the Republic of South Africa.

59. The Respondent State submits that there is no case of continuing violation in this matter because the events complained of took place in 1994/ 1995 and the Complainant has not made any further allegations of subsequent events which themselves constitute violations of their rights under the Charter. The Proclamation complained of applies only to those pension payouts that took place in 1993 on account of the privatisation scheme. There is no possibility of applying the Proclamation complained of in any payout occurring in the future

or, in any event, subsequent to the entry into force of the Charter. All the events necessary for the determination of the rights of everyone affected were completed prior to the entry into force of the Charter and there can, therefore be no case of continuing effects.

60. The second reason proffered by the Respondent State for the Communication to be declared inadmissible regarding compatibility, is that the Communication does not set out *prima facie* violation of a right in the African Charter. The State supports this argument with the Commission's decisions in *Ligue Camerounaise des Droits de l'Homme/ Cameroun* and *Frederick Korvah/Liberia*<sup>5</sup>. It further cites the Commission's decision in *Griebenow( on behalf of David Ashley Price)/ South Africa*<sup>6</sup>, where the Commission, while finding the Communication admissible, accepted the Respondent State's assertion that a *prima facie* case of violation of a right in the Charter has to be shown in order for a matter to be deemed admissible.
61. The Respondent State also refers to Article 60 of the Charter which invites the Commission to draw inspiration from decisions of other international human rights bodies. It argues that the Commission should consider the decisions of the Human Rights Committee, where in interpreting the provisions of the First Optional Protocol to the ICCPR, the Human Rights Committee has held inadmissible Communications which did not "substantiate, for purposes of admissibility, that the conduct" complained of amounted to a violation of rights in the ICCPR<sup>7</sup>; Similarly, the Human Rights Committee has declared

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<sup>5</sup> Communications 69/92 and 1/88.

<sup>6</sup> Communication 315/06.

<sup>7</sup> *Semey Joe Johnson/Spain* and *Salvadore Martinez Puertas/Spain*- HRC Communication 1102/2002 and 1183/03.

inadmissible Communications lacking in merit and that are insufficiently substantiated<sup>8</sup>.

62. The Respondent State submits on the basis of the above that to be admissible, a Communication must provide a *prima facie* evidence of violation of a right in the Charter. It states that for there to be *prima facie* violation of the Charter the Communication must concern a violation of the African Charter and not of domestic law and must be substantiated. The Respondent State is of the view that the Complainant's Communication has failed to meet these tests.
63. On the first test on substantiation, the Respondent State argues that the Complainant only alleges that various rights of theirs have been violated under Articles 2, 3, 13, and 15, of the Charter, but there is no attempt to substantiate those allegations.
64. The Respondent State also argues that local remedies have not been exhausted, since the Complainant has never raised these alleged violations in the domestic courts. It stated that the only alleged violation which the Complainant has made an attempt to substantiate is the allegation of the violation of their right not to be discriminated against.
65. The Respondent State points out that the Complainant has not shown that the Vhenda People have been discriminated against in relation to the rights provided for in the Charter. It also points out that regarding equality before the law which the Complainant allege, the scheme was not forced on the Vhenda Government employees, rather they elected to have their pension funds privatized.

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<sup>8</sup> Daljit Singh/ Canada- HRC Communication 1315/2004.



66. The Respondent State argues further that the decision of the Vhenda People to privatize was based on financial reasons and in particular the decision was based on the understanding that the South Africa scheme was under-resourced and that come reintegration into the Democratic South Africa, they would be better off. The ground for differentiation was therefore, a financial decision made by the Complainant and not based on race, sex, religion or any other ground prohibited in the Charter.

67. The Respondent State also submits that the Communication is about the calculation of benefits, that the calculation enacted by the Government Notice 3 of 1994 and the Presidential Proclamation of 1995, was incorrect. It also submits that the African Commission cannot be expected to adjudicate on such matters and to do so would be to extend the mandate of the Commission beyond the determination of human rights violations in the African Charter to another area of law. Exercising jurisdiction in such matters would imply legislative competencies in domestic policies unforeseen by the drafters of the African Charter and not exercised by other human rights monitoring bodies and as such undermine the legitimacy of the African system on the protection of human rights.

68. The Respondent State concludes its arguments by praying that the African Commission finds the Communication inadmissible based on the following reasons:

- a. the Communication concerns events which took place at a time when the Charter was inapplicable to the Republic of South Africa;
- b. the Communication does not set out a *prima facie* violation and is manifestly unfounded;

- c. the Communication is not sufficiently substantiated; and
- d. the Communication does not concern violation of human rights.

### **Analysis on Admissibility**

69. Article 56 of the African Charter provides seven requirements which must all be met before a Communication can be declared admissible by the African Commission.

70. The Complainants submit that it has fulfilled all the requirements in Article 56 of the African Charter. The Respondent State on the other hand contends that the Complainants have not fulfilled some requirements of Article 56 and as such, this Communication should be declared inadmissible. The Commission will thus proceed to analyse the arguments of both Parties based on the provisions of Article 56 of the Charter.

71. Article 56(1) of the Charter provides that “Communications relating to human and Peoples’ Rights... shall be considered if they: indicate their authors even if the latter request anonymity”. In this Communication, the author and those he is representing are clearly stated. The author is Tshifhiwa Samuel Makhale, the President of Dabalorivhuwa Patriotic Front (DPF) and the Dabalorivhuwa Patriotic Front (DPF). The Commission also has details of their contact address and other relevant information. For this reason, the Commission holds that this requirement has been duly complied with.

72. Article 56 (2) of the Charter provides that “Communications relating to human and Peoples’ Rights... shall be considered if they: are compatible with the

Charter of the Organisation of African Unity or with the present Charter". The principle of compatibility with the African Charter presupposes that four elements must be satisfied to make a Communication compatible with the African Charter. First, the Communication must allege that a provision set out in the Charter has been violated (*ratione materiae*), second, the Communication must be directed at a State Party and must be brought by someone who is competent to do so (*ratione personae*), thirdly, the Communication must be based on events which occurred within the period of the Charter's application to the State (*ratione temporis*), except there is evidence of continuing violation<sup>9</sup> and lastly, it must be within the territorial sphere within which the Charter operates (*ratione loci*).

73. The Respondent State submits that this Communication is not compatible with the Charter because it does not fall within the period of application of the Charter in the Republic of South Africa. The State in this instance argues that the Republic of South Africa deposited its instrument of accession to the African Charter in July 1996 and only became party to the Charter in October 1996, while the events complained of by the Complainant started in 1994, two years before South Africa became a party to the Charter. Therefore, the Respondent State argues, it cannot be held liable for events which took place before October 1996, especially when there is no evidence of a continuing violation.

74. It is a general principle of international law that treaties 'do not bind a party in relation to any act or fact which took place in any situation which ceased to exist before the date of the entry into force of the treaty in respect to that party',<sup>10</sup> except where the treaty itself provides otherwise by expressly allowing

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<sup>9</sup> Communication 39/90, Annette Pagnouille (on behalf of Abdoulaye Mazou)/Cameroon, Eight Activity Report 1994-1995, Annex VI ; Tenth Activity Report 1996-1997, Annex X.

<sup>10</sup> See Article 28 of the Vienna Convention on the Law of Treaties.

retroactive effect, or where there are 'continuous violations'.<sup>11</sup> The Republic of South Africa did not become a party to the Charter until 9 July 1996 (and the Charter entered into force three months later<sup>12</sup>). In principle, a State cannot be held liable for events which occurred before the applicability of the Charter to it. The African Commission applied this principle in *Njoka v Kenya*<sup>13</sup>.

75. In *Annette Pagnouille v Cameroon*<sup>14</sup> however, the African Commission recognised an exception to the general principle and stated that when the consequences of an alleged violation 'constitute a continuing violation of any of the Articles of the African Charter, the Commission must pronounce on these.'<sup>15</sup> The Commission has shown in this case that it has the competence to pronounce on violations which occurred prior to the Charter's application to the State Party in question, where there is evidence of continuing violation.

76. In the present case, the issue under determination is whether there is a continuing violation of the victims' rights. The Complainants allege that they were paid less than they were entitled to from the privatisation of the Venda Pension Fund. This is still the case till date; they have not been paid the full amounts which they allege is due to them. Also, the Proclamation 56 which is the Law relating to the pension fund scheme, which they sought to have revised, has not been revised to date. Therefore, even though the violations occurred in 1994/1995 before the Respondent State became party to the Charter, the status quo has remained the same; these victims have still not been paid what they

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<sup>11</sup> See the Human Rights Committee's views in Communication 117/81, *M.A. v. Italy*, Doc. A/39/40, p. 190, and the European Court in *DeBecker v. Belgium*, Series A, No.4, Judgment of 27 March 1962, European Human Rights Reports 1 (1962) 43. A 'Continuous violation' is an action that started before the entry into force of the treaty, but where it or its effects continue after the entry into force of the treaty and, at that stage, therefore, may constitute an infringement of the treaty.

<sup>12</sup> Article 65 of The African Charter.

<sup>13</sup> Communication 142/94, *Muthuthirin Njoka/ Kenya*, Eighth Activity Report 1994-1995, Annex VI.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, para.15.

allege they are entitled to. Therefore the Commission holds that although the events complained of occurred before 1996, there is evidence of continuing violation. The Commission holds that this element of compatibility with the Charter has been fulfilled.

77. The Respondent State also pointed out that the Communication does not set out *prima facie* violation of the Charter based on the fact that the Complainant has not substantiated their claims on Articles 2,3,13 and 15, which they allege have been violated. The Complainants allege that most of the Venda Government workers, who were involved in the Privatisation scheme, were paid less than they were meant to be paid. They also furnish the Commission with an elaboration of the facts of the matter. Without going into the merits of the Communication, the Commission can deduce that there is a *prima facie* violation of their economic rights, which intertwines with some other rights under the Charter; all these would be put under proper scrutiny at the Merits stage of the Communication. The Commission therefore holds that this element of compatibility which is contended by the Respondent State has also been fulfilled.

78. Article 56 (3) of the Charter provides that “Communications relating to human and Peoples’ Rights... shall be considered if they: are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity”(OAU). In this Complaint, the language used is not disparaging or insulting to the State nor to its institutions nor to the AU. For this reason, the African Commission holds that the Communication fulfills the provision of sub- Article 3 of Article 56 of the African Charter.

79. Article 56 (4) of the Charter provides that “Communications relating to human and Peoples’ Rights... shall be considered if they: are not based exclusively on news disseminated through the mass media”. The Complainant states that the

Communication and the events which led to bringing same before the Commission are within his personal knowledge and not through news disseminated by the mass media. The Commission does not see in this Communication, anything which shows that it is based exclusively on mass media and as such, holds that this sub-Article of Article 56 of the Charter has been complied with.

80. Article 56 (5) of the Charter provides that “Communications relating to human and Peoples’ Rights... shall be considered if they: are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged”. The Complainants in this matter allege that they took the matter, as a complaint to the Public Protector in November 1996 for investigations which took the Public Protector about five years to report on. Then it was brought before the High Court of South Africa in July 2004, which dismissed their application. It was then taken before the Supreme Court of Appeal of South Africa in November 2005, the Supreme Court of Appeal also dismissed their application. Finally it was taken to the Constitutional Court of South Africa in February 2006; the Constitutional Court dismissed their application for leave to appeal, on the grounds that there was no “prospects of success in the appeal”<sup>16</sup>. For this reason, therefore, the exhaustion of local remedy requirement has been exhausted by the Complainant.

81. The State however raised an issue that the Complainants have only just raised the issue of violation of these rights (Article 2, 3, 13, and 15) for the first time before the Commission and did not raise this in the Courts in South Africa.

82. The African Commission notes that the Complainants have shown *prima facie* evidence of taking their case before all the hierarchy of Courts in South Africa, in

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<sup>16</sup> Supra- Statement of Facts.

the hopes to remedy their situation. Also, the same facts contained in the case dismissed at the domestic courts are those presented before the African Commission. The Complainants do not have to state specific Articles of the Charter which have been violated, but where they do, it would be wrong to penalize them for doing so based on the arguments that they had not raised the fact that those Articles have been violated, in the domestic Courts.

83. The Commission stated in its decision in *Mouvement des Réfugiés Mauritanien au Sénégal v Senegal*, that the Commission does not require that the 'complaints intended to be made subsequently' at the international level had to be made 'at least in substance' at the national level, such as invoking the particular right at stake either by name or as part of an argument 'to the same or like effect', as the European system does<sup>17</sup>. What this means in essence is that, the Complainants do not need to have mentioned the Articles of the Charter violated in the domestic Courts. What is important at this stage is for the Complainants to state the facts, showing evidence of *prima facie* violation of Articles in the Charter and that they have utilized and exhausted the legal mechanisms available to them in the State to remedy the wrong; this is sufficient for the Commission to make a decision on Admissibility under this proviso. The Commission therefore holds that this requirement has been fulfilled by the Complainant.

84. Article 56 (6) of the Charter provides that "Communications relating to human and Peoples' Rights... shall be considered if they; are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter". The Complainants state that the decision of the Constitutional Court to dismiss its application for leave to appeal the Supreme Court of Appeal's decision on 16 February 2006 brought an end to

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Communication 162/97, Eleventh Activity Report 1997-1998, Annex II.

its efforts to exhaust local remedies. The Secretariat of the African Commission received this Communication on 19 December, 2006 and acknowledged receipt by a letter dated 12 February, 2007. The Charter does not provide for what constitutes a reasonable time, for a Complainant to bring his/her complaint before the Commission. The Commission has however dealt with this issue, on a case by case basis. The Communication was received by the Secretariat of the African Commission ten months after the decision of the Constitutional Court. The African Commission considers this to be a reasonable time, taking into consideration the complexities of getting a representation before an international body, the unreliability of communications system in Africa and obtaining the consent of a large group of victims. The African Commission therefore holds that this proviso has been complied with.

85. Article 56 (7) of the Charter provides that “Communications relating to human and Peoples’ Rights... shall be considered if they: do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.” The Complainants state that this Communication has not been taken before nor settled by any international body and as such this requirement has been met. The State has not objected to this and there is no evidence before the Commission to show that the Communication has been settled by an international body. The Commission therefore holds that this requirement has been fulfilled.

86. The Commission holds that all the provisions of Article 56 of the African Charter, have been fulfilled by the Complainants.

87. In view of the above the Commission declares the Communication admissible.

## **Merits**



## **Complainants' Submissions on the Merits**

88. The Complainants submit that the Communication describes in detail the violation of the human and peoples' rights that took place and indicates the date when these took place. The Complainants urge the Commission to consider the facts of the case as their submissions on the merits.

## **Respondent State's Submissions on the Merits**

89. The Respondent State submits that with the exception of the allegation concerning the right not to be discriminated against (Article 2), which can be inferred from the facts of the case, the Complainants have made no attempt to substantiate their allegations of the violation of Articles 3, 13 and 15 of the Charter.

## **Alleged Violation of Article 2**

90. On the alleged violation of Article 2 of the Charter, The Respondent State submits that it is clear that Article 2 is a non-discrimination provision, listing in some detail the prohibited grounds of discrimination. The Respondent State refers to *Kahn, Walter & Jorg Kunzli*, who define discrimination as "treating differently, without objective and reasonable justification, persons in similar situations."<sup>18</sup> It argues that the Communication does not set out the ground on which the Complainants' alleged discrimination occurred, nor whether this constitutes a prohibited ground of discrimination.

91. The Respondent State maintains that a Communication must provide a *prima facie* case of a violation of right in the Charter and there must be sufficient substantiation of a violation. In the view of the Respondent State, the current

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<sup>18</sup>Kahn, Walter & Jorg Kunzli, *The Law of International Human Rights Protection*, (2009) p. 345).

Communication fails to meet this test, firstly, because the Complainants do not substantiate the alleged violation of the right not to be discriminated against, and secondly because to the extent that some negative effect on the Complainants may have been shown, this results not from a violation of rights in the Charter but from other historical factors over which the Government had no control.

92. The Respondent State further argues that it was precisely to prevent any distinction between the two categories of civil servant that the Government acted expeditiously by promulgating Proclamation 1 of 1994, to amend Proclamation 9 of 1993 and of Government Notice 3 of 1994, to implement and give retrospective effect to the Second Privatization Scheme with its 75% funding basis, which formed the basis for the recovery from the civil servants who participated in the First Privatization Scheme the difference between the 91% payments they received and the 75% of the second scheme. The Respondent State avers that the second privatization scheme, in which the Complainants participated, was therefore not discriminatory at all, but aimed to treat all participants in both schemes equally on the basis of actuarial facts.
93. The Respondent State further argues that Venda civil servants, of whom the Complainants form part, willingly participated in the privatisation of the Venda Funds in order to prevent any prejudice to themselves upon the re-incorporation of Venda into South Africa. These civil servants themselves formed a Coalition that protested against the dangers inherent to their interest in the calculations on which the first pension fund was based. In order to address the possible prejudice to their interests, they negotiated with the Government and were represented at all times and on an equal basis in the negotiations with the Venda Government through the Crisis Committee which agreed on the second privatisation scheme and its actuarial basis of 75% for calculating their pension benefits.

94. For the above reason, the Respondent State argues that the Complainants were therefore part and parcel of the decision that resulted in them getting a 75% pay-out. The Respondent State maintains that the situation in which the Complainants find themselves results from the exercise of a free choice, which in terms of international human rights jurisprudence cannot form the basis of discrimination. To support its argument, the Respondent State cites the cases of *Young v Australia*,<sup>19</sup> and *X v Colombia*.<sup>20</sup>

95. The Respondent State explains that the Government acted speedily and expeditiously to ensure that no discrimination takes place between the beneficiaries of the first and second privatization schemes, by giving the second privatization scheme retrospective effect and acting to recover overpayments made to beneficiaries of the first privatization scheme in order to protect the interests of the beneficiaries of the second privatization scheme.

96. The Respondent State explains further that it never acted in a discriminatory way against the participants in the second privatisation scheme; in fact, it acted with a view to prevent any discrimination; there was no discriminatory act by the Government and even if the distinction between the 91% and 75% benefits are taken into account, such factual distinction that may have arisen, was the result of developments outside the control of the Government and can therefore be justified. The Respondent State therefore concludes that the alleged violation of the right to non-discrimination in the African Charter has not been substantiated.

97. It is further pointed out by the Respondent State that besides the fact that discrimination cannot be based on the facts of the case and the actions by the Venda Government, the Communication fails to take into account that the right not to be discriminated against, though a critical and vital right in the Charter, is

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<sup>19</sup> Communication 941/2000 of the Human Rights Committee

<sup>20</sup> Communication 1361/2005 of the Human Rights Committee

a right that is to be enjoyed in relation to other rights. It is argued that the Charter does not provide a general non-discrimination clause and a Complainant must show that he or she has been discriminated against with respect to the *enjoyment of rights in the Charter*. This, the Respondent State contends, the Complainants have not, and cannot do.

98. The Respondent State also points out that there is a fundamental defect in the Complainants case in that they appear to ignore the fact that they have been treated differently on account of financial decisions that they themselves made. It is further pointed out that in the Communication and the various domestic court challenges; the privatisation scheme was not forced on any Venda government employees. Rather, the affected Government employees **elected** voluntarily to have their pension funds privatised. It is argued that the decision to privatise was made on financial reasons, in particular the decision to privatise was based on the understanding that the South African scheme was under-resourced and that come reintegration into the democratic South Africa, they would be better off. The Respondent States concludes that the ground for differentiation is, therefore, a financial decision made by the Complainants and not race, not sex, not religion or any other ground prohibited by Article 2 of the Charter, but the result of the subsequent calculation of pension benefits by an independent contractor.

99. It is also argued by the Respondent State that at the heart of this Communication is the assumption that the calculation enacted by Government Notice 3 of 1994 and the Presidential Proclamation of 1995, was actuarially incorrect. It is further argued that it has also not been intimated by the Complainants how the payment of an accrued benefit to civil servants that has been actuarially calculated as correct on the basis of the funding level of a pension fund, can *per se* constitute discrimination; not obtaining a larger benefit

than what is actuarially available cannot amount to discrimination. Consequently, unlike alleged by the Complainants, they were not paid less than their calculated interest in the Funds. Simply put: they were not paid less than what was due to them, and there was consequently no discrimination.

100. The Respondent State emphasizes that the Venda Government's actions were indeed aimed at preventing discrimination and ensuring that all pension fund members are equally treated by receiving a 75% benefit. Contrary to what the Complainants allege, the distinction that did take place resulted not from the actions of the Government, but as a result of historical factors the National Council of Unity that was the *de facto* government of Venda, had no control over. It explains that as South Africa was moving inexorably towards ending apartheid and establishing democracy, the incorporation of apartheid's illegitimate offspring, the so-called independent homelands of which Venda was one, became inevitable. One of the steps leading up to the advent of democracy and the reincorporation of the homelands, was the establishment of the Transitional Executive Council ("TEC") to oversee the process and the execution of governmental functions, on which the then Government of the Republic of South Africa as well as the parties participating in the negotiations to establish a democratic South Africa were represented. The TEC was established in terms of the Transitional Executive Council Act 151 of 1993, a South African Act which was given effect in the territory of Venda by means of Proclamation 26 of 1993. The TEC Act contained certain procedural requirements which had to be complied with prior to the promulgation of Proclamation 1 of 1994, which, inadvertently, were not followed, resulting in it being set aside in the *Mulaudzi judgement* and preventing in practice the Government's determination to effect repayment of amounts having been overpaid.

101. The Respondent State concludes that the distinction between a 91% and a 75% payout of benefits, the basis for the Complainants discrimination claim, is therefore not the result of an action by the Government that violated Article 2 of the African Charter

but was the result of the relentless march of history, a factor totally out of control of the Government.

### **Alleged Violation of Article 3**

102. Regarding the violation of Article 3, the Respondent State submits that it has never been asserted in the present Communication that the Complainants' right to equal treatment and equal protection of the law is at issue and considers that its arguments on this issue are subsumed under the submissions above, on the alleged violation of Article 2.

### **Alleged Violation of Article 13**

103. It is submitted by the Respondent State that the facts of the case do not sustain any claim that the Complainants' right to political participation provided in Article 13 of the Charter has been violated. The Respondent State maintains that they were not prevented from participating in the Government of their country nor were they denied equal access to the public service or property.

### **Alleged Violation of Article 15**

104. The Respondent State submits that the Complainants have failed to substantiate the alleged violation of Article 15 which essentially deals with labour conditions in the work place.

105. The Respondent State concludes that it is clear that no violation of the African Charter has taken place and that the complaint is devoid of any remedy given that it is simply impossible to calculate today, twenty years after the events described above, any *quantum* of a monetary redress, nor is it possible to obtain reliable information of who may now be entitled to such an academic remedy and as such, no

remedy can be directed at executive conduct that will be possible for the Respondent State to give effect to.

### **The Commission's decision on the Merits**

106. The Commission is called upon to determine whether the enactment of Proclamation 1 of 1994 which occasioned a distinction between two categories of civil servants at the Service of the erstwhile Venda civil service gave rise to a violation of Articles 2, 3, 13 and 15 of the African Charter.

### **Alleged Violation of Article 2**

107. The Commission notes that there are no conflicting accounts of the facts of the present Communication at the heart of which is whether the distinction that arose from the payment of pension benefits to the beneficiaries of the first and second privatisation schemes of the Venda Pension Fund, who respectively received 91% and 75% of their actuarial interests in the fund can be said to amount to a violation of Article 2 of the African Charter, taking into consideration all the circumstances of the case.

108. The Complainants have submitted that this distinction prejudiced the civil servants who took part in the second privatization scheme. According to them, the revised formula upon which the payments of the second privatization scheme was based, did not accurately reflect a member's actual and/ actuarial interest in the pension fund. The Respondent State on the other hand contends that the Complainants willingly participated in the privatization scheme in order to prevent prejudice to themselves upon the reintegration of Venda into South Africa and were part and parcel of the decision against which they are complaining, given that they were represented at all times in the negotiation process. The Respondent State maintains that the Complainants were not paid less than their calculated interest in the Funds

109. The Commission is therefore called upon to determine whether the Complainants in the circumstances were victims of discrimination in terms of Article 2 of the Charter.

110. To respond to this issue, it is imperative to examine what amounts to discrimination under the Charter and whether or not a distinction between categories of persons who are similarly placed amounts to a violation of Article 2 of the Charter.

111. Article 2 of the Charter provides as follows:

*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 any other status.*

112. The Commission has defined discrimination in terms of Article 2 in *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* as:<sup>21</sup>

*any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.*

113. The Commission has also established in *Kenneth Good v Botswana*<sup>22</sup> the test to establish whether there has been discrimination. The Commission held in the above case that “a violation of the principle of non-discrimination arises if: a)

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<sup>21</sup> Communication 29/04 – ZLHR & IHRDA v Zimbabwe (2006) ACHPR para 91 ; see also the Commission’s decision in Communication 211/98 – Legal Resources Foundation v Zambia (2000) ACHPR para 63.

<sup>22</sup> Communication 313/05 – Kenneth Good v. Botswana (2010) ACHPR.



equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed".<sup>23</sup>

114. The Complainants have not substantiated how the conduct of the Respondent State restricted or excluded them from enjoying the rights guaranteed in the Charter; they only make reference to the distinction between civil servants who received 91% and 75% of their benefits under the first and second privatization schemes. They have also not shown that the distinction lacked an objective purpose or that it was disproportionate.

115. Furthermore, the Complainants have not established how their dignity as human beings was infringed on by the distinction, nor whether the grounds on which they were purportedly distinguished is one that is prohibited under the Charter. Their only contention is that the distinction materially affected them. The issue to be resolved is thus whether distinction/differentiation amounts to discrimination under the Charter?

116. In that regard, the Commission refers to the South African Constitutional Court ruling in *Prinelloo v Van der Linde*,<sup>24</sup>

*In regard to mere differentiation, the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate Government purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional state.*

117. It follows that Article 2 of the Charter does not require all individuals in similar circumstances to be necessarily treated in the same manner, it permits the different treatment of people similarly placed if such treatment is meant to achieve a rational and legitimate purpose that does not impair the fundamental

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<sup>23</sup> Para 219 supra

<sup>24</sup> *Prinelloo v Van der Linde* 1997 (3) SA 1012 (CC) 25.

dignity of the affected persons or infringe on their enjoyments of the rights and freedoms guaranteed by the Charter.

118. The Respondent State has justified the rationale for the enactment of Proclamation 1 of 1994, amending and giving retrospective effect to Proclamation 9 of 1993 which it asserts, was to avoid any discrimination between beneficiaries of the first and the second privatisation schemes. It has also explained that the privatization of the Venda Pension Funds was a result of the relentless march of history and the Government took all reasonable measures to mitigate the effects of the events on Venda civil servants. The Complainants have not disputed any of these facts. This is sufficient proof that the Government took reasonable steps to remedy the situation that could have potentially led to unfair discrimination. The Commission considers as a consequence that the enactment of Proclamation 1 of 1994 cannot therefore be considered arbitrary, but was meant to achieve a legitimate purpose.

119. The Commission also notes that the Respondent State did not obligate the members of the Venda Pension Fund to privatise their earning. They made a free financial choice and their contention that the formula used in calculating their benefits is a matter that does not fall within the purview of the Commission's mandate. In this regard, the Commission agrees with the Respondent State's contention that the ground for differentiation was based on a financial decision made by the Complainants and not race, not sex, not religion or any other ground prohibited by Article 2 of the Charter, but the result of the subsequent calculation of pension benefits by an independent contractor. It has been clearly established that the Respondent State took prompt measures to recover payments made to beneficiaries of the first privatization scheme which were over and above their entitlements in order to place them at a par with beneficiaries of the second privatization scheme.

120. The Complainants have failed to prove that the conduct of the Respondent State in differentiating between categories of civil servants lacked a rational purpose nor that such differentiation led to a fundamental impairment of their dignity as human beings or that the distinction affected their enjoyment of the rights and freedoms guaranteed in the African Charter. The Commission therefore finds that the conduct of the Respondent State did not violate the provisions of Article 2 of the Charter.

### **Alleged Violation of Article 3**

121. Article 3 of the African Charter protects the right to equality before the law and equal protection of the law.

122. The Complainants have referred the Commission to the facts of the case as substantiation of the violation of this provision of the Charter. The Respondent State on the other hand contends that the facts of the case raise no issues under Article 3.

123. In *Institute for Human Rights and Development in Africa (on behalf of Esmaila connateh and 13 others v Angola*,<sup>25</sup> the Commission referred to the United States Supreme Court decision in *Brown v Board of Education of Topeka*<sup>26</sup> wherein the right to equal protection of the law was defined as the right of all persons to have the same access to the law Courts and to be treated equally by the law courts, both in the procedure and in the substance of the law.

124. The treatment of the Complainants by the courts of law in South Africa is not at issue in the present Communication. From the facts of the present Communication, the Complainants were given unrestricted access to the Courts/tribunals of the Respondent State which dismissed the case for various reasons. The Complainants have not shown that the courts failed to give them the same treatment accorded to others.

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<sup>25</sup> Communication 292/04 – IHRDA (on behalf of Esmaila Connateh and 13 Ors v Angola (2008) ACHPR para 46.

<sup>26</sup> *Brown v Board of Education of Topeka*, 347 US 483 (1954).

125. The Commission therefore finds that the Complainants' allegation of a violation of Article 3 by the Respondent has not been established and can therefore not be sustained.

### **Alleged violation of Article 13**

126. Article 13 of the Charter provides as follows:

- i. *"Every Citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the*
- ii. *Every citizen shall have the right to equal access to public service of the country*
- iii. *Every individual shall have the right to access public property and services in strict equality of all persons before the law".*

127. The Complainants have not made any specific submissions to substantiate the alleged violation of the provisions of the above cited Article. The Respondent State contends that the facts of the case do not sustain any claim that Article 13 has been violated. The Respondent State avers that the Complainants were not prevented from participating in the Government of their country, or denied equal access to the public service or access to public property or services.

128. The content of Article 13 has been established in the Commission's jurisprudence in a number of Communications - *Modise v Botswana*,<sup>27</sup> *Dawda Jawara v Gambia*,<sup>28</sup> *Constitutional Rights Project v Nigeria*<sup>29</sup> and *Legal Resources Foundation v Zambia*.<sup>30</sup> General Comment No 25 of the Human

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<sup>27</sup> Communication 97/93 – John k Modise v Botswana (2001) ACHPR.

<sup>28</sup> Communication 147/95-147/96 – Sir Dawda Jawara v Gambia (2000) ACHPR.

<sup>29</sup> Communication 102/93 – Constitutional Rights Project v Nigeria (1999) ACHPR.

<sup>30</sup> Communication 211/98 – Legal Resources Foundation v Zambia (2001) ACHPR.

Rights Committee also elaborates on the content of this right.<sup>31</sup>In the above cited jurisprudence and General Comment, it has been established that this right entails the right of citizens to directly or indirectly take part in the conduct of public affairs through electoral processes and have access to public services and property without discrimination of any kind. The Commission considers that the disparities that ensued from the privatization process cannot be said to have deprived the Complainants from enjoying the rights guaranteed under Article 13.

129. It has not been shown that the Complainants were in any way restricted from participating in the Government of their country or denied equal access to public services or property. The Commission therefore considers that the facts of the case cannot sustain a violation of Article 13 of the Charter.

#### **Alleged Violation of Article 15**

130. Article 15 of the Charter protects the right of individuals to work under equitable and satisfactory conditions and to equal pay for equal work.

131. As is the case with the preceding provisions, the Complainants have not substantiated on how the conduct of the Respondent State violated this right. The Respondent State denies that the Complainants right to work under equitable conditions has been violated.

132. The Commission has considered alleged violation of the right to work under equitable conditions in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*<sup>32</sup>, *Institute for Human Rights and*

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<sup>31</sup> General Comment No 25 “the right to participate in public affairs, voting rights and the right to equal access to public services” Human Rights Committee (1996)

<sup>32</sup> Communication 284/03 – ZLHR & Associated Newspapers of Zimbabwe v Zimbabwe (2009) ACHPR

*Development (on behalf of Esmaila Conateh and 13 others) v Angola*<sup>33</sup> and *Annette Pagnoule (on behalf of A. Mazou) v Cameroon*.<sup>34</sup>

133. In the ECOWAS Community Court of Justice case of **Etim Moses v Gambia**, the Court pronounced on the provision of Article 15 of the Charter as follow:<sup>35</sup>

*"... the concept of equal work for equal salary implies that two or several persons who carry out the same job, occupy the same position in an organisation must earn the same remuneration and have the same prospects for promotion, except where the employer justifies a difference in treatment by objective factors not related to any form of discrimination. ...the objective of the principle of equal work for equal salary is to prohibit every form of discrimination between individuals who find themselves under the same condition."*

134. It has already been shown in the analysis of Article 2 above that the differentiation that occurred between beneficiaries of the first and second privatization schemes did not amount to discrimination and was based on objective and rational criteria, aimed at achieving a legitimate objective. The issue of equitable working conditions and equal pay for equal work does not therefore arise and the Commission accordingly considers that the rights of the Complainants under Article 15 of the Charter have not been violated.

135. From all the above, the Commission finds that the rights of the Complainants under Articles 2, 3, 13 and 15 of the Charter have not been violated and consequently dismisses the Communication.

**Done in Banjul, the Gambia at the 53<sup>rd</sup> Ordinary Session 9 - 23 April 2013**

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<sup>33</sup> Communication 292/03 – IHRDA (on behalf of Esmaila Conateh and 13 others) v Angola (2008) ACHPR).

<sup>34</sup> Communication 39/90 – Annette Pagnoule (on behalf of A. Mazou) v Cameroon (1997) ACHPR.

<sup>35</sup> ECW/CCJ/JUD/05/07: Etim Moses v Gambia (2007) ECW/CCJ para 27; see also General Comment No 18 ‘the Right to Work’ Committee on Economic, Social and Cultural Rights (2005).