



ACERWC
African Committee of Experts on
the Rights and Welfare of the Child

Comité Africain d'Experts sur les
Droits et le Bien-être de l'Enfant

Comitê Africano dos Direitos e
Bem-Estar da Crianças

اللجنة الأفريقية المعنية بحقوق الطفل ورعاها

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**The African Committee of Experts on the Rights and Welfare of the
Child (ACERWC)**

**Admissibility Ruling
Communication No: 0014/Com/002/2020
Decision on Admissibility No. 0001/2021**

**Ramphele Attorenys on behalf of Thlodi Tloubatla and Thibedi
Tloubatla**

V

Republic of South Africa (the Respondent)

Original: English

I. Submission of Communication

1. The Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC/the Committee) received a Communication dated 13 January 2020 in accordance with article 44 of the African Charter on the Rights and Welfare of the Child (ACRWC/the Charter) submitted by Ramphele Attorneys on behalf of Thlodi Tloubatla and Thibedi Tloubatla (the Complainants) against the Republic of South Africa (the Respondent). Having received the Communication, pursuant to Section III of the Committee's Revised Guidelines for Consideration of Communications (Revised Communications Guidelines), the Secretariat of the Committee conducted preliminary review and processing of the Communication and registered the submission as Communication No: 0014/Com/002/2020. In accordance with Section IX (2) of the Communications Guidelines, the Communication was duly transmitted to the Respondent State through Note Verbal DSA/ACE/64/76.20 dated 23 January 2020 inviting the Respondent State to submit its argument on the admissibility of the Communication. The Respondent State requested for extension to submit its arguments on admissibility through Note Verbal SAEMB/AUC/5264 dated 03 September 2020, SAEMB/AUC/5273 dated 16 September 2020, and SAEMB/AUC/5345 dated 01 December 2020. Following the several requests, the Committee granted a final extension of 20 days through Note Verbal DSA/ACE/64/545.20 dated 10 December 2020. The Respondent State submitted its argument on admissibility of the Communication through Note Verbal SAEMB/AUC/5382 dated 31st December 2020 which was transmitted to the Complainants. The Complainants did not submit any comment on response of the Respondent State.

II. Summary of alleged facts

2. The Complainants allege that the South African Revenue Services (SARS) obtained provisional preservation order against the assets of their client Mr Norman Tloubatla in accordance with the Tax Administration Act of the Respondent State for allegations of Tax Fraud. The provisional preservation order was given by the Gauteng Division of the High Court of the Respondent State. The Complainants explain that the effect of the provisional orders is that their client is not able to deal with the assets anymore. The Provisional Order appointed a Curator who is vested with the assets of Mr. Tloubatla and who has been given the power to allow for reasonable living expense given that Mr Tloubatla discloses full information about his assets. The High Court, when giving the provisional preservation order, provided that the application for living expense needs to be launched in 24-hour notice. Mr Tloubatla applied for the payment of living expense for his dependents, health expense as he was sick, and cost of legal representation. The Curator did not allow to provide for the cost of any expense sought on the basis that there was no full disclosure of assets. The Complainants allege that the decision that full disclosure of assets was made by the Curator while

it should have been made by a court. The High Court did not rule in favor of the Complainants to avail living expense for Mr Tloubatla or his dependents on the basis that Mr Tloubatla did not disclose all his assets as required. The Complainants submit that Mr Tloubatla passed away after falling ill but was not convicted for any crime. The Complainants further explain that they were forced to cover cost of legal fees by the Court. The Complaints submit that they took the matter up to the Constitutional Court of the Respondent State but failed to get any favorable decision from all the superior courts. The High Court decided against their application for disposal of funds and ordered punitive cost against the Attorneys. The decision of the Hight Court provides that the Curator reported that Mr Tloubatla's children's school fee was being paid from the Companies under scrutiny which used to be run by Mr Tloubatla. Therefore, the Curator reported that Mr Tloubatla had funds at his disposal which were not disclosed as per the Preservation Order. The High Court agreed with the Curator's finding and therefore rejected the application of the Complainants. The Complainants submit that they submitted an application for leave to appeal which was rejected by the Hight Court and they appealed up to the Constitutional Court with no success. The Complaints allege that all the courts disregarded the best interest of the child which is protected funder article 4 of the Charter in reaching at their final rulings and hence the decisions violate the Charter.

III. Applicant's Submission on Admissibility

3. The Complainants submit that the application is made on behalf of children and that the Communication is submitted against a State Party to the Charter. The Complainants further allege that they have exhausted local remedies as the matter has been taken up to the Constitutional Court of the Respondent State.

IV. Respondent's Submission on Admissibility

4. In its response, the Respondent State argues that the Complaint is not in line with the Charter as there is no violation of the Charter from the facts. The Respondent State argues that there is no action or inaction of the State Party so as to say that there is a violation of the Charter. The Respondent State submits that the Complainants are rather filing this case to raise their disagreement with the decision of the Hight Court. Moreover, the Respondent State argues that the Communication is not submitted against a State Party rather against one organ, mainly the judiciary. The Respondent provides that the Government will not interfere in the functions of the Court and therefore a Communication submitted disagreeing with the judiciary of the Respondent State cannot be said that it is submitted against a State party particularly when the Complainants fail to articulate the link between the decision of the Courts and complicity on the part of the Government. Moreover, the Respondent State argues that the Complainants have not exhausted local remedies as the issue of the best interest of the child was not

raised before local courts. The Respondent submits that the Complainants only raised the issue of punitive cost that was ordered against them in their application for leave to appeal while no issue of maintenance was raised. The Respondent State therefore argues that the best interest of the child is raised for the first time before the Committee and hence the requirement of exhaustion of local remedies has not been met. Furthermore, the Respondent State provides that the Complainants can only raise the matter for the first time if local remedy is prolonged or ineffective. In this regard, the Respondent State submits that its local courts provide swift decision and have progressive decisions on child rights issues. The Respondent therefore submits that the Communication be declared inadmissible.

V. The Committee's Analysis on the Admissibility of the Communication

5. The Committee basis its analysis of the admissibility of this Communication on article 44 of the African Charter on Rights and Welfare of the Child and its Revised Guidelines on the Consideration of Communications. After considering the submission of both parties, the Committee notes that the requirement of form and content as enshrined under Section II of the Revised Communications Guidelines are fulfilled. The Communication is submitted by Ramphele Attorenyis on behalf of Thlodi Tloubatla and Thibedi Tloubatla, who were both children during the alleged violation. Given Section I(1) of the Revised Communications Guidelines which provides that any person acting on behalf of children can have access the Committee, the Committee accepts the standing of the Complainants.
6. As to the Requirements of form provided under Section II (2) of the Guidelines, the Committee notes that the Communication is not anonymous, and it is duly signed by the Complainants. Concerning the requirement that a Communication should be directed against a State Party to the Charter, the Respondent State also contends that the Communication is not submitted against a State Party, rather one organ of the State namely the Judiciary. The Committee stresses here that any organ of the State can lead to international responsibility of the State. The Committee wishes to make reference to article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts which provides 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'¹. The Committee highlights that the State is composed of various organs and entities the action of which are attributable to the State. Despite the fact that the Judiciary is an autonomous organ, it remains to be one of the main organs of the State. Therefore, any action or omission of the Judiciary of a State

¹ Article 4, Draft Articles on Responsibilities of States for International Wrongful Acts.

can make the State responsible at supranational level given the fact that other requirements are fulfilled. In this regard, the Committee rejects the argument of the State that the Communication is not submitted against a State Party. The Respondent State ratified the African Charter on the Rights and Welfare of the Child in January 2000 and is therefore a State Party to the Charter against whom complaints alleging violations of the Charter can be brought.

7. The Committee also notes that the Complaint fulfils the requirement of content stipulated under Section II (3) as it identifies the Respondent State; it provides for the alleged violations and provision of the Charter alleged to have been violated; it highlights measures undertaken to exhaust local remedies; and also outlines remedies sought.
8. Moving forward, the Committee assesses whether or not the Communication satisfies the conditions of admissibility provided under Section IX (1) of the Revised Communications Guidelines. In doing so, the Committee notes that issues that need analysis relate to Section IX (1) (a) and (d) on compatibility of the Communication with the Charter and exhaustion of local remedies respectively.
9. On the issue of compatibility, the Respondent State argues that the Communication is not compatible as there is no action or omission of the Respondent State that led the violation of a Charter. The Committee has previously explained what is entailed under Section IX (1) (a) of the Revised Communications Guidelines in its admissibility analysis on *Center for Human Rights and other v Senegal* decision.² In that decision, the Committee provided that compatibility of a communication with the Charter entails that a Communication invokes provisions of the Charter. Moreover, in line with article 46 of the Charter, the Committees draws inspiration from the African Commission on Human and Peoples' Rights (ACHPR/Commission) concerning the understanding and definition of Compatibility. The Commission in various decisions has elaborated that a Communication is found to be compatible if the allegation invokes a prima facie violation of the African Charter on Human and Peoples' Rights.³ The Commission has further explained that prima facie case means that the facts of the case, or the allegations raise violations of the African Charter on Human and Peoples' Rights.⁴ Therefore, if a Communication raises provisions of the Charter or matters covered by the Charter, then a Communication is deemed to be compatible with the Charter as per the Revised Guidelines of the Committee. Whether or not there is an actual

² ACERWC, Communication No 003/Com/001/2012, *Center for Human Rights and other V Senegal*, Decision No 003/Com/001/2012, para 18

³ ACHPR, Communication 310/2005, *Darfur Relief and Documentation Centre v Republic of Sudan*, Decided at the 46th ordinary session, November 2009, para 63; Communication 293/2004, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development v Republic of Zimbabwe* Decided at the 43rd ordinary session, May 2008, para 45;

⁴ As above; Communication 300/2005, *Socio-Economic Rights and Accountability Project v Nigeria* Decided at the 5th extraordinary session, July 2008, para 38.

violation of the alleged provision is a matter that will be settled at the merit stage once a Communication is admissible. What is important at the admissibility stage is the fact that the Complainants are raising allegations that could give rise to violations of the Charter. In this Communication, the Complainants have raised alleged violation of article 4 of the Charter on the best interest of the child. Therefore, the Committee decides that the Communication is compatible with the Charter as it raises matters covered by the Charter.

10. The Complainants submit that they have exhausted local remedies as they have pursued the case up to the Constitutional Court of the Respondent State. Contrary to this, the Respondent State submits that the Complainants have not exhausted local remedies on the issue of the best interests of the child or the maintenance of the children of Mr Tloubatla. The Respondent State alleges that the Complaints submitted leave to appeal concerning only the issue of the punitive cost that was ordered against the Complaints by the Hight Court. The Respondent submits that the issue of the best interest of the child is being raised at the Committee for the first time.
11. The Committee reiterates its position from its previous admissibility ruling on *Legal and Human Rights Center and other v United Republic of Tanzania* that the requirement of exhaustion of local remedies is provided to ensure that 'States are given the information about the alleged violations and an opportunity to redress such violations within their available means'.⁵ This reflects the fact that regional or international mechanism are supplementary to the national system. Therefore, States can be subjected to international mechanisms only after they have been given ample notice about the alleged violation that has occurred or is occurring in their respective territories.⁶ States must be given the opportunity to remedy the alleged violation using their local systems.⁷
12. Bearing in mind the rationale for exhaustion of local remedies, the Committee is convinced that the issue that is being alleged at its jurisdiction should be the same issue for which local remedies must have been exhausted. The ACHPR has clearly stated that 'In assessing whether states have been given this opportunity is of prime importance to make sure that they have been addressed on all the substantive issues complained of and that the domestic procedures as provided by the laws of the country have been properly pursued, unless they are apparently

⁵ ACERWC, Communication No: 0012/Com/001/2019 *Legal and Human Rights Center and other v United Republic of Tanzania*, Decision on Admissibility No: 001/2020, para 26

⁶ ACHPR, Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Oct 2001) para 38

⁷ ACHPR, Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Decided at the 9th extraordinary session, 23 February to 3 March 2011, para 87

unjust or prolonged'.⁸ In the present Communication, the Complainants filed leave to appeal up to the highest level of the Respondent State's judicial structure, however, the main issue which formed their application for leave to appeal was the punitive cost that was ordered against the Complainants by the High Court. The Courts were not given the chance to analyze and decide on the best interest of the child which the Complainants allege to have been compromised by the decision of the Curator not to make funds available for the dependents of Mr Tloubatla. The Committee therefore is not in a position to consider the issue of whether or not the decision of the High Court to dismiss the claim of Tloubatla for funds to be released by the Curator violates the principle of the best interest of the child as the local courts were not given the opportunity to rule on this substantive issue which is the main allegation raised by the Complainants. In this regard, the Committee agrees with the submission of the Respondent State that the Committee is not a first instance court where new issues are presented before it unless the conditions for exemptions from exhaustion of local remedies are fulfilled.

13. For the forgoing reasons, the Committee, decides that the Communication does not meet the requirement of admissibility as it relates to exhaustion of local remedies set forth under Section IX (1)(d) of the Revised Communications Guidelines. Hence, the Committee declared the Communication inadmissible.

Adopted in March 2021 during the 37th Ordinary Session of the ACERWC

Honorable Joseph Ndayisenga



**Chairperson of the African Committee
of Experts on the Rights and Welfare of the Child**

⁸ ACHPR, Communication 306/05 – Samuel T Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe Decided at the 9th extraordinary session, 23 February - 3 March 2011, para 71.