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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

In the African Court on Human and Peoples' Rights

Application 003/2011

In the matter of:

Urban Mkandawire — Applicant

VS

The Republic of Malawi — Respondent

JUDGMENT

The Court composed of: Sophia A. B. AKUFFO, President; Fatsah OUGUERGOUZ, Vice-President; Bernard M. NGOEPE, Gérard NIYUNGEKO, Augustino S. L. Ramadhani, Elsie N. THOMPSON, Sylvain ORÉ, El Hadji GUISSE and Ben KIOKO, Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("the Protocol") and Rule 8(2) of the Rules of Court ("the Rules"), Judge Duncan Tambala, Member of the Court and a national of Malawi, did not hear the application.

The Parties

1. The Applicant, Urban Mkandawire, is a Congolese born Malawian national. He brings this application to seek redress following his dismissal as lecturer by the University of Malawi ("the University").

2. The Respondent is the Republic of Malawi. It has ratified the African Charter on Human and Peoples' Rights ("the Charter"); it did so in 1989. Respondent is also a State Party to the Protocol, having ratified it on 9 September 2008. Respondent has also made a declaration in terms of Article 34(6) of the Protocol, accepting to be cited before this Court by an individual; the declaration was made on 9 October, 2008.

Procedure

3. The application was received at the Registry of the Court on 13 March 2011 by electronic mail and notified to the Respondent, and other entities under Rule 35 of the Rules of Court, by separate letters of 17 June, 2011.

4. As the Applicant had indicated in his application that he had submitted his complaint to the African Commission on Human and Peoples' Rights ("the Commission") and that he has withdrawn it, the Registry, by letter of 28 March, 2011, inquired from the Commission, in conformity with Rule 29(6) of its Rules, whether the matter had been formally withdrawn, and by letter of 19 May, 2011, the Commission confirmed that it is so.

5. The Applicant also requested by letter dated 10 May 2011, that the then Acting Registrar and Justice Tambala, a national of Malawi, be excluded from the proceedings, and during its 21st Ordinary Session held from 6 – 17 June, 2011, the Court noted that Justice Tambala has already recused himself and that in accordance with Article 22 of the Protocol, he would not hear the matter. It also noted that the Acting Registrar would in any case not participate in the deliberations of the Court as he is not one of the Judges. By a letter of 8 July, 2011, the Registrar informed the Applicant accordingly.

6. The Registry by Note Verbale dated 9 January 2012, which was received on 7 February, 2012, was notified by the Respondent of its representatives, and also sent its response to the application, and the same were served on the Applicant on the same day.

7. On 14 March, 2012, the Registry received the Applicant's reply to the Respondent's response to the application and on the same date served the same on the Respondent.

8. During its 24th Ordinary Session held from 19 to 30 March, 2012, the Court ordered the Respondent to substantiate, within thirty (30) days, and in accordance with Rule 52(4) of the Rules of Court, the preliminary objections it raised in its response to the application. The order was served on both parties on 2 April, 2012.

9. As the Respondent failed to comply with the order, the Applicant by a letter of 21 May, 2012, received at the Registry on 22 May, 2012, requested the Court to proceed with the matter.

10. At its 25th Ordinary Session held from 11 to 26 June, 2012, the Court decided to schedule a public hearing on the matter for 20 and 21 September, 2012 and by separate letters dated 3 July 2012, both parties were notified of the decision.

11. The Respondent, by Note Verbale dated 14 July 2012, received at the Registry on 27 August 2012, requested for postponement of the hearing, and requested the Court to re-schedule the hearing to either the

last week of October or the first week of November 2012, on the ground that both the Minister of Foreign Affairs and the Respondent's two legal representatives would be committed at the United Nations General Assembly in New York, United States of America.

12. The Applicant by a letter dated 28 August, 2012, informed the Registry that if the hearing was adjourned to the 27th Ordinary Session, scheduled for Mauritius, he would not be able to attend due to the cost, and invoked Rule 55 of the Rules, requesting the Court to consider proceeding with the hearing of the case as scheduled, even if the Respondent had not confirmed its availability.

13. During its 26th Ordinary Session held from 17 to 28 September, 2012, the Court decided that the hearing should take place from 29 – 30 November, 2012, at its 27th Ordinary Session in Mauritius, and decided that it will provide assistance to the Applicant to enable him attend the session in Mauritius. That was done and at the 27th Ordinary Session held from 26 November to 7 December, 2012, the Court held a public hearing where both parties presented oral arguments.

14. Public hearings were held on 29 and 30 November, 2012 during which oral arguments were heard on both the preliminary objections and the merits. The parties were represented as follows:

For the Applicant:

Mr. Urban Mkandawire - self-represented

For the Respondent:

Mr. Zolomphi Nkowani – Counsel.

15. At the hearing, questions were put by Members of the Court to the Parties; the replies were given orally.

Brief facts

16. The Applicant had entered into an employment contract with the University as a lecturer in French to some junior students. He says he signed the contract of employment with the University on 1 December 1998 and started teaching on 5 July 1999, joining the French Department, which had its own head.

The employment was for an indefinite period. One of the terms of the contract was that either party could terminate the contract on a three months' notice, or with a three months' payment *in lieu* of notice. The contract was with effect from 1 December 1998.

As a result of certain complaints against him, the Applicant was dismissed from his post through a letter, written by the Registrar of the University, dated 2 December 1999. He took his case through Malawian Courts, including the Industrial Relations Court, right up to the Supreme Court of Appeal, the latter being the highest judicial authority in Malawi. The Applicant was still not satisfied; he therefore took the matter to the Commission. He later withdrew the matter before the Commission, and lodged this application.

Applicant's case

17. The Applicant contends that the termination of his employment violated several of his rights under the Charter. Although the Applicant mentions Articles 4, 5, 7, 15 and 19 of the Charter, it appears from the Applicant's papers both to the Commission and to this Court, and also from his overall presentation of his case, that the rights alleged to have been violated are his rights under Articles 7 and 15 of the Charter. Article 7 (1) reads:

> *"1. Every individual shall have the right to have his cause heard. This comprises:*
>
> *(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; ...".*

For its part, Article 15 of the Charter provides:

> *"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".*

Remedies sought by the Applicant

18. In his application, the Applicant presents the following as a summary of his claims:

> *"1. An order reinstating me in my erstwhile position as a lecturer in the French department at Chancellor College.*
>
> *2. A payment of the lump sum of Malawi Kwacha 12,839,059.00*

being the sum of: a) Mk 8,000,000.00 being damages and legal costs claimed. b) Mk 3,416,845.60 being my immediate loss claimed. c)Mk 1,350,000.00 being the debt of my 9 months' salary that I should have received during my counselling period if I was not prematurely dismissed. d) Mk 56,813.40 being the salary of my two months' pay. e) Mk 15,400.00 being the balance of my rent money paid to Mrs. Eurita Ibrahim Khofi.

3. *A payment of my entitlement under the scheme run (sic) by National Insurance Company on my 9 months' salary as if I was contributing towards the scheme during my counselling period if I was not prematurely dismissed."*

Circumstances leading to the termination of the Applicant's services

19. Shortly after Applicant commenced lecturing at the beginning of July 1999, his seniors started receiving complaints against him from students. The nature of the complaints was that he was not a competent lecturer. His own version of events is that he was being victimized because he refused to treat favourably some students who he says were well connected within the University. For this reason, he refused to attend a meeting, scheduled for 27 August 1999, called by the head of his department to discuss the complaints against him. He was later charged for failing to attend this meeting and, by a letter dated 9 September 1999, he was summoned to appear before a disciplinary committee. He appeared before this committee on 16 September 1999. According to the Applicant, he was briefed on 20 September 1999 on

the outcome of the hearing. By a letter of 8 November 1999, the Vice-Chancellor of the University, as had been recommended by the Disciplinary Committee, issued a warning of insubordination against the Applicant, and arranged that he be counselled on class conduct.

20. Two lecturers were mandated to, and did attend, some of the Applicant's lectures for observation and assessment. They subsequently submitted a report to the Principal, dated 30 November 1999. The report was adverse. In effect, it said the Applicant was not a competent lecturer. After receiving this report, the Principal in turn wrote a letter on 30 November 1999 to the Vice-Chancellor of the University calling for the dismissal of the Applicant in the interests of the students. According to the Applicant, the Vice-Chancellor called him to his office and briefed him about what transpired at the college by showing the Applicant the adverse report of 30 November 1999, as well as the Principal's letter, also of 30 November 1999. On 2 December 1999, the Applicant received a letter, dated the same day, from the Registrar of the University, informing him that his employment had been terminated with immediate effect. It stated, amongst others, that it was clear from the report that the Applicant had taken no steps to change his manner of teaching, which had been criticized by the lecturers who assessed him, and then filed the adverse report dated 30 November 1999.

Recourse to the national Courts of Malawi

21. To vindicate the alleged violation of his rights, the Applicant turned to various courts in Malawi.

22. The Applicant lodged a case in the High Court against the University of Malawi for, amongst others, his reinstatement. In its judgment dated 27 November 2003, the High Court found that the Applicant had not been given a fair hearing to defend himself against the adverse report, and therefore that his dismissal was wrongful. The Court, however, held that he could not be reinstated. It ordered that he be given a further 2 month's payment (the University had on its own already paid him for one month); the order was to put him in the same position as if a three months' notice had been given. Furthermore, the High Court awarded the Applicant damages for wrongful dismissal, the quantum of which would have to be established before the Registrar of that Court.

23. The University appealed against the above judgment to the Malawi Supreme Court of Appeal. One of the grounds of appeal was that the High Court had erred in awarding damages to the Applicant for the wrongful dismissal in addition to the three months' notice pay awarded to him. The Supreme Court of Appeal, in its judgment dated 12 July 2004, held that the High Court erred in awarding the damages for wrongful dismissal, over and above the three months' pay award. It ruled that if the Applicant had *"desired to contend that rules of natural justice were not observed by the University when terminating his employment, he was perfectly entitled to have appropriately stated the*

issue in the pleadings as a separate cause of action". As he had not done so, this claim was not before court; the High Court was therefore wrong in awarding such damages. The payment for the three months *in lieu* of notice was, however, confirmed by the Supreme Court of Appeal, and to date still stands.

24. Subsequently, the Applicant again approached the Supreme Court of Appeal, asking it to review its judgment of 12 July 2004. The Applicant was relying on sections 31 and 43 of the Constitution of Malawi. Section 31 guarantees the right to fair labour practice, and section 43 ensures administrative justice. As the Applicant was invoking the provisions of the Constitution, the Supreme Court of Appeal referred the matter to the Constitutional Court, which is a chamber of the High Court, comprising three judges.

25. The matter was dully enrolled before the Constitutional Court. The Constitutional Court held that the case was well governed by the employment legislation, namely, the Employment Act, 2000. It found that the case could be disposed of by invoking section 57(2) of the Employment Act, which protected an employee against unfair dismissal. It held that the matter would therefore best be handled by the Industrial Relations Court, which, in terms of the Constitution of Malawi, was also a court of law. The matter was accordingly referred to the Industrial Relations Court.

26. Applicant's case was indeed enrolled in the Industrial Relations Court of Malawi. The court had to consider whether the Applicant's dismissal was unfair in that it was for no valid reason and whether he had been given the opportunity to be heard. As the Applicant's dismissal was before the enactment of the Employment Act 2000, the Court dealt with the matter on the basis of section 43 of the Constitution which, as stated earlier, provided for the right to fair labour practice. The court went into the history of the matter; it held that the Applicant had refused to attend a meeting called by his superior to discuss students' complaints, that he failed to adapt or change his teaching methods, and that he had been found to be incompetent; that, by 30 November 1999 when his dismissal was recommended, he had not shown any improvement, hence his dismissal on 2 December 1999. Furthermore, the court held that the Applicant had been afforded the opportunity to be heard; in this respect, the following appears in the last paragraph of page 4 of the judgment of that Court:

"It was heard in the instant case that the applicant was invited to appear before the Vice-Chancellor to answer to his failure to improve following warning. The hearing was fair as far as the right to be heard in administrative setting is concerned. What was important was that at the time of the hearing the applicant was free to state his case and put in his defence. The decision to dismiss and the dismissal itself came after the hearing. The applicant was still on probation. All factors taken into consideration, this court finds no compelling reason to interfere with the sanction imposed ...".

The dismissal was held to be fair, and the action dismissed.

27. The Applicant appealed against the above judgment to the High Court as he was not satisfied with it. When the Applicant, who is neither a licensed practitioner nor a lawyer, appeared before the High Court, he wanted to address that court from the Bar where licensed practitioners would do. This was denied to him in terms of the practice before the courts in that country; he was, however, free to argue his case from where people who were not practitioners would do. He however decided not to argue from anywhere else; instead, he decided to appeal to the Supreme Court of Appeal, for the third time.

28. The Applicant's appeal was enrolled and heard in the Supreme Court of Appeal, and judgment was delivered on 11 October 2007. The judgment summarizes the Applicant's grounds of appeal into two. Firstly, *"that his employment is terminated unlawfully since he was not given the opportunity to be heard by the University Disciplinary Committee to refute the allegations made against him, and secondly that he was not allowed to address the judge in the High Court in order to argue his appeal because he was not a licensed legal practitioner"*. Regarding the first ground, the Malawi Supreme Court of Appeal held that the matter was *res judicata* and it could therefore not consider the point again; it referred to its judgment of 12 July 2004, already referred to and quoted above. In that judgment, the Supreme Court of Appeal had held, inter alia, that for this claim of unlawful dismissal, based on a breach of the rule of natural justice, the Applicant should have approached the Court by stating *"the issue in the pleadings as a separate cause of action."* In

declaring the issue as *res judicata*, the Supreme Court of Appeal was in effect maintaining the view it had taken in its judgment of 12 July 2004.

29. To bolster his case regarding the alleged violation of Article 7 of the Charter, the Applicant made several unsubstantiated allegations against some of the judges, some of which allegations are not worthy of repeating here. He alleged, for example, that one of the judges of the Supreme Court of Appeal was the biological father of one of the students who had lodged complaints against him. During the hearing and in response to a question by this Court, counsel for the Respondent pointed out that the allegation was not true; the Applicant was unable to dispute this. Again, without any substantiation, the Applicant ascribed prejudice against Judges and the Registrar, and in some instances, used unbecoming language in criticizing some judgments.

Respondent's case

30. **Preliminary Points:** The Respondent has raised two preliminary points.

30.1 The first point relates to the admissibility of the application, namely, that the application is not admissible as the matter is already before the Commission, and therefore that it is *sub judice* before the latter. In this respect, Respondent argues that it would be undesirable to allow litigants some forum shopping.

30.2 The second point raises the Court's lack of jurisdiction. Respondent contends that this Court lacks jurisdiction over this matter because the Protocol came into operation only on 25 January 2004, whereas the Applicant's cause of action arose in 1999. The Respondent also argues, in this respect, that it ratified the Protocol only on 9 September 2008, and deposited the instrument of ratification on 9 October 2008. The Respondent does not, however, develop any argument around the fact that Respondent made the Article 34(6) declaration only recently; long after the cause of action had arisen.

31. Regarding the merits of the case: As far as the merits of the case are concerned, the Respondent denies that the Applicant's rights have been violated. Regarding the alleged violation of Article 7 of the Charter, the Respondent argues that the Applicant exercised his right to go to the national Courts, and was given a fair hearing. The Respondent says further that the Courts of Malawi did in fact lean backwards to assist the Applicant. As regards the alleged violation of Article 15 of the Charter, the Respondent argues that the Applicant was employed by the University under a contract, one of the terms of which was that the contract could be terminated by either party on three months' notice or a three months' payment *in lieu* of notice. The Respondent therefore argues that, as the Supreme Court of Appeal has already ordered that the Applicant be paid for the three months, the alleged right has not been violated. The Respondent further argues, in this respect, that the Industrial Relations Court has found the dismissal to be fair.

The Court's Ruling on the Preliminary points regarding lack of Jurisdiction

32. As said earlier, the Respondent's preliminary objection against the Court's jurisdiction is that whereas the Applicant's alleged violation of his rights took place in 1999, the Protocol came into operation in respect of the Respondent only after the Respondent ratified it on 9 October, 2008. The Court notes that the Charter came into operation on 21 October, 1986 and the Respondent ratified the Charter in 1989. It is the view of the Court, therefore, that at the time of the alleged violation of the Applicant's rights in 1999, the Charter was already binding on the Respondent; the latter was under the duty to protect the Applicant's rights alleged to have been violated. Furthermore, the Court notes that the Applicant's case is that the alleged violation of his rights under Articles 7 and 15 is continuing. For the above reasons, the preliminary objection raised by the Respondent cannot succeed.

The Court's Ruling on the Preliminary point relating to Admissibility

33. Respondent's argument on this point is that the application is not admissible as it is pending before the Commission. This Court does, however, find that the Applicant did formally withdraw his communication from the Commission before lodging his application in March 2011. The Applicant submitted to this Court two copies of his letters to the Commission, dated 7 and 17 February 2011, withdrawing his communication. The Commission also confirmed to the Court, in its letter of 29 March 2011, that the Applicant had indeed withdrawn the matter before it. The matter is therefore not pending

before the Commission. Once the Applicant has withdrawn his communication before the Commission, he has the right to approach another forum and, in the view of this court, there is nothing untoward about this. The Respondent's objection is therefore not valid. However, this finding does not necessarily mean that the application is admissible because the application must still meet other requirements of admissibility; in particular, the Applicant must satisfy the provisions of Article 6(2) of the Protocol, read together with Article 56(5) of the Charter, namely, that he has exhausted local remedies. This aspect is dealt with later.

The Court's Jurisdiction in terms of the Protocol

34. The jurisdiction of the Court *ratione materiae* is set out in Article 3 of the Protocol. Article 3(1) of the Protocol provides that: *"The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."* Article 3(2) provides that *"in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide"*. The provision is quite broad as it extends to all cases and disputes, on human rights issues, concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned. In the instant case, the requirements of the subject matter jurisdiction have been met, as the rights alleged to be violated are human rights enshrined in the Charter.

35. With regard to *ratione personae* jurisdiction, the Applicant is a national of Malawi, a state that has ratified the Protocol and also filed the required declaration in terms of Article 34(6) as read together with Article 5(3) of the Protocol, accepting the competence of the Court to deal with cases against it from individuals and Non-Governmental Organizations.

36. Regarding *ratione temporis* jurisdiction, even though the facts giving rise to the application arose before the Respondent filed the declaration, the Court has already made a finding that the alleged violation is continuing. Taking all the above into consideration, the Court does have jurisdiction to deal with this matter.

The Court's finding on the exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56 (5) of the Charter

37. As said earlier, the application must satisfy the requirements of Article 6(2) of the Protocol, read together with Article 56(5) of the Charter; that is, the Applicant must have exhausted local remedies. Article 6(2) of the Protocol provides that the *"Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."* For its part, Article 56(5) of the Charter requires the exhaustion of "*local remedies, if any, unless it is obvious that this procedure is unduly prolonged*" (See also Rule 40 of the Rules of Court). From the pleadings submitted by both parties, as well as copies of various judgments of the courts in Malawi relied upon and submitted by the Applicant himself, a question arises whether the Applicant did exhaust local judicial remedies as required by the above Articles, before

coming to this Court, or whether he was faced with a procedure which was unduly prolonged. The Respondent did not raise any objection based on failure to exhaust local remedies. It, however, remains the duty of this Court to enforce the provisions of the Protocol and of the Charter. The Court is enjoined to ensure that an application meets, amongst others, the requirements for admissibility which are stipulated in the Protocol and the Charter. The law does not have to be pleaded. Failure by the Respondent to raise the issue of non-compliance with the requirements stipulated in the Protocol and the Charter cannot render admissible an application which is otherwise inadmissible. The requirement of exhaustion of local remedies is fundamental in the inter-action between State Parties to both the Protocol and the Charter, and their national courts, on the one hand, and this Court, on the other hand. State Parties ratify the Protocol on the understanding that local remedies would first be exhausted before recourse to this Court; the making of the declaration in terms of Article 34 (6) of the Protocol is also on this understanding.

38. **Some jurisprudence on the requirement of the exhaustion of local remedies:**

38.1. By exhaustion of local remedies, this Court is referring primarily to judicial remedies.

This Court has recently confirmed the jurisprudence that what is envisaged by local remedies is primarily remedies of a judicial nature. In the Consolidated Matter of *Tanganyika Law Society and the Legal and Human Rights Centre vs. The Unite Republic of Tanzania, Application no. 009/2011 and Reverend Christopher R. Mtikila vs. the*

United Republic of Tanzania, Application no. 011/2011 paragraph 82.3, the Court held that: *"The term local remedies is understood in human rights jurisprudence to refer primarily to judicial remedies as these are the most effective means of redressing human rights violations."* What the Court needs to determine in this case is whether the Applicant has exhausted local judicial remedies.

38.2 The Inter-American Commission of Human Rights (IACHR) stated in *Mariblanca Staff Wilson and Oscar E. Ceville v. Panama*, Case 12.303, Report No. 89/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 531 (2003), paragraph 35 and 36 as follows:

> *"35. In the present situation, the State argues that the petitioners did not exhaust domestic remedies because the 'amparo' brought by the presumed victim was not the appropriate remedy. It argues that in reality the petitioners should have presented a motion of unconstitutionality…*
>
> *36. In support of its arguments, the State invokes the decision of the Supreme Court ..... in which the court, analyzing the 'amparo' brought by the alleged victim, ruled that the 'amparo' was not the appropriate remedy because the challenged law was a legislative act of a general nature issued by an authority constitutionally empowered to do so.... and that it was not susceptible to challenge through 'amparo' for constitutional protection ..... The court concluded that this type of challenge must be pursued through independent action for unconstitutionality. The State argues that the petitioners failed*

to exhaust this remedy."

After considering the matter further, the IACHR upheld the above argument. The petitioners having failed in the Supreme Court as a result of approaching that court, wrongly, by way of *"an 'amparo' for constitutional protection"* instead of *"through independent action for constitutionality"* could not claim to have exhausted judicial local remedies.

39. To resolve whether or not the Applicant has exhausted local remedies in compliance with Article 6 (2) of the Protocol read together with Article 56 (5) of the Charter, it is necessary to look again at the judgments of the national courts of Malawi.

39.1. Judgment of the High Court, 27 November 2003: The Court held that the employment contract could be terminated by either party, upon three months' notice or by a three months' payment *in lieu* of such notice. The University had done neither; instead, it paid the Applicant for only a month. The Court, in its judgment of 27 November 2003, added two months' payment; this award was confirmed by the Supreme Court of Appeal in its judgment of 12 July 2004. The award still stands; whether the Appellant has collected it or not, is irrelevant.

39.2. The Industrial Relations Court: The Court held that the dismissal was fair and that the Applicant had been given the opportunity to be heard, and had in fact appeared before a disciplinary committee on 16 September 1999, and also before the Vice-Chancellor on 2 December 1999. The Appellant did not seize the opportunity to challenge and argue

against the decision of the Industrial Relations Court in the High Court. Although he did appear in the High Court, he declined to argue his case when he was told that he could not do so from a place reserved for licensed practitioners only. This practice is endorsed by the highest court in Malawi and certainly without knowing the reasons and practices behind it, it would not be for our Court to adjudicate on its correctness or otherwise. What is of importance is that there is no indication that by arguing his case from where he was supposed to be, the Applicant would be prejudiced; nor was this his case before our Court. The Applicant should have agreed to argue, and then argued, the merits of his appeal against the judgment of the Industrial Relations Court in the High Court; if not satisfied with the High Court, appealed to the Supreme Court of Appeal. The Applicant has, to date, not done either.

39.3. **Judgments of the Supreme Court of Appeal:** As already mentioned, in its judgment of 12 July 2004, that court confirmed the three months' salary payment, but dismissed the claim for wrongful dismissal based on the alleged breach of the rule of natural justice; the court's reasons have already been mentioned and quoted above. In its subsequent judgment of 11 October 2007, the court holding that it was faced with the same issue, found the issue to be *res judicata*, thereby reaffirming its earlier decision, namely, that the Applicant could not present his claim for wrongful dismissal in the way he did. The correctness of the two judgments of the Supreme Court of Appeal depends on whether or not indeed in terms of the national law of procedure, the Applicant was supposed to have stated the issue in the pleadings as a separate cause of action in claiming damages for wrongful dismissal. The Supreme Court of Appeal, being the

final court, has the last word on what the correct national law is. It has, in its two judgments, said that the Applicant did not state the claim as a separate cause of action. It is important to note that the Applicant was not barred from pursuing his claims, but merely told that he was adopting a wrong procedure. In fact, the High Court had advised him to get the assistance of a lawyer to help him, but he declined.

Findings of the Court

40. It is clear from the foregoing summary of the judgments that, as at the time the Applicant lodged his application:

40.1. The avenue to claim damages for alleged wrongful dismissal and the avenue to challenge in the High Court the judgment of the Industrial Relations Court which had ruled that his dismissal was fair and lawful, were still open to the Applicant; however, he did not use these avenues. It was open for him to argue before the High Court against the judgment of the Industrial Relations Court and, if he did not succeed, to argue on further appeal to the Supreme Court of Appeal. As a result of his failure to do so, the High Court and the Supreme Court of Appeal have not had the opportunity to deal with the merits of the claim for wrongful dismissal, as determined by the Industrial Relations Court.

40.2. There has not been any undue delay in the disposal of Applicant's cases before the highest judicial institution in Malawi; namely, the Malawi Supreme Court of Appeal. A case number allocated to a case

indicates the year in which a case was registered, and the date of judgment would not be too long thereafter: in the Supreme Court Case No 38 of 2003, the judgment, referred to earlier, was handed down on 12 July 2004; and in Case No. 24 of 2007, the judgment, also referred to earlier, was handed down on 11 October 2007.

For the above reasons:

41. The Court declares this application inadmissible in terms of Article 6(2) of the Protocol, read with Article 56(5) of the Charter.

Costs

42. In accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

In conclusion, the Court, by a majority of seven votes to three, Vice President Ouguergouz, Judges Niyungeko and Guissé dissenting, decides:

i. that the Application is not admissible.
ii. that the Application is struck out.

Done in Arusha, on this twenty-first day of the month of June, in the year Two Thousand and Thirteen, in English and in French, the English text being authoritative

Signed by:

Sophia A.B. AKUFFO, President

Fatsah OUGUERGOUZ, Vice-President

Bernard M. NGOEPE, Judge

Gérard NIYUNGEKO, Judge

Augustino S. L. RAMADHANI, Judge

Elsie N. THOMPSON, Judge

Sylvain ORÉ, Judge

El Hadji GUISSE, Judge,

Ben KIOKO, Judge

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules, the joint dissenting opinion of Judges Niyungeko and Guissé, has been attached to this Judgment.

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

URBAN MKANDAWIRE v. THE REPUBLIC OF MALAWI

(APPLICATION No. 003/2011)

JOINT DISSENTING OPINION OF JUDGES GERARD NIYUNGEKO AND EL HADJI GUISSE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The issue of exhaustion of local remedies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Gérard NIYUNGEKO

Judge El Hadji GUISSE

Robert ENO

Registrar