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Communication 444/13: Justice Thomas S. Masuku v. The Kingdom of Swaziland

SUMMARY OF THE COMMUNICATION

1. The Communication was received at the Secretariat of the African Commission on Human and Peoples' Rights on 11 April 2013. It is submitted by Justice Thomas S. Masuku (the Victim), who is represented by Lawyers for Human Rights - Swaziland (the Complainant).

2. The Communication is submitted against the Kingdom of Swaziland (the Respondent State), now officially the Kingdom of Eswatini, a State Party to the African Charter on Human and Peoples' Rights (the Charter), which it ratified on 15 September 1995.

3. The Complainant states that the Victim was appointed as Judge of the High Court of Swaziland with effect from 01 July 1999.

4. The Complainant avers that in 2003 the Victim was demoted to the Industrial Relations Court of Swaziland, which is inferior to the High Court. The Complainant further avers that, given the glaringly unlawful demotion which violated the Victim's security of tenure as Judge which is protected under Section 3 of the High Court Act, the Victim challenged it before the High Court. However the judges of the High Court recused themselves from hearing the application on the ground that the Judges were members of the same court and the Judges were very close to each other. In the recusal ruling the court recommended that an *ad hoc* judge be promptly appointed to hear and determine the application.

5. The Complainant submits that eight months later the Victim was reinstated as Judge of the High Court. Shortly after his reinstatement, however, he was appointed as Judge of the High Court of the Republic of Botswana for four years.

6. Upon ret rn from serving as Judge of the High Court in Botswana, the Victim resumed his duties as Judge of the High Court and occasionally also sat in the Supreme Court in an acting capacity.

7. On 28 June 2011, the Chief Justice Michael M. Ramodibedi, acting in his capacity as the Chairperson of the Judicial Service Commission (JSC), laid charges against the

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Victim and called him to show cause why he should not be removed as Judge of the High Cou t. The Victim was invited to make representations on why he should not be removed from office for alleged serious acts of misbehaviour, and was invited to attend an oral hearing and make oral representation before the JSC on 11 August 2011. In total, twelve charges were levelled against the Victim; however Charge number 12 was subsequently withdrawn:

(i) Failing to deliver judgments on time e.g. R v. Vusumuzi Dlaminu, Case No 375/09.
(ii) Defying the Chief Justice's directive to prepare and submit a monthly schedule of pending judgments.
(iii) Insulting His Majesty the King by using the words "forked tongue" with reference to him.
(iv) By touting yourself to be appointed Chief Justice, especially amongst the chiefs.
(v) Actively associating with those who want to bring about unlawful change to the regime.
(vi) Destabilising the High Court Judges and staff.
(vii) By sending one Gugu Vilakati, a High Court staff member, to a workshop in Hong Kong without the Chief Justice's approval, purportedly in your capacity as Chairman of a law reporting board under the Chief Justice.
(viii) By absenting yourself from work without the Chief Justice's permission particularly on 30 March 2010.
(ix) By threatening the Chief Justice with resignation when you were confronted with your absenteeism from work without leave on 30 March 2010.
(x) By attacking the Chief Justice at a symposium of the International Commission of Jurists (ICJ) held in Lesotho on 29 July 2010 for banning Judges from giving interviews to the news media, thus demonstrating both insubordination and disloyalty to the Chief Justice.
(xi) By joining a *toyi toyi* by CTA staff at the gate of the High Court on 17 June 2011. This was a protest to show dissatisfaction against the fact that the Judge President of the Industrial Court cannot finalize the CTA case due to his suspension.[1]

8. By Legal Notice No.88 of 2011 issued on 28 June 2011, the Victim was suspended pending an inquiry into the question of his removal from office, with effect from 01 July 2011.

9. The Complainant submits that on 25 July 2011 the Victim's legal representative filed his defence with the JSC, denying all the charges, and on 04 August 2011 filed preliminary objections. The preliminary objections submitted the following: that the Chief Justice ought to recuse himself from the proceedings in the matter; that the procedure by which the JSC's inquiry in the matter had been initiated and convened,

[1] Complainant submissions, Annex No.LHR9, Letter from the Judicial Service Commission to Justice Masuku, 28 June 2011

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

was fatally flawed; and that the JSC inquiry in the matter must allow for a public hearing.

10. The Complainant submits that, on 11 August 2011, the JSC convened for the disciplinary hearing, where the Victim's preliminary objections were rejected. Further, after the hearing concluded the JSC came to its conclusion and recommended to His Majesty that the Victim should be removed from office. On 27 September 2011, the King, as he is constitutionally bound, removed Justice Masuku as a High Court Judge.

Articles alleged to have been violated

11. The Complainant alleges that Articles 1, 7 and 26 of the African Charter on Human and Peoples' Rights (the African Charter) have been violated.

Prayers

12. The Complainant requests the Commission to:

(a) find that the hearing and subsequent dismissal and removal of Justice Thomas Masuku as a judge of the High Court violated Articles 1, 7, and 26 of the African Charter, as read with the Constitution (2005);
(b) order the Respondent State to reinstate Justice Thomas Masuku to the High Court unconditionally;
(c) that Justice Masuku is compensated for the loss he suffered as a result of the unlawful removal.

Procedure

13. The Communication was received at the Secretariat on 11 April 2013, and the Secretariat acknowledged receipt on 10 June 2013.

14. The Commission decided to be seized of the Communication during its 14th Extra-Ordinary Session, held from 20 to 24 July 2013, in Nairobi, Kenya.

15. On 28 July 2013, the Commission's decision was transmitted to the Complainant with a request to the latter to file written arguments and evidence on the admissibility of the Comr unication within two months, in terms of Rule 105(1) of the Rules of Procedure. On the same date, the Secretariat also notified the Respondent State about the Communication, and transmitted the Commission's decision on seizure together with a copy of the Complaint to the Respondent State.

16. Before the expiry of the two months period, the Complainant submitted written arguments and evidence on admissibility.

ACHPR

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

17. The Secretariat transmitted a copy of the Complainant's submissions on Admissibility to the Respondent State on 06 September 2013, requesting the State to present its written submissions on Admissibility within two months, in terms of Rule 105(2) of the Rules of Procedure. The Respondent State was further notified that the Commission would take a decision on the available information if the former did not present its written submissions within the prescribed time.

18. During the holding of the 16th Extra-Ordinary Session, from 20 to 29 July 2014, Kigali, Rwanda, the Commission noted that the Complainant had not made any submission on the admissibility requirement stipulated at Article 56(6) of the Charter. By a letter dated 16 July 2014, the Complainant was requested to provide an explanation in light of Article 56(6) of the Charter. The Complainant provided the requested explanation by letter received by the Secretariat on 22 July 2014 during the holding of the 16th Extraordinary Session.

19. The Commission declared the Communication admissible during the 16th Extra-Ordinary Session.

20. The Commission's decision was notified to both the Complainant and the Respondent State, by letter and Note Verbale dated 08 August 2014. Alternatively, the Commission requested the Complainant to confirm if the submissions on the merits contained in the initial Complaint would stand as his submissions on the merits.

21. At the time the Commission held its 17th Extra-Ordinary Session in February 2015, the Complainant had neither submitted the merits submissions, nor confirmed that the submissions in the Complaint shall stand as the merit submissions. Accordingly, the Communication was struck out for want of diligent prosecution during the 17th Extra-Ordinary Session.

22. The decision striking out the Communication was transmitted to the Complainant by letter dated 02 March 2015, and to the Respondent State by Note Verbale dated 04 March 2015.

23. By letter dated 12 April 2015 from Professor Michelo Hansungule, who had been retained to represent the Victim in the Communication, the Victim submitted an application for the Communication to be re-listed. The application for re-listing was transmitted to the Respondent State on 25 April 2015; however the State did not present any observations on the application.

24. During the 18th Extra-Ordinary Session, held in August 2015, the Commission re-listed the Communication for consideration on the merits.

25. The decision to re-list the Communication was transmitted to the parties on 14 August 2015. The Complainant's initial Complaint, which contains the Complainant's merits

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

submissions, were re-transmitted to the Respondent State with a request to the latter to submit its observations on the merits.

26. On 30 October 2015 the Respondent State transmitted a letter to the Secretariat, confirming receipt of the Commission's correspondence of 04 March 2015, however indicated that the State had not received the annexed decision. On 10 November 2015, the Secretariat transmitted a Note Verbale to the State, transmitting proof of delivery of the documents by email and DHL. On 02 December 2015, the Respondent State transmitted a letter to the Secretariat, once again reiterating that it did not receive the submissions of the Communication.

27. In response, on 09 December 2015 the Secretariat transmitted a Note Verbale to the Respondent State which provided information on proof of delivery by email and courier, in addition to transmitting the Complainant's merits submission and requesting the Respondent State's submissions on the merits within thirty (30) days from the date of notification. Additionally, during the Commission's Promotion Mission, the Secretariat transmitted a hard copy of the Complainant's submissions on the Merits on 08 August 2016.

28. On 13 December 2017, the Respondent State transmitted submissions on the Merits, which were transmitted to the Complainant.

29. Informational letters were transmitted to the Parties from the 62nd to the 68th Ordinary Session.

ADMISSIBILITY

The Complainant's Submissions

30. In the written submissions the Complainant initially addressed one admissibility requirement only: the exhaustion of local remedies as stipulated at Article 56(5) of the Charter. As noted above, the Complainant provided an explanation relating to Article 56(6) of the Charter in response to a request by the Commission.

31. In respect of Article 56(5) of the Charter, the Complainant argues that there are no remedies in Swaziland to redress the Victim's removal as Judge of the High Court, and advances several reasons to make out that proposition.

32. Firstly, the Complainant contends that the judiciary to which the Victim would have to lodge an application to review and set aside his dismissal is highly perceived as, and is in fact, not independent. The Complainant submits that perception is a significant factor in determining the independence of a judiciary, citing in support thereof, among others, the cases of Van Rooyen v. S (General Council of the Bar of South Africa Intervening) 2002(5) SA 246 (CC) para. 32 and South African Personal

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Injury Lawyers v. Heath 2001 SA 883 (CC) paras. 25-5 (sic), decided by the Constitutional Court of South Africa.

33. The Complainant avers that the situation regarding the independence of the judiciary in Swaziland has kept worsening despite the promulgation of a new Constitution in 2005. As indicators, the Complainant states that 'in the recent past' the Government has recorded 100% success in matters where it is a party, particularly in the Supreme Court. Further, the Government through the Prime Minister has openly declared its support for the Chief Justice in the latter's stance and manner of heading the judiciary.

34. To buttress the point regarding the alleged lack of independence of the Respondent State's judiciary, the Complainant cites **Communication 251/2002: Lawyers for Human F'ghts v. Swaziland** in which the Commission stated and held that: "[it] believes that taking into consideration the general context within which the judiciary in Swaziland is operating and the challenges that they have been faced with, especially in the recent past, any remedies that could have been utilised with respect to the present communication would have likely been temporary. In other words, the African Commission is of the view that the likelihood of the complainant succeeding in obtaining a remedy that would redress the situation complained of in this matter is so minimal as to render it unavailable and therefore ineffective. For the reasons stated herein above, the African Commission declares this communication admissible."[2]

35. Secondly, the Complainant argues that domestic courts are likely to be partial and biased towards or be influenced by the Chief Justice. The Complainant states that any application the Victim would have to lodge before domestic courts, challenging his dismissal, would necessarily have to include the Chief Justice as respondent, or in any event the matters arising from his interaction with the Chief Justice and the measures taken by the latter against him that would be challenged.

36. The Complainant claims that the Chief Justice has demonstrated that he wants judges of the High Court to abide by his directives. For example, in his address on the occasion of the opening of the High Court on 18 January 2010, the Chief Justice ordered judges to stop expressing themselves to the media and associating with some people.

37. Further, the Complainant states that the Chief Justice has issued a directive on allocation of cases which gives him the capacity to direct and influence the allocation of matters to specific judges to secure outcomes that favour particular interests. In the same vein, when a case has to be heard before a panel of judges, the Chief Justice also directs which judge should preside and which judge should write the judgment of the court, as it happened in the case of Law Society of Swaziland v. The Speaker of the House of Assembly and Another Case No. 1145/12 High Court of Swaziland. When empanelling the court for that case, the Chief Justice directed a specific judge to

[2] Communication 251/2002: Lawyers for Human Rights v. Swaziland (2005) ACHPR para. 27

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

preside during the hearing and another particular judge to write the majority or unanimous judgment of the court.

38. The Complainant contends that the practice of choosing the presiding judge and the judge who drafts the judgment interferes with the decisional independence of the judges, and creates the perception that he gives specific instructions on the conduct and outcome of the case to the judges that he prefers for those specific roles.

39. Furthermore, the Complainant contends that it is inconceivable that judges of the High Court would possibly make a finding against the Chief Justice who is the head of the judiciary.

40. From the above, the Complainant surmises that there is a veritable likelihood that the Chief Justice will influence the outcome on any application lodged with the domestic courts challenging his dismissal.

41. Thirdly, the Complainant avers that local remedies are not available because judges who would hear his application against the dismissal will be apprehensive to make a finding against the King who ultimately dismissed him. He contends that the judges would be apprehensive of the repercussions of sitting to hear and decide a matter possibly against the King's decision, a task that partly earned the Victim the charges which led to his dismissal.

42. Fourthly, and more importantly, the Complainant maintains that local remedies are not available because the Chief Justice has, *suo motu*, and administratively issued a Practice Directive to the effect that legal suits against His Majesty the King, or any person acting for and on his behalf, should not be accepted by the Registrar of the High Court or any court staff, purportedly pursuant to Section 11 of the Respondent State's Constitution. The Complainant further states that attempts by the Law Society of Swaziland to have the Practice Directive reviewed administratively have not been successful. Such attempts included the lawyers' boycott of court attendance that lasted four months.

43. Fifthly, the Complainant states that in terms of the existing domestic case law, courts are indisposed to hear and determine matters in which one of the parties is a fellow judicial officer. The Complainant cites two previous cases which articulate the position of courts in such matters: the case of Law Society of Swaziland v. The Swaziland Government and Two Others, Civil Case No. 743/2003 (as yet unreported) decided by the High Court; and the case of Minister of Justice and Constitutional Affairs v. Stanley Wilfred Sapire, Civil Appeal Case No 49/2001 (as yet unreported) decided by the Court of Appeal.

44. In the former case, the Law Society of Swaziland lodged an urgent applicant before the High Court challenging the variation of terms and conditions of appointment of the Complainant from the High Court to the Industrial Relations Court. The High

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Court judge before whom the urgent application came for hearing and determination recused himself on the grounds that the High Court being a small institution, judges interact and have proximate relations with each other, that they cannot be or be perceived to be impartial in hearing and determining cases in which a fellow judge is a party. The Court in that case recommended the appointment of a judge from outside the jurisdiction in accordance with Swazi law.

45. The latter case of Sapire, was an application by the then Chief Justice Stanley Wilfred Sapire before the High Court seeking an order determining the age and date of his retirement. On appeal against the refusal by the three High Court Judges to recuse themselves, the Court of Appeal ordered the High Court Judges to recuse themselves on the basis of proximate relations between the judges and the Chief Justice who was the applicant.

46. The Complainant contends that in terms of the doctrine of *stare decisis*, there is a great likelihood that the High Court before which he would lodge any application challenging his dismissal would decline to hear and determine the matter pursuant to the existing case law.

47. The Complainant invokes the established jurisprudence of the Commission that the local remedies that ought to be exhausted as required under Article 56(5) of the Charter must be: (a) available in the sense of a complainant pursuing them without impediment; (b) effective in the sense of offering a prospect of success; and (c) sufficient in the sense of being capable of redressing the complaint.[3] The Complainant concludes by submitting that no remedies fitting these criteria are presently available within the Respondent State's legal system.

48. Accordingly, the Complainant prays that the Commission should declare this Communication admissible.

The Commission's Analysis on Admissibility

49. As stated above the Respondent State has not presented its submissions on Admissibility, despite the opportunity accorded to it to do so in terms of Rule 105(2) of the Rules of Procedure. The Commission has time and again bemoaned the lack of written submissions from one of the parties to a Communication. Inevitably in such cases, the Commission has to adopt its decision on the basis of information provided by one party, which deprives the Commission the benefit of a balanced version of the complaint under consideration.

50. Regarding Admissibility of a Communication submitted pursuant to Article 55 such as the present, Article 56 of the Charter stipulates seven conditions which have to be satisfied for such Communication to be considered on the merits.

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[3] Communication 275/03: *Article 19 v Eritrea* (2007) ACHPR para. 46; Communication 146/96: *Jawara v The Gambia* (2000) ACHPR; and Communication 307/05: *Chinhamo v Zimbabwe* (2007) ACHPR.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

51. The Commission adopts the position that the requirements for admissibility under Article 56 of the Charter are cumulative and must each be adequately addressed and fulfilled for a Communication to be declared admissible. Consequently, if upon the Commission's assessment of the information submitted any one of the conditions is not satisfied, the Communication will be declared inadmissible entirely or to the extent of non-conformity as the case may be: see, among others, **Communication 304/05: FIDH and others v. Senegal** (2006) ACHPR para 38; **Communication 338/07: Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria** (2010) ACHPR para 43; and **Communication 284/03: Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe** (2009) ACHPR para 81; and **Communication Anuak Justice Council v. Ethiopia** (2006) ACHPR para. 44.

52. In that regard, the Commission's practice is to examine a Communication in light of each admissibility requirement as stipulated under Article 56 of the Charter,[4] even if the parties have not advanced any arguments on any of the conditions.

Indication of the Authors, Article 56(1) of the Charter

53. The Commission notes that the identities of the Victim in the present Communication and the Complainant are clearly indicated respectively as Justice Thomas S. Masuku and Lawyers for Human Rights - Swaziland respectively, with full contact details of the latter. Clearly, Article 56(1) of the Charter requiring that the author must be indicated, as read together with Rule 93(3) of the Rules of Procedure, are duly satisfied and the Commission finds accordingly.

Compatibility with the Charter, Article 56(2) of the Charter

54. Regarding Article 56(2) of the Charter, the Commission notes that the present Communication alleges violations of Articles 1, 7 and 26 of the Charter. In the broad terms of Article 55 of the Charter providing for Communications other than those brought by State Parties, the Complainant is entitled to submit the present Communication. Further, the Communication is brought against a Party to the Charter. The violations complained of allegedly occurred within the jurisdiction of the Respondent State and apparently at the instance of its institutions and officials. Furthermore, the violations occurred after the Charter had become enforceable against the Respondent State. There is nothing in the information submitted by the Complainant indicating to the contrary on each of these elements.

55. The Commission is accordingly satisfied that the present Communication is compatible with the Charter by reasons of the subject matter, the parties, the location of the alleged violations, and the time the alleged violations occurred, all in terms of Article 56(2) of the Charter.

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[4] Communication 308/05: Michael Majuru v. Zimbabwe (2008) ACHPR para. 69

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Language of the Communication, Article 56(3) of the Charter

56. The Commission does not include any disparaging or insulting language in the Complainant's submissions directed against the Respondent State and its institutions or the AU. Accordingly the Commission holds that the Communication complies with Article 56(3) of the Charter.

Source of evi lence or information relied on, Article 56(4) of the Charter

57. The Commission observes that the Communication is not exclusively based on news disseminated through the mass media. As a matter of fact it is almost entirely based on the Victim's own account of his involvement in, and written records of various proceedings at the domestic level leading to his dismissal. Accordingly, Article 56(4) of the Charter is accordingly satisfied.

Whether settled in terms of Article 56(7) of the Charter

58. There is no information to the Commission's knowledge indicating that the subject matter of the present Communication has been settled in terms of Article 56(7) of the Charter. Consequently, the Commission deems the Communication compliant with Article 56(7) of the Charter.

Exhaustion o local remedies, Article 56(5) of the Charter

59. Regarding Article 56(5) of the Charter, the rule is that a Communication will be considered on the merits if it is "sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." From the language of the rule, firstly, where a Complainant successfully makes out the case that the procedure for pursuing local remedies is unduly prolonged, the requirement to exhaust local remedies before submitting a Communication would not apply. For this purpose, whether the procedure is unduly prolonged is a question of both law and fact to be settled on the circumstances in each case. The Commission does not wish to belabour this point as it does not arise for consideration in the present Communication.

60. In furtherance of compliance with Article 56(5) of the Charter, Rule 93(2)(i) of the Rules of Procedure requires a Complainant to outline the steps taken to exhaust domestic remedies, or if the applicant alleges the impossibility or unavailability of domestic remedies, the grounds in support of such allegation.[5]

61. Further, the Commission's jurisprudence is well established that the local remedies required to be exhausted must be (a) available,[6] (b) effective, and (c) sufficient. A

[5] See also Communication 308/05: Michael Majuru v. Zimbabwe (2008) ACHPR para. 102

[6] The words "... if any ..." in Article 56(5) of the Charter imply that if there are no remedies, the requirement to exhaust local remedies does not apply.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

remedy is considered available if firstly it exists, and secondly a victim can access, pursue or make use of it without impediment; it is considered effective if it offers a prospect of success; and it is considered sufficient if it is capable of redressing the wrong established to have been suffered: see, among others, **Communication 147/95-149/96: Sir Dawda K. Jawara v. The Gambia** (2000) ACHPR paras. 31-32; **Communication 299/05: Anuak Justice Council v. Ethiopia** (2006) ACHPR paras. 51-52; **Communication 250/02: Liesbeth Zegveld and Mussie Ephrem v. Eritrea** (2003) ACHPR para. 37; **Communication 334/06: Egyptian Initiative for Personal Rights and Interights v. Egypt** (2011) ACHPR para. 93.

62. The Commission wishes to highlight that availability of a remedy entails both its existence in law and its accessibility in practice. There must exist in the municipal legal order both substantive and procedural provisions for redressing complaints. Secondly, in practice, such remedies must be accessible to the victim. There must be no unjustifiable obstructions in the victim's way to access such remedies.

63. Accordingly, a remedy will be considered as unavailable to a given victim if it does not exist at all, or if it does exist, it cannot be accessed or used by that particular victim. The latter comports the result that even if a remedy may exist in law and is accessible generally, it may nevertheless be unavailable to a given victim because of circumstances unique to such victim's case. This is a question of fact to be settled on the evidence in each case.

64. Another point to note is that any evaluation regarding "effectiveness" and "sufficiency" of a remedy presupposes at least the availability of some remedy. Where a given remedy is not available, the criteria of effectiveness and sufficiency do not arise. On the other hand, if the argument be that a given remedy does not offer prospects of success, the conclusion would be that such remedy is ineffective and if so accepted by the Commission, the Communication would be admitted for considera .on on the merits. The same applies where the remedy is found to be insufficient because it is not capable of redressing the wrong suffered.

65. It is an epic *non sequitur* to argue that a remedy is 'ineffective' or 'insufficient' and conclude that it is therefore 'unavailable.' For the avoidance of doubt, when in **Communication 251/02: Lawyers of Human Rights v. Swaziland** (2005) ACHPR para. 27 the Commission stated that it was "... of the view that the likelihood of the complaint succeeding ... is so minimal as to render it unavailable and therefore ineffective", both the preposition "it" and the word "unavailable" referred to the "likelihood of ...succeeding" or the prospects of success which is used to assess the effectiveness of a remedy.

66. Furthermore, the Commission has adopted the position that even though there may be a range of other local remedies for redressing a given violation, it is particularly important for purposes of Article 56(5) of the Charter that the remedy must be of a judicial nature; a remedy sought from the municipal courts: see **Communication**

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

221/98: Alfred B. Cudjoe v. Ghana (1999) ACHPR para. 14;[7] **Communication 313/05: Kenneth Good v. Botswana** (2010) ACHPR para. 88; **Communication 375/09: Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and the International Centre for the Protection of Human Rights) v. Kenya** (2011) ACHPR para. 53.

67. In the present Communication, the Complainant contends that "no remedies fitting the standard [of availability, effectiveness and sufficiency] are at present available within the [Respondent State's] constitutional and judicial framework." To make out this submission, the Complainant advances five grounds as summarised above. The Commission will first consider the fourth ground as it is critical.

68. The Complainant avers that domestic remedies are not available because civil claims against the King are not entertained by domestic courts. In this regard, the Complainant produces a Practice Directive issued by the Chief Justice on 16 June 2011 addressed to all courts and legal practitioners. In the operative part, the Practice Directive stipulates as follows:-

It has come to the attention of the Chief Justice that some legal practitioners issue summonses or applications for civil claims against His Majesty the King and iNgwenyama. The attention of legal practitioners and litigants is hereby drawn to s. 11 of the Constitution which provides as follows:
'11. The King and iNgwenyama shall be immune from –
(a) Suit or legal process in any cause in respect of all things done or omitted to be done by him; and
(b) Being summoned to appear as a witness in any civil or criminal proceedings."
Accordingly, the Chief Justice hereby issues the following Practice Directive:-
(1)Summonses or applications for civil claims against His Majesty the King and iNgwenyama, either directly or indirectly, shall not be accepted in the High Court or any other Court in the country.
(2) The Registrar of the High Court and/or all those entrusted with receipt of court process in this country are hereby directed to refuse to accept any summons or application specified in 2(1) above.

69. The Complainant avers that the Victim's dismissal is an act of the King and *iNgwenyama*. In terms of the above Practice Directive, which is being followed in practice, any possible suit the Victim might institute will not be entertained by the domestic courts because such suit would be challenging the King's decision. Accordingly, domestic remedies are not available in the circumstances of the Victim's complaint.

[7] The Complainant produced a decision handed down by the Ghanaian Human Rights Commission in his favour. He did not indicate any steps he had taken before the municipal courts. Neither did he suggest that beyond the decision of the Ghanaian Human Rights Commission he was precluded or impeded from approaching the municipal Courts. The Commission declared the Communication inadmissible.

ACHPR

70. Notably, the Complainant notes that the Victim does not appear to agree with the Chief Justice's adumbration of Section 11 of the Constitution, as in the Practice Directive quoted above. However that is immaterial for the present purposes. What is material is whether in practice the Victim can access the domestic courts to challenge his removal from the position of Judge of the High Court and seek the appropriate remediation.

71. The Commission finds itself of one mind with the Victim that his complaint inseparably relates to both the disciplinary inquiry which recommended his dismissal, as well as the very formal act of dismissal. The Complainant produces, and the Commission has perused, a copy of Legal Notice No. 140 of 2011 done under the hand of Mswati III, King and *iNgwenyama* of Swaziland dated 27th day of September 2011. In it the King and *iNgwenyama* removes Justice Thomas Masuku, the Victim, from the office of Judge of the High Court of Swaziland for serious misbehaviour. The King and *iNgwenyama* does this in exercise of the powers provided for under Section 158(2) of the Constitution of the Kingdom of Swaziland. Clearly, the formal removal of the Victim is an act of the King and *iNgwenyama*. To this extent, any legal suit the Victim would have to institute would have to deal with this official act of the King and *iNgwenyama*, in addition to its antecedent disciplinary hearing.

72. Given the plain language of the Practice Directive quoted above, and considering that the Practice Directive is being implemented in practice, it is clear that even though judicial remedies may generally exist in the Respondent State's legal system, such remedies cannot be accessed by the Victim, as suits against the King and *iNgwenyama* cannot even be registered by domestic Courts.

73. Accordingly the Commission is satisfied that domestic remedies are not available in the circumstances of the Victim and consequently the requirement to exhaust local remedies does not apply.

74. Having found that domestic remedies are not available in the circumstances of the Victim, the Commission does not consider it necessary to examine the other grounds advanced by the Complainant. This is because the remaining grounds relate to effectiveness and sufficiency, as opposed to availability even though the Complainant advanced them to make out the submission that local remedies are not available.

Whether Communication submitted within reasonable period, Art. 56(6) of the Charter

75. Lastly, Article 56(6) of the Charter requires that a communication must be brought within a reasonable period from the time local remedies are exhausted. As the Commission has already found, domestic remedies are not available in the circumstances of the Victim. However, this does not mean that the requirement of Article 56(6) of the Charter does not arise. In cases where local remedies are unavailable, the communication must be brought within a reasonable period from the time the alleged violation occurs or in appropriate cases from the time the

SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Complainant becomes aware of the violation, or indeed when the Complainant becomes aware that local remedies are not available.

76. Further, it is important to highlight that Article 56(6) of the Charter does not prescribe a specific .ime limit. It merely requires that a Communication must be submitted "within a reasonable period." What constitutes a "reasonable period" is a question of both law and fact. To the extent that it is a question of fact, it will be settled on the circumstances of each case. In this regard, previous instances where specific periods were accepted or rejected as reasonable or unreasonable are of very limited consequence in assessing whether a Communication at hand has been submitted within a reasonable period of time. Thus the Commission has previously held that whereas six months appears to be the standard time limit applied by the Inter-American Commission and European Court of Human Rights, "each case must be treated on its own merits."[8]

77. In the present Communication, local remedies are not available in the circumstances of the Victim in light of the Practice Directive barring suits against the King issued on 16 June 2011. Accordingly, the relevant period would be reckoned from the date he was ultimately removed as Judge of the High Court of Swaziland: 27 September 2011. This Com.nunication was submitted on 11 April 2013. The Complainant did not initially advance any arguments on the requirements of Article 56(6) of the Charter.

78. Upon being requested by the Commission, the Complainant referred the Commission to documents already filed together with the submissions on admissibility. In particular, there is correspondence indicating that after the Victim had been dismissed, he sought to obtain a record of the disciplinary inquiry, written rulings on the preliminary objections he had raised during the disciplinary inquiry, and the reasons supporting the recommendation for his removal, all to assist him in seeking local remedies. Further, the Complainant states that since there is a Practice Directive which bars registration of suits against the King, the first step in pursuing local remedies entailed challenging the Practice Directive. Before the Victim could file the necessary application for that purpose, the Courts went on recess from November 2011 to February 2012. The Victim was only able to attempt to file the necessary application after the Courts resumed around February 2012.

79. However, the Victim's application challenging the Practice Directive could not also be registered by the Registrar of the Court because it was deemed to be indirectly against the King since the Practice Directive is for the benefit of the King. It was only upon these frustrations that the Victim finally resolved that domestic remedies were not available and decided to approach the Commission with the present Communication in April 2013.

[8] Communication 308/05: Michael Majuru v. Zimbabwe (2008) ACHPR para. 109

SECRETARIAT AU-UA

80. The Commission notes that there elapsed a period of about one year from around February 2012 when he attempted to initiate domestic proceedings to April 2013 when the Complainant finally submitted the present Communication. Having regard to the circumstances of this case and the efforts deployed by the Victim in trying to seek local remedies, the Commission considers that this Communication was submitted within a reasonable period of time and therefore complies with Article 56(6) of the Charter.

81. Accordingly, the Commission declares the Communication admissible.

DECISION ON STRIKE OUT

82. Rule 108(1) of the Commission's Rules of Procedure (the Rules) provides that once a Communication has been declared admissible, the Commission shall set a period of sixty (60) days for the Complainant to submit observations on the merits.

83. Rules 113 of the Rules provides that when a deadline is fixed for a particular submission, either party may apply to the Commission for extension of the period stipulated, and the Commission may grant an extension which shall not exceed one month.

84. The Commission notes that, as at 24 February 2015 when this Communication is being considered during the holding of the 17th Extra-Ordinary Session, the Complainant's observations on the merits are over four months overdue from the stipulated deadline, to wit, latest from 19th October 2014.

85. The Commission also notes that neither during the stipulated two months, nor during the four months outside of that period did the Complainant seek an extension of the time within which to submit observations on the merits.

86. The Commission considers that the Complainant's failure to submit observations on the merits within the prescribed time or at all, or indeed to seek an extension of the time within which to do so amount to want of diligent prosecution of this Communication.

87. In light of the Complainant's failure to prosecute the Communication diligently, or at all, after the decision on admissibility, the Commission decides to strike out this Communication.

RELISTING THE COMMUNICATION

The Application for re-listing

88. By letter dated 12 April 2015, but received at the Secretariat on 15 April 2015 from Professor Michelo Hansungule who had just been retained as the Complainant to

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
SECRETARIAT
AU-UA
COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

represent the Victim, the Complainant submitted an application for the Communication to be re-listed. The application is supported by affidavits of the Victim and the Chairperson of Swaziland Lawyers for Human Rights, which submitted the Communication on behalf of the Victim. In the same application for relisting, Professor Hansungule requested to be heard orally on the application during the 56th Ordinary Session of the Commission which was due to be held from 21 April to 07 May 2015.

89. With only about six (6) days to the 56th Ordinary Session in respect of which the agenda h d already been settled, and with the impossibility of affording the Respondent State a fair notice of the requested hearing, the request for an oral hearing on the application could not be granted. The new Complainant was promptly informed of the impossibility of holding the oral hearing.

90. The Complainant's application for re-listing was transmitted to the Respondent State by e-mail of 25 April 2015 and by courier delivered on 6 May 2015 at 10:32 am. The application for re-listing was transmitted to the Respondent State because it had received notice of the strike out decision and it was deemed necessary in the interest of transparency and due process to avail it the opportunity to present observations on the application. As at the date of adopting the present decision, the Respondent State has neither acknowledged receipt of the application for re-relisting, nor presented any observation on the application.

91. In the application for re-listing, the Complainant submits on behalf of the Victim that the failure to present merits submissions, or indeed to confirm that the submissions in the Complaint shall stand as merits submissions was no fault of the Victim himself. Rather the default was as a result of "*the regrettable oversight which is entirely due to negligent and unprofessional handling of the Communication by the [previous] legal representatives of the victim.*"

92. In his supporting affidavit, the Victim himself states that he retained the services of Swaziland Lawyers for Human Rights to submit and prosecute the present Communication before the Commission on his behalf. With shock and dismay, he learnt on 17 March 2015 that his complaint had been struck out. All the while the Victim labored under the impression that the Communication is due for consideration on the merits. The Victim firmly states that at no point did he have the intention to abandon the complaint, and he is ever desirous to see it through to the merits with a view to vindicate his rights. Accordingly, he prays that the Commission may exercise its discretion to re-list the Communication and consider it on the merits.

93. Additionally, the Chairperson of Swaziland Lawyers for Human Rights affirms that upon receiving the Commission's decision on admissibility, the Board of Trustees of Swaziland Lawyers for Human Rights (the Board) met and resolved that it was not necessary to file additional submissions to those advanced in the Complaint. The previous Complainant states with regret that by pure oversight and not intentionally,

the decision was erroneously not communicated to the Commission. In his testimony, the entire Board was under the impression that its decision had since been communicated to the Commission, until he learnt of the Commission's decision striking the Communication out. Finally, he highlights the importance of the matter to the Victim, and the possible implications of the Commission's ultimate decision on the merits for the independence of the Respondent State's judiciary. He accordingly prays that the Communication may be reinstated for consideration on the merits.

The Commission's assessment of the application

94. It must be noted at the outset, that despite stipulating definite periods within which parties must present their written submissions, the Rules of Procedure do not expressly provide for striking out of a Communication for the Complainant's failure to diligently prosecute the complaint. Indeed it might either have been considered unnecessary to so expressly stipulate, preferring that the Commission should exercise discretion in each case; or merely an oversight to so stipulate.

95. Whatever the case may be, the Commission retains the inherent power to deal with matters that are not expressly provided for under the Rules of Procedure. The Commission bears in mind its duty to invoke and exercise such inherent power judiciously, to various ends which include upholding the authority of the Rules of Procedure which are meant to facilitate adjudication of complaints in such a manner that a single complaint does not clog the complaints handling mechanism to the detriment of other existing and prospective complaints.

96. To this and other legitimate ends, the Commission may sanction inexplicable defaults by the parties: for example by proceeding to adopt a decision based on the Complainant's submissions only where the Respondent State does not submit its observations, as was the case with the admissibility decision, or indeed where the State is so tardy in presenting its submissions. Similarly, where the Complainant does not present submissions at any stage of the procedure on time or at all, the Commission may expunge the Communication from consideration for failure to prosecute the complaint.

97. By the same inherent power, the Commission can consider an application for an expunged Communication to be re-listed for consideration. For purposes of such an application, the Complainant must offer a cogent explanation or reason for the default which resulted in the strike out. In considering such an application, the Commission will take into account, as principal considerations, the object and purpose of the Charter and the Rules of Procedure being the protection of the rights and freedoms guaranteed under the Charter. The Commission will also consider the possible prejudice that may be occasioned to the Respondent State as a result of the default or indeed if the Communication were to be revived after being struck out. Other than these factors, the Commission will consider all the circumstances of the case in exercising its discretion on whether or not to re-list the Communication.

98. In the case at hand, the Commission notes the explanations offered by the Victim, who seems to have been unaware of the developments on the Communication since it was submitted, until he was notified of the decision striking out the Communication. On its part, Swaziland Lawyers for Human Rights through its Chairperson explains that the default was as a result of a pure oversight in failing to confirm to the Commission that the merit arguments advanced in the Complaint shall stand as submissions on the merits and no further papers would be filed.

99. Further, the Commission notes the Respondent State's failure to present any observations on the application for re-listing, by which observations it would have raised prejudice, if any, in presenting its case henceforth. The Commission does not perceive any such prejudice. The Commission also notes the prompt manner in which the Victim responded to the strike out decision by retaining new legal representation and filing the present application. This demonstrates the resolve and commitment to prosecute the matter to finality. Indeed as the procedural history of this matter indicates, the Complainant has been so timely as to even beat the time stipulated for submission of arguments and evidence on admissibility.

100. In the circumstances of this case, the Commission finds the Victim's default excusable as a mere lapse on the part of the previous Complainant (Lawyers for Human Rights - Swaziland). The Commission does not consider it to serve any legitimate end to deny the Victim at least adjudication of his complaints on the merits on account of a default that in all earnest cannot justifiably be imputed to him directly.

101. Accordingly, the Commission decides to re-list the Communication for consideration on the merits.

THE MERITS

The Complainants' Submissions on Merits

Article 1

102. The Complainant submits that, in terms of Article 1, Swaziland has an obligation it cannot renege from, to respect and perform its obligations under the Charter.

103. The Complainant avers that many of the provisions of the African Charter were incorporated in the Constitution and must be respected.

104. The Complainant refers to **Civil Liberties Organization v. Nigeria**, in which the Commission held that "any doubt that may exist as to Nigeria's obligations under the African Charter is dispelled by reference to Article 1 of the Charter."[9] The

[9] Communication 129/94: Civil Liberties Organization v. Nigeria (2000) ACHPR, para 16

ACHPR

Complainant submits that this statement applies with equal force in relation to Swaziland, as a State Party to the African Charter.

Article 7

105. The Complainant submits that Article 7 of the Charter, read together with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), guarantee the right to a fair and just hearing.

106. The Complainant further submits that the ingredients of such a hearing are that a person, against whom certain accusations have been levelled, has a right to have the matter determined by a competent, impartial and just tribunal.

Right to appear before, and to be heard by an impartial, independent and competent tribunal

107. The Complainant avers that the Victim's right was violated, because the Judicial Service Commission (JSC), the tribunal which tried him, was chaired by the Chief Justice who became the accuser, prosecutor, witness and Judge, all at the same time, which offends the rules of natural justice, fairness and common sense.

108. The Complainant avers that the Chief Justice was the complainant in the proceedings, which appears in the charges against the Victim. The Complainant further avers that the Chief Justice would ordinarily be required to be a witness and give evidence, in light of the fact that a number of the charges related to him or his office; therefore the Chief Justice should have been open to cross-examination.

109. The Complainant avers that, at the heart of the application for the Chief Justice to recuse hir self was the observation that he was likely to be biased in his determination of the matters, given the charges related to him or his office. Accordingly, the Complainant avers that the refusal of the Chief Justice to recuse himself at the hearing was a violation of Justice Masuku's right to a fair trial.

110. The Complainant referred to **Lawyers for Human Rights v. Swaziland**[10] in which the Commission held that Article 7 of the African Charter provides for fair trial guarantees – safeguards to ensure that any person accused of an offence is given a fair trial. Further, in **Zimbabwe Human Rights NGO Forum v. Zimbabwe**,[11] the Commission stated that the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons, but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Complainant submits that the JSC is one such body enjoined to respect fair hearing rights.

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[10] Communication 251/02: Lawyers of Human Rights v. Swaziland (2005) ACHPR, para 53
[11] Communication 245/02: Zimbabwe Human Rights NGO Forum v. Zimbabwe (2006) ACHPR, para 128

SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

111. The Complainant argues that the lack of impartiality and independence of the JSC, and in particular the refusal by the Chief Justice to recuse himself rendered the proceedings irregular, unlawful and unconstitutional, and liable to be found to have violated the State's Constitution and obligations under the Charter and international law.

112. The Complainant further argues that the Victim appeared before the JSC in its capacity as the administrative body, headed by the Chief Justice, therefore the provisions of Section 33(1) of the Constitution were supposed to be followed. In this regard the Complainant makes reference to the United Nations Human Rights Committee which stated that "Article 14 requirements and procedures of the fair administration of justice applies not only to procedures for the determination of criminal charges against individuals, but also to procedures to determine their rights and obligations in a suit at law."

Right to a fair public hearing

113. The Complainant submits that the JSC was wrong to refuse the Victim the right for his case to be heard in public. The Complainant further submits that although serious allegations were levelled against the Victim, he desired that he be vindicated in public.

114. The Complainant submits that the request and desire by the Judge for the hearing to be heard in public was in line with the provisions of Section 21(11), read with Section 33 of the Constitution, and further that, in the context of the disciplinary hearing against the Victim, the JSC was sitting as a quasi-judicial body, and therefore an adjudicating authority within the provisions of Section 21(11) of the Constitution. Accordingly, the Complainant urges the Commission to find that the manner in which the JSC conducted the disciplinary hearing violated Article 7 of the African Charter.

115. Furthermore, the Complainant avers that the JSC refused independent observers to observe the hearing. In this regard, the Complainant references General Comment No. 13 of the Human Rights Committee, which states that "the publicity of hearings is an important safeguard in the interest of the individual and society at large." The Complainant concludes that the failure to afford the Victim a public hearing, when he asked for it, rendered the hearing arbitrary.

Article 26

116. The Complainant submits that charging the Victim with an offence while in the course of duty was gross interference with his individual and decisional independence as a judicial officer. The Complainant further submits that, the fact that the Victim was dismissed while he exercised his functions properly granted by the law and the Constitution is a gross violation of his independence as a judicial officer, and a violation of the independence of the judiciary as a whole.

117. The Complainant contends that the dismissal of the Victim violated and undermined the independence of the judiciary as guaranteed by Article 26 of the Charter and Section 141(1) of the Constitution. Further, the Complainant contends that the judiciary is the bastion of the protection and promotion of human rights, as stated in Section 14(2) of the Constitution.

118. The Complainant avers that the unlawful and unconstitutional manner in which the JSC conducted the hearing, violated the provisions of the Charter and the Constitution and undermined the rule of law.

119. The Complainant cites **Lawyers for Human Rights v. Swaziland,**[12] in which the Commission emphasized the independence of the courts, stating that "it is the duty of all government and other institutions to respect and observe the independence of the judiciary."

120. The Complainant contends that the reasons for the Victim's dismissal are not in line with the international standards that justify the dismissal of a judge. The Complainant further contends that the members of the JSC are appointed by the King; however this is not in compliance with the provisions of Section 173(4) which requires that the process of appointment must be done in a competitive, transparent and open manner. In this regard, the Complainant references the Commission's decisions, including, **Media Rights Agenda v. Nigeria** [13]and **Civil Liberties Organization v. Nigeria,**[14] in which the Commission questioned the independence of bodies whose membership is composed by members who were hand-picked and appointed by the Executive, in particular the Head of State.

121. The Complainant submits that, the fact that the members of the JSC are hand-picked by the King, offends the principle of separation of powers. The Complainant notes that in its jurisprudence the Commission held: "By entrusting all judicial powers to the head of state with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary."[15] The Complainant further submits that the recommendations issued by the Commission following its Promotion Mission to Swaziland in August 2006, underscored that Swaziland must ensure that the monarch respects the doctrine of separation of powers and the rule of law, to ensure that power belongs to the people.

122. The Complainant avers that the Victim's dismissal demonstrates the sad reality and experience of interference with the judges' decisional independence. The Complainant contends that under the rule of law, judges are free to decide their cases without any interference from any authority.

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[12] Communication 251/2002: Lawyers for Human Rights v. Swaziland (2005) ACHPR, para 55
[13] Communications 105/93, 128/94, 130/94, 152/96: Media Rights Agenda v. Nigeria, Complainants submissions, para 17.7.1
[14] Communication 129/94 Civil Liberties Organisation v. Nigeria (1995) ACHPR
[15] Communication 251/2002: Lawyers for Human Rights v. Swaziland (2005) ACHPR, para 56

123. Additionally, the Complainant submits that, despite the fact that the charge relating to decisional independence was withdrawn, the Victim was still found guilty.

124. The Complainant further submits that the Victim was not afforded an opportunity, as is customary, to be advised of the conviction by the JSC. It is contended that the Victim was not afforded an opportunity to make submissions in mitigation of sentence; the JSC proceeded to recommend his sanction to the King, with no reference to what he would have wished to state in mitigation of sentence.

The Respondent State's Submissions on Merits

125. Firstly, the Respondent State rebutted the Admissibility of the Communication, averring that the State Party denies the Complainant's allegation that there are no available remedies in Swaziland because the judiciary is not independent. The State referenced Section 141(1) of the Constitution (2005), which endows the judiciary with judicial independence.

126. The Respondent State further avers that there is no evidence to suggest that the Victim was never afforded an opportunity to be fully heard by the judicial system of Swaziland, or that the case was never decided on the merits, or that the remedies would be ineffective. Accordingly, the State submits that the Complainant is put to strict proof of any allegations of ineffectiveness of domestic remedies.

127. In response to the Complainants submissions on the Practice Directive No.4/2011, the Respondent State submits that this has been overtaken by events, given that the Directive has been withdrawn. The State further submits that Section 152 of the Constitution empowers the High Court to exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may issue orders for the purpose of enforcing its review or supervisory powers.

128. Regarding the demotion of the Victim to the Industrial Court of Swaziland, the Respondent State avers that the variation of terms and conditions of appointment was an administrative decision, made independently by the judiciary, in order to address the backlog of cases at the Industrial Court, which affected other Judges in addition to the Victim.

129. The Respondent State contends that the Judicial Service Commission is constitutionally empowered, as a competent and independent structure to investigate and advise on the removal of Justices of the Superior Court, in terms of Section 158(3) and 159 of the Constitution.

130. Regarding the allegation of holding the JSC proceedings in private, the Respondent State concedes that, at the time the Communication was filed, impeachment

ACHPR

SECRETARIAT AU-UA

proceedings were considered as merely administrative proceedings which did not require any public hearing. The State submits that it has since taken steps to ensure that impeachment of Justices of the Superior Courts are conducted publicly, as evidenced in the impeachment process of the then Chief Justice and another High Court Judge, who were found to have compromised the independence of the judiciary.

131. The Respondent State further submits that conducting impeachment proceedings in camera does not automatically render the proceedings arbitrary. The State referenced Rule 99(8) of the Commission's Rules of Procedure (2010) which provides that hearings on communications before the Commission shall be held in camera. The State avers that an inference may be drawn that the intention of the Rule is to protect the integrity of the parties to the Communication, as was the case with regards to the Victim's case.

132. The Respondent State submits that the proceedings against the Victim were administrative and not criminal, therefore the protection of whistle blowers was important. The State avers that corrective measures have been undertaken in subsequent proceedings of a similar nature.

133. Regarding the question of the independence of the judiciary, with regards to the appointment of members of the JSC by the King, the Respondent State submits that the Complainant's assertions are intended as a direct attack on the country's supreme law and should not considered. The State further submits that Section 173(3) and (4) is irrelevant for advancing the Complainant's argument in so far as it relates to the independence of the judiciary and the appointment of the JSC, as all provisions relating to the JSC are specifically outlined in Chapter VIII of the Constitution.

134. Regarding the principle of the separation of powers, the Respondent State contends that the appointment of Justices of Superior Courts is entrusted to Heads of State in many Member States. The State avers that progressive steps have been undertaken to facilitate the independence of the judiciary, including through adherence to the rule of law, strengthening the judiciary through the appointment of permanent High and Supreme Court judges, the removal from office of the then Chief Justice and another judge who were found to have compromised the independence of the judiciary, as well as the removal of the Practice Directive.

135. In conclusion, the Respondent State requests the Commission to recommend that the parties should resolve the matter amicably at the domestic level, based on the fact that the cause f action is contractual. The State also calls on the Commission to disregard the request of the Complainant "that the Government of Swaziland be ordered to reinstate Mr. Justice Thomas Masuku to the High Court unconditionally," given that this would pre-empt the State's request to resolve the matter at the domestic level.

136. Accordingly, the Respondent State calls on the Commission to find that it has not violated Articles 1, 7 and 26 of the African Charter.

THE COMMISSION'S ANALYSIS ON THE MERITS

137. This Communication concerns the alleged unlawful and unconstitutional removal of the Victim as a judge of the High Court, in which the Complainant bases the claims against the Respondent State on violations of **Articles 1, 7** and **26** of the African Charter.

138. The Commission will analyse each of the articles alleged to have been violated by the State individually, followed by a discussion on Article 1 of the African Charter.

139. At the outset, the Commission observes that the Judicial Service Commission (JSC) is a constitutional body established under Article 159 of the Respondent State's Constitution, of which the Chief Justice is the chairman.[16] The JSC is mandated, *inter alia*, to investigate and advise whether a Justice of the Superior Court of Judicature should be removed from office.[17] The Constitution further stipulates that, acting on the advice of the Chief Justice in the case of any Justice of a superior court, the JSC enquires into the matter and recommends to the King whether the Justice should be removed from office.[18]

140. The Commission notes that *strictu sensu* the JSC is not a judicial body - the Complainant refers to the JSC as a quasi-judicial body,[19] whereas the Respondent State refers to the JSC proceedings as 'administrative proceedings.'[20]

141. Regardless, as noted in the Commission's jurisprudence: *"The right to a fair hearing is based on key elements including in particular the principle of equality of arms for the parties to the case, whether administrative, civil, criminal or military, the opportunity to properly prepare the defence, to present arguments and evidence and to respond to the arguments and evidence of the prosecution or the defendant."*[21] Accordingly, the Commission observes that the principles on the right to a fair trial should be observed and respected in the disciplinary proceedings of the JSC.

142. With these preliminary considerations in mind, the Commission will proceed to analyse the alleged violations of the African Charter.

Violation of Article 7

143. Article 7(1) of the African Charter stipulates thus:

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[16] Section 159(2)(a), Constitution of the Kingdom of Swaziland (2005)
[17] Section 158 (1) and (3), Constitution
[18] Section 158(3) and (4), Constitution
[19] Complainant submissions, paragraph 10.3.1, pg. 16
[20] Respondent State submission, page 4
[21] Communication 286/04: Dino Noca v. Democratic Republic of the Congo (2012) ACHPR, para 186

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 of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
(c) the right to defense, including the right to be defended by counsel of his choice;
(d) the right to be tried within a reasonable time by an impartial court or tribunal.

144. In the present Communication, the Complainant avers that Article 7 of the African Charter, read together with the UDHR and the ICCPR, guarantee the right to a fair and just hearing. The Complainant contends that the ingredients of such a hearing include "*the right to appear before and to be heard by an impartial, independent and competent tribunal,*" in addition to "*the right to a fair public hearing,*" drawing inspiration from Article 10 of the UDHR and Article 14 of the ICCPR.[22]

145. In light of the fact that the Complainant has argued these two elements individually, the Commission will analyse them separately.

The right to appear before, and to be heard by an impartial, independent and competent tribunal

146. Whereas the African Charter provides that the right to a fair trial includes the right to be tried within a reasonable time *by an impartial court or tribunal*, the Complainant does not specifically refer to a violation of Article 7(1)(d) in the present Communication. Rather the Complainant refers to the "right to appear before, and to be heard by an impartial, independent and competent tribunal" as one of the requirements of a fair trial.

147. However, it is instructive to note that the Commission's **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** (the Principles on the Rights to a Fair Trial),[23] stipulate the following in **Principle 1**: "*In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.*" As earlier noted, whereas this principle refers to criminal cases, the Commission has determined that the right to a fair hearing applies equally to administrative, civil, criminal or military cases,[24] and therefore would apply to the JSC disciplinary proceedings.

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[22] Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. (UDHR)
Article 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (ICCPR)
[23] Adopted by the Commission during its 33rd Ordinary Session, held in May 2003
[24] Communication 286/04: Dino Noca v. Democratic Republic of the Congo (2012) ACHPR, para 186

148. The Complainant avers that the Victim's right to appear and be heard by an impartial, independent and competent tribunal was violated because the JSC was chaired by the Chief Justice who became the "accuser, prosecutor, witness and Judge all at the same time, which offends the rules of natural justice, fairness and common sense." The Complainant submits that the Chief Justice was the accuser in the proceedings, because a number of the charges related to his office, therefore the Chief Justice would ordinarily be required to be a witness and give evidence. The Complainant avers that by the time the Chief Justice presided over the hearing, his independence had long been compromised and concludes that the refusal of the Chief Justice to recuse himself from the JSC hearing was a violation of the Victim's right to a fair trial.

149. The Respondent State, on the other hand, submits that the JSC is constitutionally empowered as a competent and independent structure to investigate and advise on the remo al of Judges, as stated in Section 158 and 159 of the Constitution respectively.

150. In **Communication 281/03 Marcel Wetsh'okonda Koso and others v. DRC**, the Commission stated that it "*read Articles 7 and 26 together and held that Article 7 deals with the right to be heard by impartial courts, and Article 26 insists on the independence of courts; the Commission notes that States have the duty to put in place credible institutions for the promotion and protection of human rights. Article 26 being the necessary appendix of Article 7, one can expect a fair trial only before impartial courts.*"[25]

151. To this end, the Commission notes that "*the notions of independence and impartiality tend to have different meanings in different contexts. Generally speaking, both impartiality and independence are understood to safeguard the objectivity and fairness of judicial proceedings.*"[26]

152. Regarding impartiality, "*the UN Human Rights Committee stated that it 'implies that judges must not harbour any preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.*" [27] In contrast, "*judicial independence safeguards the judiciary against any interference by state organs or private persons with the performance of judicial duties. Thus, while impartiality reflects an open-mindedness on the part of the judges, independence describes functional and structural safeguards against extraneous intrusion into the administration of justice.*"[28]

153. Taking into account the definition of 'independence' prescribed above, the Commission is of the view that the information and evidence provided in relation to the present Communication does not demonstrate a lack of independence of the JSC, or of the disciplinary proceedings which were held regarding the Victim. The

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[25] Communication 281/03: Marcel Wetsh'okonda Koso and others v. DRC (2009) ACHPR, para 77

[26] "Independence and Impartiality of Judges," by P. Rädler, in The Right to a Fair Trial, Weissbrodt, D., Wolfrum, Rudiger (Eds.), Springer-Verlag Berlin Heidelberg, 1997, http://hrlibrary.umn.edu/fairtrial/wrft-rae.htm

[27] "Independence and Impartiality of Judges," by P. Rädler

[28] "Independence and Impartiality of Judges," by P. Rädler

Commission observes that the JSC is duly established by law, and from the evidence provided, the JSC disciplinary proceeding against the Victim was not subject to any undue "restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter."[29]

154. As to the issue of 'impartiality,' the Commission takes notes that the premise of the allegation is founded on the Complainant's submission that, in the disciplinary proceedings against the Victim, the Chief Justice was the 'accuser, prosecutor, witness and Judge all at the same time;' therefore the Chief Justice should have recused himself from the JSC hearings against the Victim.

155. Taking into account the information provided, the Commission observes that approximately six (6) of the charges which were laid against the Victim, out of a total of twelve (12), relate to the Chief Justice.

156. Specifically, the Commission considers that the following charges relate to the Chief Justice:

- Charge 2: Defying the Chief Justice's directive to prepare and submit a monthly schedule of pending judgments;
- Charge 4: By touting yourself to be appointed Chief Justice, especially amongst the chiefs;
- Charge 7: By sending one Gugu Vilakati, a High Court staff member, to a workshop in Hong Kong without the Chief Justice's approval;
- Charge 8: By absenting yourself from work without the Chief Justice's permission particularly on 30 March 2010;
- Charge 9: By threatening the Chief Justice with resignation when you were confronted with your absenteeism from work without leave on 30 March 2010.
- Charge 10: By attacking the Chief Justice at a symposium of the International Commission of Jurists (ICJ) held in Lesotho on 29 July 2010 for banning Judges from giving interviews to the news media, thus demonstrating both insubordination and disloyalty to the Chief Justice.

157. In light of the fact that these charges against the Victim emanated from the Chief Justice, given that the Chief Justice would have had to report them to the JSC in order for the disciplinary proceedings to be instituted against the Victim, the Commission is of the view that the Chief Justice ought not to have chaired the JSC proceedings against the Victim, given the likely perception that the Chief Justice could not be impartial in the disciplinary proceedings.

158. To this end, the Commission takes note of the provisions in the **Principles on the Rights to a Fair Trial** on an impartial tribunal:

[29] Communication 334/06: Egyptian Initiative for Personal Rights and Interights v. Egypt (2011) ACHPR, para 112

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Principle 5: Impartial Tribunal

d) The impartiality of a judicial body would be undermined when:
(i) a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
(ii) a judicial official secretly participated in the investigation of a case;
(iii) a judicial official has some connection with the case or a party to the case;
(iv) a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.
In any of these circumstances, a judicial official would be under an obligation to step down.

159. In the instant case, the Chief Justice can be said to have "*some connection with the case,*" given that a number of the charges against the Victim related to the Chief Justice and even expressly referred to him; therefore in principle the Chief Justice was under an obligation to step down from the JSC disciplinary inquiry of the Victim.

160. Furthermore, in its jurisprudence, the Commission has held the following: "*Impartiality may be perceived in a subjective and objective manner. In a subjective manner, the impartiality of a judge is gauged by his internal inclinations. Since it is impossible to infer from this inclination objectively, it was simpler to conclude that subjective impartiality be assumed until proven otherwise. However, appearances cannot be ignored while gauging the impartiality of a jurisdiction.*"[30]

161. Taking this into consideration, the Commission finds that the information provided in the present Communication does raise doubts on the impartiality of the Chief Justice in relation to the JSC proceedings against the Victim.

162. Based on this analysis, the Commission finds that the Chief Justice's participation in the JSC disciplinary proceedings violated the Victim's right to appear before an impartial tribunal.

The right to a fair public hearing

163. With regard to the alleged violation of the right to a fair public hearing, the Commission notes the Complainant's assertion that the JSC was wrong to refuse the Victim's request to have his case heard in public, regardless of the fact that he desired to be vindicated in public. Furthermore, the Complainant avers that the JSC rejected the Victim's request for independent observers to observe the hearing. Therefore, the Complainant avers that the failure to afford the Victim a public hearing, when he asked for it, rendered the hearing arbitrary.

164. For its part, the Respondent State concedes that, at the time the Communication was filed, impeachment proceedings were considered as merely administrative proceedings which did not require any public hearing, and further that conducting impeachment proceedings in camera did not automatically render the proceedings

[30] Communication 281/03: Marcel Wetsh'okonda Koso and others v. DRC (2009) ACHPR, para 80, 81

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

arbitrary. The Respondent State referenced Rule 99(8) of the Commission's Rules of Procedure (2010), averring that an inference could be drawn that the intention of the Rule was to protect the integrity of the parties to the Communication, as was the case with regards to the Victim's case.

165. In determination of this allegation, the Commission notes that Article 7 of the African Charter does not expressly refer to the 'right to a public hearing.'

166. However, **Principle 1** of the **Principles on the Rights to a Fair Trial** stipulates that, *"in the determination of any criminal charge against a person, or of a person's rights and obligations everyone shall be entitled to a fair and public hearing* [...]," which the Commission considers should apply equally to administrative, civil or military hearings.

167. Additionally, **Principle 3** stipulates a number of exceptions which would justify denying a public hearing and would not violate the right to a fair trial:

> **Principle 3: Public hearing**
> *f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be:*
> *(i) in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence*
> *(ii) for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.*

168. The Commission also takes note of the **UN Basic Principles on the Independence of the Judiciary**, which stipulate that: *"A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge."*[31]

169. In the present Communication, the Victim expressly requested that the JSC disciplinary proceedings considering his removal from judicial office should be held in public, as recounted below from his response to the JSC which was submitted on 04 August 2011, in advance of the JSC disciplinary proceedings:

> *"Disciplinary inquiries of the JSC may sometimes be held behind closed doors for the protection of the Justice who stands accused of unsubstantiated charges. I prefer any inquiry into my conduct to be held in public however, because the charges against me have been widely publicised and I am entitled an opportunity to refute them in public."*[32]

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[31] Basic Principles on the Independence of the Judiciary, Principle 17 on Discipline, suspension and removal; adopted by the seventh UN Congress on the prevention of Crime and the Treatment of Offenders on 06 September 1985 and endorsed by the UNGA in Resolution 40/146 on 13 December 1985

[32] Complainant submissions, Annex LHR12, Letter from Magagula & Hlophe to the Judicial Service Commission, para 19, pg.12

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

170. However, the JSC dismissed the request for a public hearing for the following reasons:

"The JSC i- appalled by the suggestion to open an investigation of this nature to the public. It is hard to conceive of a need for public hearing even in a pure matter of discipline between an employer and employee relationship. In any event, there is no provision in this country entitling the JSC to open an investigation of this nature to the media and public."[33]

171. Whereas the Commission takes note of the fact that the legal framework for the JSC, that is the Constitution of the Respondent State and the Judicial Service Commission Act (1982), do not have a provision for the JSC to hold its proceedings in public, there is equally no express provision mandating that its' proceedings should be held in private. Furthermore, the Commission notes that both the Constitution and the JSC Act prescribe that the JSC may regulate its own procedure.[34]

172. The Commission also observes that none of the exceptions to holding a public hearing, which are stipulated in **Principle 3(f)** of the **Principles on the Rights to a Fair Trial**, were cited by the JSC when it declined the Victim's request for a public hearing. Furtherm re, whereas there is no explicit provision stipulating that the JSC's proceedings should be held in public, the JSC's legal framework authorizes it to regulate its procedure; therefore it should not have been out of the realm of possibility for the JSC to grant the Victim's request for a public hearing of the JSC disciplinary proceedings.

173. Additionally, the Commission takes note of the information provided by the Respondent State, in paragraph 130 above, stating that steps have since been taken to ensure that impeachment of justices of the superior courts are conducted publicly.

174. Taking all these factors into account, the Commission is of the view that the JSC should have granted the Victim's request for a public hearing, and concurs that he should have been given the opportunity to refute the charges against him in public. The Commission also notes that the reasons given for rejecting the Victim's request do not meet the standard stipulated in the **Principles on the Rights to a Fair Trial**.

175. Accordingly, the Commission finds that the failure to accord the Victim a public hearing of the JSC disciplinary hearing violated his right to a fair trial.

176. In light of the fact that the Commission has determined that the JSC disciplinary proceedings against the Victim were not impartial, and further the Victim's request for a public hearing was wrongfully denied, the Commission finds that this amounts to violation of the Victim's right to a fair trial, and accordingly finds a violation of Article 7.

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[33] Complainant submissions, Annex LHR13, Judicial Service Commission Referral under Section 158(3) of the Constitution to His Majesty King Mswati III, para 19

[34] Section 159(8) Constitution (2005) and Article 7(3) Judicial Service Commission Act (1982)

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Violation of Article 26

177. Article 26 of the African Charter stipulates thus:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

178. This provision of the African Charter is buttressed in the Commission's **Principles on the Rights to a Fair Trial**:

Principle 4: Independent tribunal
"a) The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities;"

179. In the present Communication, the Complainant avers that charging the Victim with an offence while in the course of duty was gross interference with his individual and decisional independence as a judicial officer. Additionally, dismissing the Victim while he exercised his functions, amounted to a gross violation of his independence as a judicial officer, and a violation of the independence of the judiciary as a whole.

180. The Respondent State however, submits that the Complainant's assertions are intended as a direct attack on the country's supreme law and should not be considered. Further, the Respondent State denies the Complainant's allegation of a violation of the Victim's decisional independence, and puts the Complainant to strict proof.

181. In order to understand the Complainant's allegation on interfering with judicial independence, the Commission notes that, among the twelve charges of misbehaviour which the Victim was accused of committing, one of the charges levelled against the Victim states as follows: *"Charge 3: Insulting His Majesty the King by using the words "forked tongue" with reference to him."*[35] From the Complainant's submissions, the Commission notes that the Victim used these words in a written judgement, in a case referenced 'Maseko v. Commissioner of Police (Civil High Court case 1778/09).'[36]

182. However, the Commission also notes that the Complainant made a serious error in its submissions, when it stated the following:

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[35] Complainant submissions, Annex No.LHR9, Letter from the Judicial Service Commission to Justice Masuku, 28 June 2011

[36] Complainant submissions, Annex LHR13, Judicial Service Commission Referral under Section 158(3) of the Constitution to His Majesty King Mswati III, para 47

ACHPR

"Despite the fact that the charge relating to decisional independence was withdrawn, Judge Masuku was still found guilty."[37]

183. Indeed, from the information submitted in support of the Communication, the Commission observes that this charge was not withdrawn, and further the Victim was found guilty of serious misbehaviour in relation to the charge.

184. In finding the Victim guilty of this charge, the JSC stated the following:

"In the present investigation, although the Judge said that he did not believe that the King could speak with a 'forked tongue,' it is the very use of those words which constitutes an insult. Mr. Simelane's view on this point is accepted by all Swazi members of the JSC. [...] It would have been the simplest thing for the Judge to say that he did not believe the story which was imputed to His Majesty the King. But for him to have gone further and used the words 'forked tongue' with reference to His Majesty was not only reckless and unwarranted but it was also plainly insulting to His Majesty. Such inappropriate and uncalled for language can only be explained on the basis of malice in the circumstances of the investigation. [...] Accordingly, the JSC unanimously finds the Judge guilty of serious misbehaviour on this charge."[38]

185. Based on this, the Commission concludes that the Victim was found guilty of serious misbehaviour on account of specific language which he had used in the written judgment of Maseko v. Commissioner of Police (Civil High Court case 1778/09).

186. To this end, the Commission notes that *"judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties."*[39] The corresponding language used in Respondent State's Constitution refers to 'serious misbehavior,[40] whereas the **UN Basic Principles** state plainly that *"judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."*[41]

187. With regard to the present Communication, the Commission is of the view that instituting disciplinary proceedings against a Judge based on language which was used in a judgment does not constitute 'serious misbehavior;' rather this charge amounts to interference with the Victim's judicial independence.

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[37] Complainant submissions, Para 17.9.2, pg.38

[38] Complainant submissions, Annex LHR13, Judicial Service Commission Referral under Section 158(3) of the Constitution to His Majesty King Mswati III, para 53

[39] Principles on the Rights to a Fair Trial Principle 4(p)

[40] Removal of Justices of superior courts, Section 158(2): *"A Justice of a superior court shall not be removed from office except for stated serious misbehavior or inability to perform the functions of office arising from infirmity of body or mind."*

[41] Principle 18 of the UN Basic Principles

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

188. Judicial independence refers to the ability of courts and judges to perform their duties free of influence or control by other actors. Whereas the notion judicial independence is more commonly understood from the perspective of the principle of separation of powers, judicial independence is equally impeded if Judges have reason to fear disciplinary or other consequences due to their exercise of judicial functions.

189. One of the requirements for an independent tribunal stipulated in the Commission's **Principles on the Rights to a Fair Trial** is that; *"there shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law."*[42] Additionally, the principle on an impartial tribunal stipulates that; *"Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason."*[43]

190. Furthermore, in **Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe**, the Commission held that: *"It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference;"* and further that: *"the credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure."*[44]

191. In the same vein, the Commission finds that charging the Victim with serious misbehaviour, warranting removal from judicial office, partly on the basis of language which he used in a written judgment, amounts to exerting influence or pressure on the Victim. Likewise, this amounts to exerting influence or pressure on the Respondent State's judiciary, given that this action may cause other members of the judiciary to fear disciplinary or other consequences if they use language which is similarly questioned, while in the exercise of their judicial functions.

192. Taking this into account, the Commission finds that charging the Victim with serious misbehaviour, warranting removal from judicial office, partly on the basis of language which he used in a written judgment, is an action which directly threatened both the Victim and the judiciary's judicial independence.

193. Accordingly the Commission finds that Article 26 of the African Charter has been violated in the present Communication.

Violation of Article 1

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[42] Principle 4(f), Principles on the Rights to a Fair Trial
[43] Principle 5(a), Principles on the Rights to a Fair Trial
[44] Communication 294/04: Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe (2009) ACHPR, para 118, 119

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS SECRETARIAT AU-UA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

194. According to its well established jurisprudence, the Commission holds that *"a violation of any provision of the Charter automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter."*[45]

195. Thus, having found violations in the above analysis, the Commission also finds that the Respondent State has violated Article 1.

Decision of the Commission on the Merits

196. In light of the foregoing, the African Commission on Human and Peoples' Rights:

i. Finds a violation of **Articles 1, 7** and **Article 26** of the African Charter;
ii. Urges the Government of Eswatini to compensate the Victim a fair and equitable amount for the violation of his right to a fair trial in the Judicial Service Commission disciplinary proceedings;
iii. Urges the Government of Eswatini to request the Judicial Service Commission to review the charges which were laid against the Victim;
iv. Urges the Government of Eswatini to review the Judicial Service Commission's legal framework to include a provision which allows judicial officers to seek judicial review of the disciplinary proceedings; and
v. Urges the Government of Eswatini to review the Judicial Service Commission's legal framework to include a provision which entitles judicial officers facing disciplinary proceedings to object to the participation of a member of the Commission in the proceedings and decisions of the Commission on the ground of bias.

Done virtually, during the 33rd Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, from 12 to 19 July 2021

[45] Communications 147/95 and 149/96: Sir Dawda K. Jawara v. The Gambia (2000) ACHPR, paragraph 46

ACHPR