IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, DPJ; Audace Ngiye, Charles O. Nyawello & Charles Nyachae, JJ)

REFERENCE NO. 01 OF 2017

ERIC KABALISA MAKALA ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF RWANDA ..... RESPONDENT

18TH JUNE 2020

JUDGEMENT OF THE COURT

INTRODUCTION

1. This Reference was brought under Articles 6(d) and 9(e) of the Treaty for the Establishment of the East African Community (hereinafter 'the Treaty'), challenging the termination of the Applicant's service with Rwanda Utilities Regulatory Authority (RURA) in the context of the restructuring and downsizing of that institution pursuant to a policy of the Government of the Republic of Rwanda. The Reference hinges on the allegation that the termination process flouted Rwandan law, the Treaty and other international Conventions.

2. The Applicant is a resident of Kalisimbi Village, Cyivugiza Cell, Nyamirambo Sector, Nyarugenge District, Kigali City, Rwanda; and thus, resident within the East African Region (for purposes of Article 30(1) of the Treaty. The Respondent is the Attorney General of the Republic of Rwanda, who was sued on behalf of the Government of Rwanda as its Principal Legal Advisor.

3. The Applicant was self-represented at trial, while Mssrs. Nicholas Ntarugera and Timothy Tutasesswa appeared on behalf of the Respondent.

BACKGROUND

4. The dispute in issue in this Reference arose from the *Prime Minister's Order N° 139/03 of 19/10/211* on the re-organisation of job positions within RURA, which was the basis of the subsequent directive to implement the re-structuring policy. Pursuant to that directive RURA embarked on an annual performance evaluation and appraisal of all staff, including the Applicant.

5. Based on his grading in performance evaluation results, RURA served the Applicant with a letter of suspension on 14th November 2011, and a dismissal letter on 31 May 2012. Aggrieved by the procedure that culminated in his dismissal, the Applicant instituted two consecutive cases: ***High Court Case No. RAD 0153/12/HC/KIG*** and ***Supreme Court Case No. RADA 0034/13/CS***. In both cases, judgement was delivered in favour of the Respondent upholding the

legality of the process that led to the termination of the Applicant's services with RURA.

6. Dissatisfied with the Supreme Court Ruling in ***Case No. RADA 0034/13/CS***, the Applicant unsuccessfully sought to have it reviewed by the same court and subsequently lodged this Reference challenging the legality thereof.

APPLICANTS' CASE

7. The Applicant's case is set out in his Statement of Reference; his Affidavits of 9th January 2017, written submissions lodged on 8th August 2019 and oral highlights made during the hearing on 13th June 2019. In a nutshell, he contests his dismissal by the Respondent State, alleging that RURA adopted unlawful procedures for his termination and Rwanda's national courts from which he sought legal redress flouted the country's domestic law, the Treaty and other international conventions.

8. The allegedly flouted laws include Articles 16, 18(3), 96, 141 and 200 of the Constitution of the Republic of Rwanda (as amended); Articles 6, 69, 148 and 186 of *Law No. 21/2014 relating to the Civil, Commercial, Labour and Administrative Procedures*; Article 114 of *Law No. 22/2002 on General Statutes for Rwanda Public Service*; Articles 3 and 28 of *Law No. 15/2004 relating to evidence and its production*, and Articles 5, 6, 8, 9 and 10 of the *Protection of Wages Convention, 1949*. It is on that premise that the Applicant seeks to have the Government of Rwanda held culpable for the infringement of Article 6(a) and (d) of the Treaty. We reproduce them later in this judgment.

9. The Applicant seeks the following reliefs (reproduced verbatim):

    i. **Because of all the reasons I have mentioned I am requesting the Court to accept and study my complaint that I have submitted stating that the Government of Rwanda did not abide by the EAC convention in relation to Article 6 of that convention/agreement.**

ii. **And to declare that the Government of Rwanda did not honour the law of EAC and I have** (suffered) **injustice.**

iii. **To oblige the Government of Rwanda to compensate me as I have been pursuing this in its courts.**

THE RESPONDENT'S CASE

10. On the other hand, it is the Respondent State's case that it is neither in contravention of its Constitution and domestic laws, nor the Treaty and international conventions, either at the executive or judicial levels. On the contrary, the Respondent questions this Court's jurisdiction over the matters before it. It is the contention, first, that the acts being challenged are neither the acts of a Partner State nor of an institution of the Community under Article 9(2) of the Treaty. The second limb to this contestation is that the Court is not clothed with the jurisdiction to entertain any matter relating to the violation of the Constitution and laws of a Partner State. On that premise, it is the Respondent's contention that it was improperly enjoined as a party to the present Reference as the Applicant's Statement of Reference does not disclose any cause of action against the Respondent State.

ISSUES FOR DETERMINATION

11. At a Scheduling Conference held on 19th September 2018, the Parties framed the following issues for determination:

    a. Whether this Honourable Court has jurisdiction over the matter before it for determination.

    b. Whether or not the acts complained of by the Applicant are in contravention of Article 6 of the Treaty.

    c. Whether or not the Applicant is entitled to remedies sought.

COURT'S DETERMINATION

Issue No. 1: **Whether this Honourable Court has jurisdiction over the matter before it for determination.**

12. It was the Applicant's submission that the Treaty did vest the Court with jurisdiction to deal with the instant matter in so far as it challenges the legality of a decision taken by a Partner State in violation of the provisions of the Treaty. He invoked Articles 6(d), 9(e), 23(1), 27(1) and Article 30(1) of the Treaty as the basis for this Court's interpretative mandate with regard to the Treaty, arguing that as a citizen of an EAC Partner State he was entitled to institute the present proceedings.

13. Conversely, citing Article 27 of the Treaty, it was the contention of learned Counsel for the Respondent that this Court had no jurisdiction to entertain this matter given that the acts complained of were neither the acts of a Partner State nor of an institution of the Community. To buttress this argument, Mr. Ntarugera referred us to the following decision in the case of **Modern Holdings Limited vs. Kenya Ports Authority, EACJ Ref. No. 1 of 2008** where Kenya Ports Authority had been adjudged to not be an institution of the Community. It was held:

> **Further and in respect of the submission by learned Counsel for the claimant based on Article 93 of the Treaty, the Court finds that the obligation to promote the development of efficient and profitable sea port services enumerated in the said Article is an obligation of the Partner States. In this particular case, the obligation lies squarely on the shoulders of the Republic of Kenya, and not on other implementers along the way like KPA. In sum, therefore, the reference is not properly before this Court due to lack of capacity of KPA as a respondent under Article 30 of the Treaty. .... Based on the above reasons, we hold that this Court has no jurisdiction to entertain this reference. We accordingly uphold the preliminary objection raised by Counsel for the Respondent and dismiss the reference with costs to the Respondent.**

14. We carefully listened to both Parties on this issue and considered the pleadings before us. As quite rightly argued by the Applicant, the Court's jurisdiction is delineated in Articles 27(1) and 30(1) of the Treaty. We reproduce them below for ease of reference.

> Article 27(1):
>
> **The Court shall initially have jurisdiction over the interpretation and application of this Treaty.**
>
> Article 30(1):
>
> **Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.**

15. Whereas Article 27(1) categorically designates the jurisdiction of this Court as the interpretation and application of the Treaty, Article 30(1) provides the context within which such jurisdiction would be exercised. In the matter before us, although the latter issue was not canvassed in submissions, the Respondent did raise two (2) related points of law. First was the argument that the perpetrator of the actions complained of had no legal standing before the Court and, secondly, was the question of the Court being devoid of jurisdiction to entertain a Reference that required it to interpret the domestic laws of a Partner State.

16. The 2 issues raised aptly capture the dichotomies of the legal notion of jurisdiction. Thus to succeed on a claim of lack of jurisdiction in this Court, a party must demonstrate the absence of any of the three (3) types of jurisdiction: *ratione personae/ locus standi, ratione materiae and ratione temporis.*[1] Simply stated, these 3 jurisdictional elements respectively translate into jurisdiction on account of the person concerned, matter involved and the time element. In the instant

[1] See **The Attorney General of the United Republic of Tanzania vs. Anthony Calist Komu, EACJ Appeal No. 2 of 2015**.

case, the Respondent has challenged the Court's jurisdiction on account of the *ratione personae* (person concerned) and *ratione materiae* (matter involved).

17. In terms of the *ratione personae*, we understood it to be the Respondent's contention that the actions complained of were undertaken by an entity that was neither a Partner State nor an Institution of the Community with legal persona before the Court under Article 30(1) of the Treaty. We could not agree more. Indeed that precisely was the mischief that **Modern Holdings Limited vs. Kenya Ports Authority** (supra) sought to address when the Court adjudged the Kenya Ports Authority to have had no *ratione personae* before it.

18. However, that is as far as the commonalities with this case go. In the matter before us (unlike **Modern Holdings Ltd**) it is the Republic of Rwanda that has been sued. Quite obviously, any of the EAC Partner States would have *ratione personae* before this Court under Article 30(1) of the Treaty. By maintaining its assertion that the Court has no jurisdiction over this matter and advancing the subtle preposition that there is no cause of action against it, the Respondent State would appear to deny responsibility for RURA's impugned actions. That argument is not tenable. It is trite law that nation states can be held internationally responsible for the actions of any state organ. Thus Article 4(1) of the *International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts*, reads:

> **The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State**.

19. In **The East African Civil Society Organisations Forum (EACSOF) vs. The Attorney General of Burundi, EACJ Ref. No. 2 of 2015**, this Court clarified that state responsibility for a wrongful judicial act would only accrue as against a state party where such judicial act is established on the face of the record as depicting

outrage, bad faith and wilful dereliction of judicial duty; and no sufficient action has been taken to redress it.

20. At this preliminary stage, however, it is not necessary to consider the merits of the Applicant's case. It is sufficient if it has been demonstrated, on the face of the pleadings, that a judicial decision violated the Treaty in a significant way and the Respondent State is responsible for that Treaty infringement. In this case, the Statement of Reference did elaborately detail the circumstances under which domestic laws of Rwanda were flouted in the decisions of the High Court and Supreme Court. He did also unsuccessfully explore the avenue of judicial review. He considers the impugned judicial actions to constitute a violation of Article 6 of the Treaty, and stated as much in his pleadings. The Respondent State was explicitly designated as the party internationally responsible for the cited Treaty violations. We would therefore disallow the preposition that the Respondent has no *ratione personae* in this matter.

21. Turning to the *ratione materiae* propounded herein, it is now well established law that this Court's jurisdiction would have been sufficiently established where it was demonstrated on the face of the pleadings that the *matter complained of* constituted an infringement of the Treaty. *See* ***Hon. Sitenda Sebalu vs. The Secretary General of the East African Community & Others***[2] *and* ***Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 2 Others.***[3]

22. The Court has gone further to expound on this, adjudging the violation of Partner States' domestic laws to constitute a Treaty violation that is justiciable before it. *See* ***Plaxeda Rugumba vs. The Attorney General of Rwanda***[4] *and* ***Samuel Mukira Muhochi vs. The Attorney General of Uganda***.[5] In the more recent case of **Simon Peter Ochieng & Another vs. The Attorney General of Uganda, EACJ Ref. No. 11 of 2013** it was further clarified that for a matter to be justiciable before the Court, the subject matter in question had to be one '**the**

[2] EACJ Ref. No. 1 of 2010
[3] EACJ Ref. No. 1 of 2006
[4] EACJ Ref. No. 8 of 2010
[5] EACJ Ref. No. 5 of 2011

legality of which is in issue viz the national laws of a Partner State or one that constitutes an (outright) **infringement of any provision of the Treaty.**'

23. The foregoing legal position was conclusively summed up in **Henry Kyarimpa vs. The Attorney General of Uganda, EACJ Appeal No. 6 of 2014** as follows:

> **Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the Treaty to observe the principle of rule of law, it is the Court's inescapable duty to consider the internal law of such Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty.**

24. It does then become abundantly clear that the Respondent's argument that the Court is not vested with the jurisdiction to entertain a matter relating to the violation of a Partner State's domestic laws is fundamentally flawed. This Court is most evidently adorned with the *ratione materiae* to adjudicate the present Reference. Having found that the Court is similarly vested with *ratione persona* viz the Respondent State, we would answer this Issue in the affirmative.

Issue No.2: Whether or not the acts complained of by the Applicant are in contravention of Article 6 of the Treaty.

25. The Applicant avers that the restructuring of RURA was inevitable but was wrongly done because it did not conform to the guidelines embodied in the Prime Minister's *Order No. 139/03 of 19 October 2011*, that was intended to inform that exercise. That supposedly flawed restructuring process resulted in his dismissal, loss and suffering, for which he seeks compensation. In addition, he faults the Rwandan domestic courts (to which he had turned for legal redress) for flouting Rwandan domestic law, and considers the Supreme Court of Rwanda to have violated the rule of law principle espoused under Article 6(d) of the Treaty when it endorsed what in his view was the erroneous decision of the High Court. He holds the Government of Rwanda responsible for the violation of its domestic laws, which violation constitutes an infringement of Article 6 of the Treaty.

26. Meanwhile, it was the Respondent's contention that the measures leading to the Applicant's dismissal were done in compliance with the law. In that regard, it was argued that the re-organisation of RURA was done in accordance with the Prime Minister's *Order No. 139/03 of 19 October 2011*; along with many others, the Applicant was suspended for a six-month period after which they were all dismissed, and the Applicant was paid his terminal benefits in accordance with Article 93(5) of *Law No. 86/2013 of 11/09/2013*, which establishes the general statute for public service in Rwanda. Learned Respondent Counsel cited the decisions in ***Case No. RAD 0153/12/HC/KIG*** and ***Case No. RADA 0034/13/CS***, from Rwanda's High Court and Supreme Court respectively, in support of his case.

27. The chronology of events in this matter is instructive as to the intrinsic nature of the dispute before us. On 31st May 2012 the Applicant's employment with RURA was terminated. Dissatisfied with the procedure that informed his termination, the Applicant sought redress before the High Court of Rwanda vide ***Case No. RAD 0153/12/HC/KIG***. In its judgment of 26th April 2013 the High Court held that he had not been dismissed illegally and was not entitled to any compensation. The Applicant unsuccessfully appealed to the Supreme Court of Rwanda vide ***Case No. RADA 0034/13/CS***, which in its decision of 11th October 2013 upheld the High Court's decision. He then invoked the provisions of Article 186 of *Law No. 21/2012* and vide ***Case No. RS/REV/AD 0001/16/CS*** sought to move the Supreme Court to review its decision. The Supreme Court dismissed that application on 11th November 2016, citing the absence of valid grounds for the review of its earlier judgment.

28. The nature of judicial practice is such that there often is an elaborate appeal and review process inbuilt therein. Indeed the option of review is often available with regard to final appellate courts' decisions. From the chronology of events highlighted above, the same processes are available within the Respondent State and were exhaustively explored by the Applicant in pursuit of his legal rights. It thus becomes superfluous to reconsider in detail either the processes that underlay the Applicant's dismissal by RURA or the judicial proceedings in the High Court of Rwanda where they were challenged. We take the view that, the

legality of those processes and proceedings having been tested in the Supreme Court, due process ensued and there would scarcely be need for this Court to revisit them.

29. Therefore, it is the final Supreme Court decision in ***Case No. RS/REV/AD 0001/16/CS*** that is primarily in issue before us. We would have considered it alongside ***Case No. RADA 0034/13/CS*** given that the latter was the substantive appellate decision but it was not availed to us. In the premises, we are constrained to refer to the High Court decision in ***Case No. RAD 0153/12/HC/KIG*** in so far as it sheds light on the Supreme Court decision in ***Case No. RS/REV/AD 0001/16/CS***.

30. Before progressing further, we deem it necessary to interrogate international practice on the review by international courts of domestic courts' decisions. We draw inspiration from decided cases from this and other international courts. As was held earlier herein, it is now trite law that nation states are responsible for the conduct of their judicial organs under international law. *See Article 4(1) of the ILC Articles on State Responsibility and a legal advisory opinion by the International Court of Justice (ICJ) in* ***Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports 1999, p.62 at pp. 87-88, paras. 62, 63.*** Consequently, where a domestic court is alleged to have flouted its national laws, as well as related Treaty provisions (as is the case before us), **'an international adjudication process would be required to interrogate whether indeed there has been a violation of a State's international (Treaty) obligations.'** *See* ***EACSOF vs. The Attorney General of Burundi*** *(supra).*[6]

31. The applicable burden of proof could not be stated any better than it was in the **Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina vs. Serbia & Montenegro), Judgment, ICJ Reports 2007, p.43** as follows:

> **On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party**

[6] EACJ Ref. No. 2 of 2015 (2)

asserting a fact must establish it; as the Court observed in the case of Military and para-military Activities in and against Nicaragua (Nicaragua vs. United States of America,[7] **"it is the litigant seeking to establish a fact who bears the burden of proving it."**

32. Stated differently, **'the court will require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which the decision in its favour might be given.'** *See* ***Henry Kyarimpa vs. The Attorney General of Uganda*** *(supra),* ***British American Tobacco (U) Ltd vs. The Attorney General of Uganda***[8] *and* ***Raphael Baranzira & Another vs. The Attorney General of Burundi***.[9]

33. On the other hand, in the **Bosnia & Herzegovina vs. Serbia & Montenegro** case the ICJ spelt out the standard of proof applicable to international claims that invoke state responsibility and are of exceptional gravity. It held:

> **The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.[10] .... The same standard applies to the proof of attribution for such acts.**

34. In **Ida Robinson Smith Putnam (USA) vs. United Mexican States, 1927, UNRIAA, vol. IV, p.151 at 153**, challenges to the decisions of nation states' apex courts were recognised as cases of exceptional gravity and an onerous duty placed on applicants. It was held:

> **The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country.[11] A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only** (proof of)

---

[7] Judgment, ICJ Reports 1984, p.437, para. 101
[8] EACJ Ref. No. 7 of 2017
[9] EACJ Ref. No. 15 of 2014
[10] See Corfu Channel (United Kingdom vs. Albania), Judgment, ICJ Reports 1949, p.17.
[11] See case of **Margaret Roper, Docket No. 183, paragraph 8**

a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.

35. Thus the *'fully conclusive evidence'* required of challenges to apex courts' judicial decisions should demonstrate '**a clear and notorious injustice, visible, to put it thus, at a mere glance.**' The **Ida Robinson Smith Putnam** case (rightly in our view) places an onerous duty upon applicants that seek to challenge apex domestic judicial decisions in the international arena. However, decisions that emanate from lower domestic courts need not necessarily be held to the same onerous standard, this being the apparent preserve of decisions from apex courts. Further, the consequential remedies proposed in that case are not entirely tenable. The prudence of an international court setting aside a domestic court's decision yet the 2 courts exercise significantly distinct mandates is debatable.[12] For present purposes, we are more inclined to accept the remedies proposed in **EACSOF vs. The Attorney General of Burundi** (supra), where it was held:

> **It then becomes abundantly clear that this Court cannot set aside the impugned decision. It can only scrutinize it to ascertain its compliance with the Respondent State's international obligations under the Treaty and make consequential orders. The obligations in question would include the adherence to the *rule of law* principle encapsulated in Articles 6(d) and 7(2) of the Treaty.**

36. The foregoing position was inspired by the decision in **The East African Civil Society Organisations' Forum (EACSOF) vs. The Attorney General of Burundi & Others, EACJ Appeal No.4 of 2016**. The Appellate Division of this Court held:

> **The Trial Court is not expected to review the impugned decision ... looking for new evidence or some mistake, fraud or error apparent**

[12] See **EACSOF vs. The Attorney General of Burundi, EACJ Ref. No. 2 of 2015**. Whereas international courts evaluate such decisions from the perspective of states parties' international obligations, domestic courts approach the same set of facts within the context of the rights conferred upon parties by domestic laws.

on the face of the record. The Trial Court will however have to sift through the impugned decision and evaluate it critically with a view of testing its compliance with the EAC Treaty and then make a determination. In so making the said determination, the Trial Court does not quash the impugned decision as if it were a court exercising judicial review powers as known in municipal laws of the Partner States, but rather makes declarations as to the decision's compliance with the EAC Treaty.

37. Turning to the instant case, we deem it necessary to reproduce Article 6(d) of the Treaty and restate our understanding of the notion of rule of law enshrined therein. It reads:

> **The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:**
>
> *(a)* .....
>
> *(b)* .....
>
> *(c)* .....
>
> *(d)* **good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;**

38. Meanwhile, the rule of law is well elucidated in the following excerpt from a ***Report of the (UN) Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies***,[13] as cited with approval by this Court in **Raphael Baranzira & Another vs. Attorney General of Burundi** (supra).

[13] UN Doc S/2004/616 (2004), para. 6

> **It refers to the principle of governance** (according) **to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.**

39. Simply stated;

> **The rule of law is a concept that describes the supreme authority of the law over governmental action and individual behaviour. It corresponds to a situation where both the government and individuals are bound by the law and comply with it. It is the antithesis of tyrannical or arbitrary rule.**[14]

40. In other words, as espoused in the case of **James Katabazi & 21 Others vs. The Secretary General of the East African Community**, **'the principle that no one is above the law.'**[15]

41. Against that yardstick, it is to an interrogation of the Parties' contestations that we now turn. The Prime Ministerial Order that the Applicant thought should have informed RURA's restructuring process was annexed to the Reference as Appendix 12. It essentially lays out the organisational structure and job positions that would pertain to the restructured RURA. The Applicant was at the time of his termination serving as Personnel Administration Officer.[16] That position was not retained in the Prime Ministerial Order. The Applicant nonetheless took issue with his dismissal because staff with equivalent or lower qualifications than his had

---

[14] Valcke, Anthony, The Rule of Law: Its Origins and Meaning, 2012, http://ssrn.com/abstract=2042336

[15] EACJ Ref. No. 1 of 2007.

[16] See Appendix 4 - Performance Evaluation Form

allegedly been retained. It is his contention that the process leading up to his dismissal was flawed and contravened Articles 16 and 18(3) of the Constitution of the Republic of Rwanda. For avoidance of doubt, we reproduce the cited constitutional provisions below.

> Article 16
>
> **All human beings are equal before the law, they shall enjoy, without any discrimination, equal protection of the law.**
>
> Article 18(3)
>
> **The right to be informed of the nature and cause of charges and the right to defense are absolute at all levels and degree of proceedings before administrative, judicial and all other decision making organs.**

42. The Applicant faulted the domestic courts of Rwanda for endorsing the foregoing constitutional infringements without regard for Article 200(2) of the Rwandan Constitution, which stipulates that **'any law, any act which is contrary to this Constitution shall be null and void.'** In his view, the High Court had flouted Rwandan law and failed to either carry out an investigation into the matters that were before it or call for the Applicant's evidence, resulting in a decision that was devoid of any justifiable basis, which it itself is a violation of Article 141 of the Constitution.[17] He particularly faulted the Supreme Court for acquiescing the supposed illegalities that had been overlooked by the High Court.

43. Article 141(2) of the Constitution reads:

> **Every court decision shall indicate the grounds of its basis, be written in its entirety, delivered in public together with the reasons and orders taken therein.**

44. We did carefully consider the constitutional provisions in reference above, the documentation annexed to the Reference, as well as the impugned court

[17] See also Article 69, paragraph 2 of Rwanda's *Law No. 21/2012 of 14th June 2012 relating to civil, commercial, labour and administrative procedure.*

decisions that were availed to us. It seems to us that to the extent that the organisational structure delineated in the Prime Ministerial Order did not include the Applicant's job position, there cannot have been any reason for RURA to retain him. The fact that other members of staff with similar or lesser qualifications might have been retained while the Applicant was dismissed would not necessarily amount to a constitutional indictment on RURA. We do also observe that the Applicant was (alongside other staff) subjected to a performance appraisal. Without the benefit of the performance appraisals of the retained staff, as well as the job designations to which they were retained, we cannot impute unequal treatment on the part of RURA in contravention of Article 16 of the Rwandan Constitution.

45. With regard to Article 18(3) of the Rwandan Constitution, the Applicant would appear to challenge his dismissal in so far as the organ that took the decision to terminate his services did not avail him a hearing before so deciding. Having carefully considered the material on record, we indeed find no averment or evidence of RURA having heard the Applicant prior to his dismissal. However, it seems to us that Article 18(3) is couched in terms that make it applicable to judicial, quasi-judicial or disciplinary proceedings that prefer *charges*. It would not necessarily apply to the scenario in the present case where termination of employment ensued on account of a national restructuring policy.

46. In the same vein, a perusal of the judgments that were availed to us would negate the Applicant's assertion that they violate Article 141(2) of the Constitution for being devoid of any justifiable basis. In our considered view, both judgments do explain with sufficient clarity the reasons for the conclusions arrived at. In the ruling on the application for review (***Case No. RS/REV/AD 0001/16/CS***), it was clearly stated that the application failed for lack of proper grounds of review. The Supreme Court's judgment in ***Case No. RADA 0034/13/CS*** was not availed to us. However, the High Court's judgment in ***Case No. RAD 0153/12/HC/KIG*** clearly spelt out the reasons for the rejection of the Applicant's assertion of illegal dismissal. It attributed his dismissal to the non-existence of a job that matched his qualifications. Consequently, we find no merit in the allegation that the Constitution of Rwanda was contravened, neither would Article 200(2) thereof

apply to this case so as to render the court decisions in question an outright nullity.

47. Be that as it may, we are constrained to interrogate the other allegations of similar nature that were set forth in the Reference albeit in respect of other laws. It was the Applicant's contention that whereas Article 6(4) of *Law No. 21/2012* prohibited reliance upon foreign decisions in the determination of suits, the High Court did in ***Case No. RAD 0153/12/HC/KIG*** rely upon French jurisprudence. As we have held earlier in this judgment, the High Court decision having been subjected to an appeal process, it is the decisions from the latter process that are in issue before us. The appellate decision in ***Case No. RADA 0034/13/CS*** was never availed to us so as to enable us interrogate how the Supreme Court navigated that issue. In any event, under Article 6(4), reference to foreign courts' decisions is only obviated to the extent that **'they are in contradiction with the principles of public order or the Rwandan legal system.'** The Applicant bore the onus of demonstrating any such contradictions if they did exist. He did not attempt to discharge this onerous duty upon him. We would therefore disallow this claim.

48. The Applicant further opined that, although Article 114 of *Law No. 22/2002* prohibits the withholding of an employee's salary until a related suit that is pending before a court has been determined and the judge in ***Case No. RADA 0034/13/CS*** had acknowledged the Applicant's withheld salary, he made no attempt to resolve the issue in his decision and similarly ignored the provisions of the *Protection of Wages Convention, 1949*. In like vein, the Applicant asserted that the miscomprehension of his evidence had caused a travesty of justice that entitled him to seek revision but the same evidence was similarly ignored by the Supreme Court vide its decision in ***RS/REV/AD 0001/16/CS***. To compound matters, in that decision the judge allegedly ignored a Supreme Court decision in ***RADA/0006/12/CS***. Finally, it was his view that the absence of one of the Supreme Court judges at the delivery of the judgment in ***Case No. RADA 0034/13/CS*** violated Article 148 of *Law No. 21/2012.*

49. We have belaboured to explain earlier herein that the Supreme Court did espouse quite clearly its grounds for dismissing the Applicant's application for

review - ***RS/REV/AD 0001/16/CS***. Courts are enjoined to administer justice with due regard to procedural rules therefore it is not enough for a litigant to seek to have a matter reviewed, s/he must furnish the court with sufficient grounds to be so entertained. Adherence to established procedural rules by courts and court users alike is a crucial building block in the promotion of the rule of law concept of equality of all persons before the law.

50. Similarly, at the risk of repeating ourselves, in the absence of the judgment in ***Case No. RADA 0034/13/CS*** we are unable to agree with the Applicant that the Supreme Court merely ignored the issue of the Applicant's supposedly withheld salary or disregarded the *Protection of Wages Convention, 1949*. On the other hand, the Supreme Court was neither obliged to follow the decision in ***RADA/0006/12/CS***, it being another Supreme Court decision; nor apparently would the delivery of a judgment in the absence of the physical presence of a member of a coram be prejudicial to the legality of the judgment. The Supreme Court did categorically pronounce itself on this latter issue in ***RS/REV/AD 0001/16/CS***.

51. We therefore find that the Applicant has not satisfactorily discharged the onus on him to adduce before this court fully conclusive evidence that the impugned decisions of the Rwandan courts amounted to a clear and notorious injustice.

52. Conversely, the Respondent supported the decisions of the Rwandan Courts, urging that they were made in compliance with Rwandan law, particularly Article 93(5) of *Law No. 86/2013 of 11th September 2013*. We consider it appropriate to reproduce Article 93 in its entirety so as to provide a holistic view of the legal regime it puts in place.

> Article 93:
>
> **A public Servant shall be subject to automatic removal:**
>
> **1. .....**
> **2. .....**
> **3. .....**
> **4. .....**
> **5. after the period of suspension of more than six (6) months.**

53. The totality of the material on record would support the conclusion that the Applicant was undoubtedly dismissed under the above legal provision. Having so complied with its domestic laws and thus the rule of law principle, we find that the sanctity of Article 6(d) of the Treaty remains intact. Accordingly, we would answer Issue No. 2 in the negative.

Issue No. 3: Whether or not the Applicant is entitled to the remedies sought.

54. The Applicant sought the reliefs highlighted in paragraph 9 of this judgment. The first remedy sought literally seeks to have this Court entertain the present Reference that questions the Respondent State's compliance with Article 6 of the Treaty. *Issue No. 1* herein did challenge the mandate of the Court to so entertain the Reference. It does follow that, the Court having resolved that issue in the affirmative and indeed proceeded to hear the Reference, the first remedy sought by the Applicant was granted and fully discharged.

55. The Applicant did also seek a declaration that the Respondent State contravened EAC law and sought recompense for the expenses incurred in pursuit of his legal rights. However, given that the preceding issue was resolved in favour of the Respondent, the declaration sought by the Applicant is clearly untenable.

56. On the question of costs, Rule 127 of this Court's Rules posits that costs should follow the event unless the Court, for good reason, decides otherwise. In **Schuller vs. Roback (2012) BCSC[18] 8**, citing with approval **Gold vs. Gold (1993) BCCA[19] 82**, the following factors informed judicial discretion in departing from the general rule:

> **When the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of the Court. ... Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in**

[18] British Columbia Supreme Court
[19] British Columbia Court of Appeal

the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

57. In the instant Reference, each of the Parties succeeded in one of the 2 substantive issues that had been framed, therefore their success in the Reference is evenly balanced and renders moot the question as to which party won the event. Suffice to state here that we do consider the point of law raised by the Respondent to have been a substantive issue in the Reference given its vitality to the determination of the Parties' respective interests.

58. In terms of hardship, it is not lost upon us that the Applicant propagated his case personally without the benefit of advocacy services that, given his circumstances, he was seemingly unable to afford. Perhaps had he had the benefit of legal advice he might have forgone the present legal proceedings and spared himself and opposite party the costs incurred. It seems to us, therefore, that the circumstances of this case do warrant a departure from the general rule as espoused in Rule 127(1) of this Court's Rules. Consequently, we would exercise our discretion to award one third of the costs hereof to the Applicant.

CONCLUSION

59. In the final result, we hereby dismiss this Reference with one third (1/3) costs to the Applicant.

It is so ordered.

Dated, signed and delivered by Video Conference this 18th day of June, 2020.

HON. LADY JUSTICE MONICA K. MUGENYI

PRINCIPAL JUDGE

***HON. JUSTICE DR. FAUSTIN NTEZILYAYO**

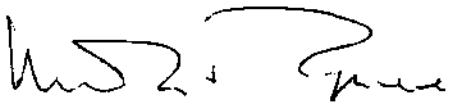
DEPUTY PRINCIPAL JUDGE

HON. JUSTICE AUDACE NGIYE

JUDGE

HON. DR. JUSTICE CHARLES O. NYAWELLO

JUDGE



HON. JUSTICE CHARLES NYACHAE

JUDGE

[Hon. Justice Dr. Faustin Ntezilyayo resigned from the Court in February 2020 but signed this judgment in terms of Article 25(3) of the Treaty.]