

Communication 414/12-Lawyers for Human Rights (Swaziland) v The Kingdom of Swaziland

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 24 April 2012 from Lawyers for Human Rights-Swaziland (the Complainant) against The Kingdom of Swaziland (Respondent State or Swaziland).
2. The Respondent State is a State Party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter) having ratified the same on 15 September 1995.
3. The Complainant avers that the Swazi people in particular, political parties in general, and their members who desire to put in place a government of their choice through a multi-party system, have since 12 April 1973 suffered and continue to suffer irreparable harm as a result of the denial of free political activity and the banning of political parties to lawfully and effectively contest elections.
4. The Complainant states that Swaziland is an independent State having obtained independence from the Kingdom of Great Britain on 6 September 1968 under the Swaziland Independence Order, Act No. 50 of 1968 (otherwise known as the 1968 Independence Constitution). The Complainant states that the independence Constitution established a democratic form of government, provided for the rule of law, separation of powers and an independent judiciary. In Chapter II, the 1968 Constitution provided for a justiciable Bill of Rights which was enforceable by an independent judiciary.
5. The Complainant states that the rights articulated in the independence Constitution were subject to reasonable limitations. Quoting sections of the Constitution, the Complainant states that: *'... the provisions in this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights by any individual does not prejudice the rights and freedoms of others and public interest.'* Thus, the Complainant

submits, limitation of rights was based on the respect of the rights of others and public interest within a democratic dispensation.

6. The Complainant avers that prior to independence, Swaziland held two national elections, one in 1964 and another in 1967. In these elections no opposition political party won a single seat in parliament. In both instances the King's political party, the *Imbokodvo* National Movement (INM) was the overall winner. It states that these elections were conducted on a multi-party basis. Among the political parties that contested were the United Swaziland Association (USA), the Swaziland Independent Front (SIF), the Swaziland Democratic Party (SDP), the Swaziland Progressive Party (SPP), the *Ngwane* National Liberation Congress (NNLC) and the INM.
7. The Complainant states that post-independence elections were held in 1972. They aver that to the surprise of the ruling INM, while it won the majority seats in parliament, one of the political opposition parties, the NNLC won three seats. This victory ushered a new era in the political history of the newly independent State, as it meant that for the first time there would be an official opposition inside parliament. It avers that it was the emergence of this opposition that led to a number of events in the country, resulting in the unlawful abrogation of the independence Constitution and its electoral system and laws.
8. The Complainant avers that the Government was unhappy with the opposition party, NNLC being in parliament, and decided to frustrate one of its members, *Bhekindlela Thomas Ngwenya* by declaring him a non-Swazi citizen. The Complainant submits that this was a violation of his fundamental rights as provided for under Chapter II of the Constitution. It states that in a series of court cases, *Ngwenya* finally won in the Court of Appeal, whose decision was contested by the Government.
9. The Complainant states that upon failing in the courts to suppress the opposition, the Government opted to unlawfully¹ repeal the Constitution

¹ Unlawful, they argue, because there was no provision in the Constitution of its repeal in the Constitution. Rather, section 134 provided for its amendment, so that if the King was unhappy with some provisions therein, he had the lawful option of amending it. In this regard the Court of Appeal of Swaziland as it then was in *Ray Gwebu and Lucky Nhlanhla Bhembe v The King* Criminal Appeal Nos. 19 and 20 of 2000 (Unreported) found that indeed the repeal was unlawful.

through the unprecedented promulgation of the King's Proclamation to the Nation of April 12, 1973.²

10. The Complainant states that King Sobhuza II assumed supreme authority by vesting executive, legislative and judicial powers of the State to himself. The Complainant submits that supremacy of the Monarchy was reaffirmed by King Mswati III after he assumed the Throne on 25 April 1986.
11. The Complainant argues that the idea of supremacy of the King and Monarchy is inherently inconsistent with constitutionalism, democracy and good governance. The concentration of power in the hands of one person or institution, it avers, is inherently not conducive to the protection, promotion and enjoyment of fundamental human rights basic freedoms and civil liberties.³
12. The Complainant avers that to prove beyond any doubt, in November 2008 the People's United Democratic Movement (PUDEMO) and its Youth League, the Swaziland Youth Congress (SWAYOCO) were banned and listed under the infamous Suppression of Terrorism Act N0. 3 of 2008. Its leaders were arrested, charged and tried under the Act, and one of its members *Sipho Jele* died in custody after he was arrested during the Workers' Day Commemoration on 1 May 2010.
13. The Complainant avers that the people of Swaziland have through peaceful means, campaigned that the country should return to just and democratic constitutional governance through a people-driven democratic Constitution based on the rule of law.

² Sabelo Gumedze 'Swaziland' 1580-1588 in Christof Heyns (Ed) *Human rights law in Africa* Vol. Two (2004).

³ Paragraph 3 of the Proclamation reads:

Now THEREFORE I, SOBHUZA II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme authority in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers. They state further that it is not necessary to go into detail on the provisions of the Proclamation as they were a subject of determination in the matter of *Lawyers for Human Rights (Swaziland) v Swaziland*, in which the African Commission on Human and Peoples' Rights (the African Commission/the Commission) found the Proclamation to be in violation of the African Charter.

Paragraph 3 A. of the Proclamation reads:

The Constitution of Swaziland which commenced on the 6th September, 1968, is hereby repealed;

14. The Complainant states that not all the people of Swaziland were involved in the crafting of the 2005 Constitution. It avers that the Court of Appeal in *Jan Sithole N.O. (in his capacity as a Trustee of the Constitutional Assembly-Trust) v The Swaziland Government*⁴ refused to allow legitimate peoples' organizations - banned political associations and organized trade unions to participate in the making of the constitution of the country. It states that the Court refused to give a liberal meaning to the provisions of section 4 of Decree No. 2 of 1996⁵ and found that such organisations did not have the right to approach the Court for relief. Neither were they entitled to participate in the constitution-making process because of the ban placed on them by the King's Proclamation.
15. The Complainant states that the process of making a Constitution should be carried under a legal and political environment that is conducive for the *effective and meaningful participation of all the people* regardless of their political opinions and political affiliation.

Articles alleged to have been violated

16. The Complainant alleges that the Respondent State has violated **Articles 1, 2, 7, 10, 11, 13, 19, 20 and 26** of the African Charter.

Prayers:

17. The Complainant prays that the African Commission on Human and Peoples' Rights (the Commission) should:
- i. Give an order that the conception, crafting and adoption of the Swaziland Constitution 2005 was done in violation of the African Charter in particular, in total disregard for the Commission's decision made during its Fifth Ordinary Session held between 4-5 July 2005;⁶

⁴ Appeal No. 35/2007 (Unreported).

⁵ It read: Representation Any member of the general public who desires to make a submission to the Commission may do so in person or in writing and may not represent or be represented in any capacity whilst making such submission to the Commission.

⁶ *Lawyers for Human Rights v Swaziland*, paragraph 63

- ii. Order that the Constitution be reviewed with the full involvement and participation of all stakeholders, and that if need be, the 2013 elections be postponed until such time that all stakeholders are agreed on the holding of genuine, free and fair, inclusive democratic elections;
- iii. Undertake a promotional mission to ensure that its decisions are implemented;
- iv. Request the Respondent to give effect to all the provisions of the African Charter and in particular Articles 1, 2, 7, 10, 11, 13, 20, and 26;
- v. Take urgent and Provisional Measures to prevent the irreparable damage caused by the ban of political parties and disenfranchisement of their members since 1973, and that the 2013 elections are conducted under a political and legal environment conducive to genuine, free and fair democratic elections in accordance with Swaziland's obligations under regional and international human rights law.

Procedure

18. The Secretariat received the Complaint on 24 April 2012 in the margins of the 51st Ordinary Session, and it was seized by the Commission during the same Session. The Commission did not however grant the request for Provisional Measures because it deemed that the facts as submitted did not necessitate the grant of Provisional Measures.
19. The Parties were informed of the fact of seizure and the Complaint was transmitted to the Respondent State by correspondence dated 21 May 2012. The Complainants were also requested on the same date to submit observations on Admissibility.
20. On 26 July 2012, the Complainants' submissions on Admissibility were received at the Secretariat and transmitted to the Respondent State by correspondence dated the same day. The Respondent State was in the same correspondence

requested to submit its observations on the Complainants submissions on Admissibility.

21. On 15 October 2012, in the margins of the 52nd Ordinary Session, a delegation of the Respondent State from the Ministry of Justice requested for an extension of time to make submissions on Admissibility for the reason that it was not aware of the Communication. The Secretariat re-sent the Communication and attached the correspondences and attachments earlier sent in May 2012.
22. The Communication was deferred to the 53rd Ordinary Session to allow the Respondent to make submissions. Following this, correspondence dated 12 November 2012 was sent to the Complainant informing the latter about the grant for extension of time to the Respondent State.
23. The Communication was deferred during the 53rd Ordinary Session and by letter of 10 May 2013, the Complainant was requested to resubmit a Complaint with annexes referred therein.
24. The Complainant resubmitted a Complaint with annexes on 20 August 2013, and the Secretariat acknowledged receipt on 21 August 2013.
25. By Note Verbale of 6 September 2013, the Secretariat transmitted the submissions to the Respondent State.
26. The Communication was deferred during the 54th Ordinary Session pending submissions from the Respondent State and both Parties were informed on 5 December 2013.
27. The Respondent State has to date failed to make its submissions on Admissibility.

The Complainant's Submissions on Admissibility

28. The Complainant submits that all the admissibility requirement under Article 56 of the Charter have been complied with. It specifically elaborates on the provisions of Article 56 (5) of the Charter on the exhaustion of local remedies.

29. In that regard, the Complainant contends that all available local remedies have been exhausted. They submit that the Supreme Court, the most superior Court in Swaziland, in the case of **Jan Sithole N. O (in his capacity as a Trustee of the National Constitutional Assembly) v The Government of Swaziland**⁷ held that political parties are by virtue of section 79 of the Constitution barred from participating, but individual members of political parties can participate as citizens.
30. The Complainant submits further that because the Supreme Court as the highest court of Swaziland has taken the above position, there are no other remedies available for the complainants to exhaust within Swaziland. The Complainant cites the Commission's decision in **Free Legal Assistance Group and others v Zaire**,⁸ wherein the Commission held that the requirement to exhaust local remedies should not apply literally where it is impracticable or undesirable for the Complainant to seize the local courts. In that regard, the Complainant argues that it is inconceivable for it to again approach the very courts and complain to them about a matter they have already decided.
31. The Complainant argues further that even if the remedies were available, the level of confidence that the people have in the court is very low because the courts have in recent times been deeply compromised for the reason that the appointment process of judges is devoid of credibility and transparency.
32. It is further submitted by the Complainant that all members of the Judicial Service Commission, which is the body constitutionally mandated to advise the King on the appointment of judges, are the appointees of the King himself.
33. For the above reasons, the Complainant urges the Commission to find the Communication admissible.

Analysis of the Commission on Admissibility

⁷ Judgement of 21 May 2009, unreported.

⁸ Communication 25/89, 47/90

34. The Admissibility of Communications submitted to the Commission is governed by the requirements contained in Article 56 of the African Charter. Article 56 sets out seven requirements which must be cumulatively complied with for a Communication to be admissible. The Complainant submits that all these requirements have been met but only substantiates on the requirement under Article 56 (5).
35. As indicated above, the Respondent State has not submitted its observations on admissibility. In the present circumstances and in accordance with the practice of the Commission as enunciated in the case of **Institute for Human Rights and Development in Africa v. Republic of Angola**, “in the face of the state’s failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure.” In the same decision, the Commission re-affirmed its position by holding that “... it would proceed to consider Communications on the basis of the submission of the Complainants and information at its disposal, even if the State fails to submit.”⁹ Accordingly, the Commission must give due weight to the Complainant’s allegations insofar as these have been adequately substantiated.
36. The Commission notes from the Complainant’s submissions and the facts of the Communication, that the requirements under subsections (1) (2) (3) (4) and (7) of Article 56 raise no contentious issues and require no further examination. The Commission considers that the Communication meets these requirements and will assess further, the conformity of the Communication with the requirement under Article 56 (5) and (6) of the Charter.
37. Article 56 (5), allows the Commission to consider a Communication after the Complainant has exhausted local remedies, if any, unless it is obvious that this procedure is unduly prolonged. The rationale of this rule has been clarified in the Commission’s jurisprudence as a means of giving the state notice and affording it

⁹Communication 292/04 - Institute for Human Rights and Development in Africa v. Republic of Angola, para. 34; see also Communication 155/96 Social and Economic Rights Action Center, Center for Economic and Social Rights v. Federal Republic of Nigeria, and 159/96 Union Inter Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme, Rencontre Africaine des Droits de l’Homme, Organisation Nationale des Droits de l’Homme au Sénégal and Association Malienne des Droits de l’Homme v. Republic of Angola.

the opportunity of remedying a violation that has occurred in its territory, using its own local mechanisms, before its international responsibility can be called into question.¹⁰

38. The Commission has also held that the generally accepted meaning of local remedies, which must be exhausted prior to any Communication/Complaint procedure before the Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.¹¹ The Commission has also held in **Alfred Cudjoe v Ghana**,¹² and reaffirmed in **Good v Botswana**,¹³ that the internal remedy to which Article 56(5) refers entails a remedy sought from courts of a judicial nature.
39. The Commission notes the Complainant's submission that proceedings were initiated at the domestic level regarding the ban on the participation of political parties in elections. The Commission has ascertained from the evidence adduced that the local courts indeed had an opportunity to deal with the matter in the case of **Jan Sithole N. O (in his capacity as a Trustee of the National Constitutional Assembly) v The Government of Swaziland**,¹⁴ (**the Sithole Judgment**) in which the Supreme Court of Swaziland delivered its judgment on 21 May 2009, upholding the ban on the participation of political parties in elections. The Commission also that that the Supreme Court is the highest court in the hierarchy of Courts in Swaziland.
40. Since it is not in dispute that the Supreme Court of Swaziland is the Respondent State's Court of final jurisdiction, the Commission considers that there were no other remedies left to be exhausted given that the subject matter in the Communication before the Commission and that of the Sithole judgment is the same. Consequently, the Commission holds that local remedies were duly exhausted.

¹⁰ See Communication 296/05 Centre for Housing Rights and Evictions (COHRE) v. Sudan (2010) ACHPR.

¹¹ Communication No 242/01 Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme/ Islamic Republic of Mauritania* 17th Annual Activity Report at para 27.

¹² Communication 221/98 (1998 – 1999) 12th Activity Report ACHPR. para 14

¹³ Communication 313/05 (2010) 28th Activity Report ACHPR. para 88

¹⁴ *Op cit* at 7 above.

41. Regarding submission of the Communication within a reasonable time, Article 56(6), provides that Communications 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 present Communication was received at the Secretariat of the Commission on the 24 April 2012. From the Complainant's submissions, local remedies were exhausted in May 2009 when the Supreme Court of Swaziland handed down its judgment. This gives an interval of thirty four (34) months when the Complainants released that there were no further remedies to exhaust after the Sithole Judgment was handed down and the submission of the Communication to the African Commission.
42. Unlike in the other regional human rights instruments, notably the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms which all consider the period of six months¹⁵ as a reasonable period within which Complaints must be submitted after the exhaustion of local remedies, the African Charter has no such period. The Commission by virtue of its mandate under Article 45 of the Charter therefore interprets this provision on a case by case basis taking into consideration its duty to promote and protect human rights as laid down in the Charter.
43. The African Charter empowers the Commission to, in interpreting the provisions of the Charter, draw inspiration from various sources of law including legal precedents, doctrine, customs and practices consistent with international norms

¹⁵ See articles 56 (1) b & 36(1) respectively of the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Rights and Freedoms.

on human rights.¹⁶ Accordingly, the Commission in interpreting the provision of Article 56 (6) in **Michael Mujuru v Zimbabwe**¹⁷ stated as follows:

Going by the practice of similar regional human rights institutions, such as the Inter-American Commission and Court and the European Court, six months seem to be the usual standard. This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice

44. The question that therefore falls for determination is whether a period of thirty four months can be considered reasonable in the circumstances of the present case.

45. The Complainant has made no submissions to explain why the Communication was submitted 34 months after the *Sithole* judgment was delivered. It has not shown why it was necessary to submit the Communication at the material time. Submitting a Communication thirty four months after local remedies being aware of the unavailability of local remedies without any reason to explain such a long interval is clearly unreasonable and the Commission therefore finds no compelling reason why this Communication should meet the requirement of Article 56(6).

1. In view of the above, the Commission decides:

¹⁶ See articles 60 & 61 of the African Charter.

¹⁷ Communication 308/05(2008) 25th Activity Report, ACHPR. Para 109. The Commission declared this Communication inadmissible on account of the fact that it was submitted 22 months after the Complainant fled Zimbabwe and no convincing reason was put forth to explain such delay.

- i. To declare the Communication inadmissible for failure to comply with Article 56 (6) of the Charter;
- ii. To notify its decision to the parties in accordance with Rule 107 (3) of its Rules of Procedure.

Done in Banjul, Gambia, at the 14th Extraordinary Session

ACHPR