

**Communication 413/12 –David Mendes (represented by the Centre for Human Rights, University of Pretoria) v Angola<sup>1</sup>**

**Summary of the Complaint:**

1. The Complaint was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on **21 April 2012**. The Communication is submitted by the Centre for Human Rights (CHR), University of Pretoria (the Complainant), on behalf of Mr. David Mendes (the Victim) against the Republic of Angola (the Respondent State).
2. The Complainant submits that the Victim is a human rights lawyer, activist and President of the Popular Party (Partido Popular), an opposition party to the ruling Peoples' Movement for the Liberation of Angola (MPLA) Party, led by Jose Eduardo dos Santos.
3. The Complainant states that under the 2010 Constitution of Angola, the President would no longer be directly elected, as was the case under the 1992 Constitution. It notes that according to the Constitution, "*The individual heading the national list of the political party or coalition of political parties which receives the most votes in general elections held under the terms of Article 142 onwards of this Constitution shall be elected President of the Republic and Head of the Executive.*"<sup>2</sup> According to the Complainant, it is in line with the 2010 Constitution of Angola that Mr. Mendes ran for President in the 2012 elections.

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<sup>1</sup> Ratified the African Charter on Human and Peoples Rights on 2 March 1990

<sup>2</sup> Art 109(1) of the 2010 Constitution of Angola.

4. The Complainant avers that under Angolan electoral legislation, a party intending to contest the election is required to obtain a significant number of signatures in the provinces of Angola before it can be registered for the elections: 5 000 signatures in Luanda Province, and 500 signatures in each of the other 17 provinces, totalling 13, 500 signatures.
5. The Complainant submits that, Mr. Mendes has been heading Mãos Livres, the leading association of lawyers, where he served as President until 30 August 2011, and later resigned so as to concentrate on his campaign for Presidency in the elections of 2012.
6. The Complainant points out that this Complaint is made with respect to the Respondent State's violations of the Victim's rights under the African Charter on Human and Peoples' Rights (the African Charter), which occurred since the Victim announced his support for a demonstration that was planned to be held on 7 March 2011.
7. The Complainant alleges that the violations continued, in particular since he announced his candidature for the presidency in the elections and since he subsequently brought a private criminal complaint before the Attorney General's Office accusing President Eduardo dos Santos of embezzlement and corruption.
8. The Complainant also alleges that the Respondent State has instigated, participated in, been complicit in, and/or allowed violations of the Victim's rights by intentionally committing, or failing to investigate credible allegations of the violation of the following unlawful acts:
  - a) Death threats against the Victim and his family;

- b) Destroying the Victim's motor vehicles and other vehicles belonging to Mãos Livres;
  - c) Sending an assembly of a threatening mob to the Victims' house in June 2011 accompanied by State television;
  - d) Falsely and maliciously accusing the Victim of seditious acts in respect of a complaint he made in relation to the alleged corruption and embezzlement of public funds by President dos Santos;
  - e) Destroying the Victim's car while he was in Benguela organizing political activities on 31 March 2012, and shooting the offices of Mãos Livres with machine guns, in Luanda.
9. Based on the above, the Complainant seeks the urgent intervention of the African Commission on Human and People' Rights (the Commission), in order to prevent any imminent danger to the Victim's life by virtue of the death threats he has continued to receive and the attacks on his life and property. The Complainant therefore requests the Commission to adopt Provisional Measures.
10. The Complainant submits that it has received additional information confirming that the actions directed by the Respondent State or with its acquiescence against the Victim have resulted in a final determination by the Constitutional Court denying the Popular Party and its candidates, including the Victim, a place on the 31 August elections for the National Assembly. The Constitutional Court adopted its Decision No. 197/2012 to disqualify the Popular Party from appearing on the ballot on 31 August. The Victim and the

Popular Party appealed this decision before the filing deadline of 3 July 2012. On 5 July 2012, the Constitutional Court rejected the appeal in a detailed opinion (Decision 222/2012) which found the appellant's arguments to be without merit.

11. The Complainant concludes that the Popular Party's exclusion from the ballot for the 31 August 2012 National Assembly elections confirms that the Respondent State has excluded the Victim and his party from direct participation as candidates enrolled on the ballot in the 2012 National Assembly elections in Angola.

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

12. The Complainant submits that the Victim's rights under **Articles 1, 4, 6, 9, 10, 11, 12, 13 and 21(2)** of the African Charter have been violated by the Respondent State.

#### **Prayers:**

13. The Complainant requests the Commission to issue Provisional Measures directing the Respondent State to:
  - a) Immediately refrain from any actions, measures or threats to the life and personal security of the Victim and his family.
  - b) Investigate the death threats and other attacks on the life and personal security of the Victim and his family.
  - c) Allow the Victim to exercise his right to participate as a candidate in the forthcoming election, and provide equitable access to state controlled media during the campaign period as required by the

African Charter, the Angolan Constitution, in line with Article 17 of the African Charter on Democracy, Elections and Governance.

d) Enable the Victim to collect the signatures in all the provinces therein, by guaranteeing his safety and by providing the necessary protection for him to travel freely to the provinces so as to obtain the required number of signatures.

e) Extend the deadline for submission of signatures, so as to compensate for the lost time caused to the Victim while he was being persecuted by the Respondent State, and which has consequently jeopardized his election campaign.

## **Procedure**

14. The Communication was received at the Secretariat on 21 April 2012, and registered as Communication **413/12 -David Mendes (represented by the Centre for Human Rights, University of Pretoria) v Angola**.

15. The Commission at its 51<sup>st</sup> Ordinary Session which took place from 18 April to 2 May 2012 in Banjul, The Gambia, considered the above-mentioned Communication and decided to be seized of it.

16. On 30 April 2012, the Commission issued Provisional Measures and requested the Respondent State to:

- Immediately refrain from any actions, measures or threats to the life and personal security of the Victim and his family;
- Investigate the death threats and other attacks on the life and personal security of the Victim and his family; and

- Allow the Victim to exercise his right to participate as a candidate in the elections, and provide equitable access to state controlled media during the campaign period as required by the African Charter and the Angolan Constitution.
17. A copy of the Provisional Measures was forwarded to the Respondent State on 11 May 2012.
  18. By letter dated 18 May 2012, the Complainant was informed about Seizure of the Communication and a copy of the Provisional Measures was forwarded to the same. A Note Verbale informing the Respondent State about the Complaint was also sent on the same date.
  19. On 21 June 2012, the Complainant forwarded a letter to the Secretariat, requesting for a follow up of the Provisional Measures sent to the Respondent State. The letter noted specifically that elections are due in August 2012 and that the Victim has been inhibited from freely campaigning.
  20. By letter dated 26 June 2012, the Secretariat acknowledged receipt of the Complainant's follow-up letter and informed the latter that it will be tabled before the Commission during its next Session.
  21. On 18 July 2012, the Secretariat received the Complainant's additional submissions on Admissibility, acknowledged receipt on 19 July 2012 and forwarded to the Respondent State on the same date.
  22. The Commission at its 12<sup>th</sup> Extra-Ordinary Session which took from 30 July to 4 August 2012 in Algiers, Algeria considered the implementation of its Provisional Measures, and decided that the Provisional Measures be resent.

23. On 21 August 2012, the Secretariat forwarded a Note Verbale to the Respondent State resending the Provisional Measures. It requested the Respondent State to report to the Commission on the actions taken to implement the Provisional Measures issued against it within fifteen (15) days of the receipt of the request for Provisional Measures.
24. On 28 September 2012, the Secretariat received the Respondent State's Portuguese submissions on Admissibility and responses to the Provisional Measures issued by the Commission and sent for translation.
25. In a letter dated 3 December 2012, the Respondent State's submissions were forwarded to the Complainant. The Secretariat also informed the Complainant that the Commission considered the non-Compliance of Provisional Measures by the State and decided to proceed on Admissibility. The reason being that the matter could not be referred to the African Court under Rule 118(2) because the Respondent State has not ratified the Court Protocol.
26. In a Note Verbale dated 4 December 2012, the Secretariat acknowledged receipt of the Respondent State's submissions after ascertaining the content. The Secretariat noted that the 15 days required by the State to respond to the Provisional Measures expired on 4 September 2012 and in that regard, the Commission considered non-compliance of Provisional Measures by the State during its 52<sup>nd</sup> Ordinary Session and decided to proceed on Admissibility.
27. The Communication was deferred during the 53<sup>rd</sup> Ordinary Session of the Commission to allow time for the preparation of a decision on Admissibility.

### **The Complainant's Submissions on Admissibility**

28. The Complainant submits that the requirements for admissibility under Article 56 of the Charter have been met.
29. On the issue of exhaustion of domestic remedies in particular, the Complainant avers that the Victim cannot exhaust domestic remedies in Angola because such remedies do not meet the Commission's requirements of availability, effectiveness, and sufficiency. They cite *Jawara v The Gambia*, wherein the Commission held that 'the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness'.
30. The Complainant points out that the principal ex post facto remedy for the type of actions perpetrated against Mr Mendes in Angola is the investigation of the allegation of death threats and embezzlement, and, if necessary, the criminal prosecution of those responsible. The Complainant maintains that it is the duty of the state to ensure through its police force that, where there is a breakdown of law and order, the perpetrators are arrested and brought before the domestic courts of that country. Therefore any criminal processes that flow from this action, including undertaking investigations to make the case for the prosecution are the responsibility of the state concerned and the state cannot abdicate that duty.
31. The Complainant argues that considering the pattern of harassment and intimidation, including the vandalism and death threats which may have been intended to generate a fear of lynching (e.g. the attack on his home in June, 2011, and the hostile occupation of the Popular Party's headquarters in December, 2011), as well as the fact that he has been publicly vilified by the Luanda party secretary of the MPLA, Bento Bento, and the latter's subsequent appointment as governor of Luanda province in Angola, the requirement of



exhaustion of domestic remedies for admissibility of a Communication has been satisfied.

32. It is submitted further that the Victim reported his complaints of threats and vandalism to the police on a number of times and no investigations or any other action has been taken. Instead of redress through an effective investigation of his complaint, the Victim continued to receive a wide range of death threats to his life, his family members and his close associates – which threats effectively impeded his access to local remedies.
33. The Victim also lodged a complaint with the Attorney General based on the corruption report but to-date no action has been taken by the Attorney General. The Complainant states that the Attorney General informed the Victim that his Office will not proceed with the complaint against the President as it lacks competence under the Angolan Constitution. There is, therefore, no remedy available under the Angolan legal system. Rather than investigating the complaint, the Attorney General informed the Victim that he was going to be charged with subversion, and was subjected to five hours of questioning by police officials and prosecutors at the National Directorate of Criminal Investigations. Hence, it is the Complainant's contention that there are no available domestic remedies, and, even if there are, they have been exhausted or are otherwise ineffective in the circumstances.
34. In addition, the Complainant points out that any attempt to pursue judicial remedies at this point would necessarily involve undue delay, particularly as Angola is nearing elections. In short, no effective legal remedies exist that might be invoked to protect Mendes's right to life and other fundamental rights, particularly in view of the risks to his person, family and associates that such further complaints could entail.

35. The Complainant further contends that the Victim could not exhaust local remedies because there are no provisions in the national laws of Angola allowing them to seek remedies for the violations alleged in respect of the allegations of corruption. Articles 133 and 135 of the Constitution of Angola provide for immunity for the head of state during and after his or her term of office. This implies that no local remedy can be sought on the failure to investigate the allegations of embezzlement complaint. The Complainant avers that the Attorney General indeed informed the Victim that his Office does not have the competence to proceed with the complaint against the President.
36. The Complainant further submits that the issue of death threats and vandalism of the Victim's property is intertwined with that of embezzlement of state funds by the President of the Respondent State, since the death threats emanated from the fact that the Victim lodged a complaint against such embezzlement with the Attorney General. It therefore urges the Commission to find that the President is indeed immune under the Constitution of Angola in respect of the embezzlement accusations and, therefore, no local remedies are available to the Victim. The Complainant submits that the Commission should dispose of all issues simultaneously, including those on the death threats and vandalism since these issues cannot be divorced from each other.
37. In addition to the foregoing, the Complainant stresses that the climate of violence and repression that accompanied the planning and holding of street demonstrations in Angola, detailed in the complaint, has made the exercise of fundamental rights for those involved in planning or participating in demonstrations, or defending those arrested or whose rights are violated at demonstrations, quite dangerous. According to the Complainant, the climate of fear existing in the country and the failure of the government to respond effectively supports the argument that there is no effective domestic remedy

available to address the Victim's complaints. The Complainants argue that under the circumstances, his attempts to secure access to justice were sufficient, and he should (a) either be deemed to have exhausted the available remedies; or (b) be exempted from exhausting any available remedies due to their unavailability, ineffectiveness and insufficiency.

### **The Respondent State's Submissions on Admissibility**

38. The Respondent State in its submissions, objects to the grant of Provisional Measures by the Commission and urges the Commission to declare the Communication inadmissible.
39. The Respondent State submits that the Victim, being a jurist, is fully aware of the provisions of the Code of Criminal Procedure of the Republic of Angola, specifically, the legal requirements under which the government, through its relevant institutions, shall adopt appropriate measures with a view to protecting, defending and guaranteeing the rights of citizens, regardless of their status.
40. The Respondent State points out that the Code of Criminal Procedure of Angola, enacted in terms of Decree n<sup>o</sup> 19271 of 24 January 1931, and supplemented by several domestic laws, provides for the lodging of criminal complaints. It refers to Articles 6 and 7 of the Code which govern the conditions for initiating criminal proceedings and places an obligation on the prosecuting authorities to investigate and prosecute in cases where a complaint has been lodged by an individual. According to Article 11 of the Code action may be taken by persons who have been particularly aggrieved, and these shall be those whose interests would have been protected under criminal law in terms of the indictment. The Respondent State maintains that

it is only on the basis of this procedure that the State learns of the allegedly unlawful or criminal facts requiring attention or the due process of law.

41. The Respondent State observes that the Victim has alleged that he filed several complaints with the police related to the death threats and acts of vandalism targeted at him, but that the Police failed to investigate or to take any action to establish the facts. These statements, according to the Respondent State, lack in veracity and evidence because the Complainant has made no reference to numbers under which criminal proceedings were instituted. The Respondent State explains that whenever a complaint is filed, a case is automatically filed, a relevant number allocated and the nature of the crime indicated. The Respondent State regrets that it is therefore, faced with situations which should have been proven but which in the present circumstance are vague and without a juridical and legal basis.
42. The Respondent State maintains that as a respected jurist in Angola, the Victim is aware of the procedure to follow if the Police fail to comply with the formalities foreseen by the law, notably through the Public Prosecution Service which has the required resources to guarantee and defend the rights of individuals.
43. Regarding the existence of available, effective and sufficient remedies, the Respondent State points out that under the judicial system of the Republic of Angola, the domestic remedies to try cases have been established by law - the Constitution of the Republic, Chapter IV, supplemented by Acts n<sup>o</sup> 18/88, 19/88 and 20/88 of 31 December on the Unified System of Justice. The system comprises a hierarchy at the top of which are the higher courts like the Constitutional Court, the Supreme Court, the Audit Court, and the Supreme Military Tribunal. The system is supplemented by the Public Prosecution Service - Office of the Attorney General - and the Ombudsman.

44. It also points out that other courts expected to be established include the Court of Appeal and others with autonomous jurisdiction over administrative, fiscal and customs and excise matters, all of which operate under a higher court.
45. According to the Respondent State, despite its shortcomings, Angola's judicial system is capable of attending to any complaints submitted to it. A complainant, however, shall be required to submit his/her complaint to the relevant body so that proceedings may be initiated in accordance with the law.
46. The Respondent State argues that in order for the three requirements of "*availability, effectiveness and sufficiency*" of local remedies to come into play, it is indispensable that the judicial instances must be aware of the subject matter, which does not seem to be the case since none of the paragraphs of the Communication allude to concrete proceedings instituted by the Complainant, except where it refers to "threats, intimidation, telephone calls. The Respondent State avers that the Communication is therefore deficient in two basic principles of Law - objectivity and submission of evidence to prove the degree of danger to the life and security of the Victim and the irreparability of the acts.
47. It is argued that as a respected jurist, the Complainant should know that in order to guarantee the defence of legally protected rights and matters of public interest, as well as principles governing allegations and counter allegations procedure, and to curb violations of democratic rights, Courts should know the subject. This, the Respondent State maintains, was not observed in the present case.
48. The Respondent State explains that in terms of Article 189 of the Constitution of Angola and of its own Statutes, the Public Prosecution Service is

responsible, among other things, for instituting criminal action, defending the rights of physical and artificial persons and upholding the law during the early stage of proceedings. The only proceedings referred to in the Communication were the ones which had been initiated against the President of the Republic of Angola, on the basis of a corruption report submitted to the Office of the Attorney General which declined to hear the matter for lack of jurisdiction. According to the Respondent State, the Victim as a jurist knew fully well the procedure to follow in such cases but failed to do so.

49. On the basis of the above, the Respondent State urges the Commission to dismiss the Communication.

#### **Analysis of the Commission on Admissibility**

50. The Admissibility of Communications submitted to the Commission under Article 55 of the African Charter is governed by the seven requirements set out in Article 56 of the Charter. Article 56 comprises seven requirements which must be cumulatively complied with for a Communication to be admissible.
51. From the above submissions of the parties, it appears that the requirements under subsections (1) (2) (3) (4) (6) and (7) of Article 56 raise no contentious issues. The Commission after carefully examining the facts and submissions considers that the requirements under the above provisions have been complied with.
52. Regarding the exhaustion of local remedies under Article 56 (5) of the Charter, the rationale of this provision has been addressed by the Commission in

several of its decisions. In **Free Legal Assistance Group and Others v Zaire**<sup>3</sup> and **Recontre Africaine pour la Defense des Droits de l'Homme v Zambia**<sup>4</sup> the Commission stated that the requirement of exhaustion of local remedies is founded on the principle that a government should have notice of human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

53. In the present Communication, the Complainant submits that local remedies were ineffective and insufficient in respect of the allegations of harassment, intimidation, vandalism and death threats against the Victim, and unavailable in respect of the allegations concerning the failure of the Respondent State to investigate allegations of corruption and embezzlement against the President of the Republic of Angola. The Complainant has further submitted that the climate of fear existing in the country during that particular election period and the failure of the government to respond effectively supports the argument that there is no effective domestic remedy available to address the Victim's complaints

54. The Respondent State on the other hand contends that despite the shortcomings of the Angolan judicial system, it is capable of remedying the violations complained of. It contests, for lack of evidence, the Victim's claims that Angolan authorities failed to investigate his allegations of harassment, intimidation, vandalism and threats during the period leading up to the elections. It also argues that the Victim failed to follow the required procedure under domestic law to lodge his complaint regarding allegations of embezzlement by the President of Angola.

55. As already outlined above, the rationale for requiring Complainants to exhaust local remedies is to afford the concerned State an opportunity to

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<sup>3</sup> Communication 25/89, 47/90, 56/91, 100/93 – *Free Legal Assistance Group and Others v Zaire* (1995) paragraph 36

<sup>4</sup> Communication 71/92 – *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia* (1997) paragraph 10.

receive notice of an alleged violation of rights in its jurisdiction and to remedy same. In the present Communication, the Complainants have submitted that allegations of harassment, intimidation, vandalism and death threats directed at the victim were brought to the attention of the relevant authorities. The Respondent State contests the fact that the violations complained of were brought to its notice which made it impossible for it to take measures to remedy the violations.

56. The Commission notes that the Complainant has not provided any evidence in support of its assertions that it reported the violations to the authorities of the Respondent State. The Respondent State has explained that whenever legal proceedings are instituted, a case is automatically filed, a relevant number allocated and the nature of the crime indicated. This fact is not contested by the Complainant. The Commission notes further that no copy of a complaint that was purportedly submitted by the Victim to any of the authorities has for example been submitted as an element of proof. Without such proof, the Commission is compelled to agree with the Respondent State that the alleged violations were not brought to its notice and it was therefore not in a position to take any action to remedy the violations.
57. The Complainant has also submitted that any local remedies that might have been available were ineffective and insufficient in the Victim's circumstances due to the general atmosphere of fear that characterised the election period and the death threats directed at the Victim. The Respondent State has submitted that its judicial system is capable of entertaining any complaints brought before it.
58. The Commission notes that the Complainants have in their submissions indicated that the Victim is a prominent lawyer in Angola who has in many occasions successfully represented clients in Court. Even if this is not determinative of the effectiveness of the domestic judicial instances in this particular case on account of the alleged threats against his life and the



general atmosphere of fear, the Commission notes further that the Victim, alongside several other individuals did indeed institute proceedings, without any impediment, before the Constitutional Court during that same period in respect of the disqualification of their parties from running for the presidential elections. It is therefore contradictory for the Complainants to assert that local remedies were ineffective in the circumstances. That the decision of the Constitutional Court was not in the Victim's favour cannot be invoked to justify the assertion that local remedies were ineffective.

59. The Commission has maintained that merely casting aspersions on the effectiveness of local remedies is not enough to absolve the Complainant of the duty to exhaust local remedies. Complainants must provide concrete evidence and sufficiently demonstrate that their apprehensions are well founded.<sup>5</sup> Without such concrete proof and sufficient substantiation in the present case, the Commission considers that the assertion that local remedies were ineffective and insufficient cannot be sustained. The Commission therefore finds that the Complainant has failed to comply with the provisions of Article 56 (5).

60. Regarding exhaustion of local remedies in respect of the failure of the authorities to investigate allegations of corruption against the President of Angola, the Commission considers that the subject matter does not fall within the purview of its mandate as it does not relate to the violation of a right provided for in the Charter. The Commission will accordingly not address the issue.

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

- i. To declare the Communication inadmissible;

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<sup>5</sup> See the Commission's decision in Communication 299/05 - Anuak Justice Council v Ethiopia (2006) ACHPR para 58.

- ii. To notify its decision to the parties in accordance with Rule 107 (3) of its Rules of Procedure.
- iii. To set aside the order of provisional measures granted on

**Done in Nairobi, Kenya, at the 13<sup>th</sup> Extraordinary Session**

ACHPR