

Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73

Application 042/2016, *Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali*

Ruling, 28 March 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicants are a group of former workers at Australian Laboratory Services (ALS), a company domiciled in the Respondent State. The workers claimed to have suffered lead poisoning as a result of their work but despite their complaint to the government authorities, they received no redress. For this reason, they alleged the violation of, inter alia, their right to health and right to a fair trial. The Court dismissed their Application holding that the Applicants had failed to exhaust local remedies.

Admissibility (identification of Applicants, 23; exhaustion of local remedies, 36-38; conditions are cumulative, 39)

I. The Parties

1. The *Collectif des anciens travailleurs du laboratoire ALS* (hereinafter referred to as “the Applicants”) are an informal group of one hundred and thirteen (113) out of one hundred and thirty-five (135) former workers of the Australian Laboratory Services (ALS), a limited liability company, all domiciled in Mali.
2. The Respondent State is the Republic of Mali which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) on 24 January 2004. The Respondent State, deposited on 19 February 2010, the Declaration through which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. According to the records, on 1 February 2012, the Applicants, who claim to have been victims of lead poisoning during their service, seized the Prosecutor at the Commune III Court of First Instance of the District of Bamako of a criminal complaint, followed by a letter addressed to the Attorney General at the Court of Appeal of Bamako on the same subject. The Applicants allege that the Australian Laboratory, which specializes in the chemical analysis of samples to determine the content of gold and other metals, used in this respect, toxic products such as acid, butyl diisobutyl (DIBK), and solvents such as nitrate, sodium, lithium, borax, sodium carbonate, sodium oxide and lead.
4. Having received no information from the Prosecutor General on the progress of the case one year after the referral, they concluded that the proceedings had been unduly prolonged by the judicial authorities of the Respondent State. They therefore decided to file the case before this Court.

B. Alleged violations

5. The Applicants assert that their rights to the enjoyment of the highest attainable standards of health set out in Articles 16 and 24 of the Charter and 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “the ICESCR”), have been violated.¹
6. They further submit that the undue delay in the examination of the case constitutes a violation of their rights under Articles 7(1) and 26 of the Charter and Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as “the ICCPR”).²

III. Summary of the Procedure before the Court

7. The Application was filed on 1 July 2016, and served on the Respondent State on 27 September 2016. In accordance with Rule 35(3) of the Rules of the Court (hereinafter, 'the Rules'), the Application was transmitted, on 30 September 2016, to the Chairperson of the African Union Commission, and through him, to the Executive Council of the African Union and the State Parties to the Protocol.
8. After exchange of written submissions, the Court decided to close written pleadings on 14 June 2017 and not to hold a public hearing.
9. On 13 August 2018, in accordance with the decision of the Court at its 49th Ordinary Session, the Registry requested the Applicants to file their submissions on reparations within thirty (30) days of receipt of the notification.
10. On 20 November 2018, the Applicants filed their submissions on reparations and these were served on the Respondent State on 21 January 2019, requesting the latter to submit its Response within thirty (30) days. On 29 January 2019, the Respondent State received the Applicants' submissions on reparations and submitted its Response thereon on 4 March 2019, but this Response was rejected by the Court for having been filed out of time.

IV. Prayers

11. In the Application, the Applicants prayed the Court to:
 - i. admit the Application and declare that the Respondent State has violated the afore-mentioned provisions;
 - ii. rule that the Respondent State must publicly acknowledge its responsibility not only for the alleged violations from the occupational illnesses suffered by the Applicants as a result of lead poisoning, but also for the right to medical treatment of the contaminated employees and to bear the costs of the said treatment in a way that offers sick workers, the best possible living conditions;
 - iii. order the Respondent State to conduct an investigation to identify the private institutions responsible for violating the regulations in force at the time of the alleged facts, that is, intoxication and non-assistance to persons in danger;
 - iv. order the Respondent State to forthwith pay cash compensation to the victims and ensure that the amounts due are fully paid to them;
 - v. order such other measures deemed necessary to remedy the alleged violations;

- vi. order the Respondent State to publish the judgment of the Court in the Official Gazette and in local dailies.
- 12.** In their submissions on reparations, the Applicants pray the Court to order the Respondent State to pay:
- i. Fifty million (50,000,000) CFA Francs to each of the victims as compensation for medical expenses, loss of income arising from the dismissal or sick leave, occupational illness, funeral expenses and loss of income for their beneficiaries; and
 - ii. Fifty million (50,000,000) CFA Francs to each of the victims for the direct and indirect moral damages suffered.
- 13.** In its Response, the Respondent State prays the Court to:
- i. On the form, declare the Application inadmissible as the Applicants lack legal capacity to seize the Court and for failure to exhaust local remedies; or
 - ii. On the merits, dismiss the Application as unfounded.

V. Jurisdiction

- 14.** Article 3(1) of the Protocol provides that: “The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol, and any other relevant Human Rights instrument ratified by the States concerned”. In accordance with Rule 39(1) of the Rules, “the Court shall conduct preliminary examination of its jurisdiction ...”

A. Objection to personal jurisdiction

- 15.** The Respondent State contests the legal capacity of the Applicants to file the Application, on the basis that access to the Court should only be available to individuals rather than to a group of individuals. The Applicants dispute the submission of the Respondent State and aver that they have legal standing before the Court.

- 16.** The Court observes that, as stated in paragraph 1 of this judgment, the Applicants are an informal group of one hundred and thirteen (113) individuals. The Court recalls that the Republic of Mali is party to the Protocol and has deposited the Declaration

prescribed under Article 34(6), allowing individuals to seize the Court directly, in accordance with Article 5(3) of the Protocol. Accordingly, the Applicants are entitled to file their Application before this Court. Therefore, the Respondent State's objection in this regard is dismissed.

B. Other aspects of jurisdiction

17. With regard to material, temporal and territorial jurisdiction, the Court notes that they have not been challenged by the Respondent State and that nothing on file indicates that it has no jurisdiction in this regard. It therefore finds that it has:
 - i. material jurisdiction, since the Applicants allege the violation of the right to health provided under Articles 16 and 24 of the Charter, and 12 of the ICESCR; the right to a fair trial under Articles 7(1) and 26 of the Charter, and of the right to be tried without delay as provided under Articles 2(3) and 14 of the ICCPR; all instruments to which the Respondent State is a party, thus, giving the Court the power to interpret and apply them in accordance with Article 3 of the Protocol;
 - ii. temporal jurisdiction, insofar as the alleged violation in the present case, namely, the fact that the national courts have not adopted measures to remedy the violations committed against the Applicants, is continuous;
 - iii. territorial jurisdiction, insofar as the facts occurred in the territory of the Respondent State, a State Party to the Protocol.
18. In light of the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

19. In terms of Article 6(2) of the Protocol: "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter". In accordance with Rule 39(1) of the Rules: "The Court shall conduct preliminary examination of ... the admissibility of the application in accordance with Articles ... 56 of the Charter and Rule 40 of these Rules".
20. Rule 40 of the Rules, which restates the content of Article 56 of the Charter, reads as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, in order to be examined, applications shall comply with the following conditions:

 1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
 2. comply with the Constitutive Act of the Union and the Charter;
 3. not contain any disparaging or insulting language;

4. not be based exclusively on news disseminated through the mass media;
 5. be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
 6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
 7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union”.
21. The Respondent State raises two objections on admissibility relating to the identity of the Applicants and to the requirement of exhaustion of local remedies.

A. Conditions of admissibility in contention between the Parties

i. Objection based on the identity of the Applicants

22. The Respondent State raises an objection to the admissibility of the Application based on the lack of proper identification of the members of the group who have filed the Application. In their Reply, the Applicants submitted a list of the names of the one hundred and thirteen (113) former workers of ALS who are part of the group.
23. The Court notes that with the submission of the above mentioned list of the members of the group, the Applicants are properly identified in accordance with Rule 40(1) of the Rules and hence, the Respondent State’s objection in this regard is dismissed.

ii. Objection based on failure to exhaust local remedies

24. The Respondent State alleges that the Application should be declared inadmissible on the ground that local remedies were not exhausted, because in the absence of a judgment on the criminal complaint as is the case in this matter, the Applicants should have gone on appeal before the investigating judge and filed a civil suit, which they failed to do.
25. The Respondent State also states that the Applicants seized the State Prosecutor, whereas the competent authority in such matters is the Labour Court which deals with all issues relating to

disputes between employers and employees.

26. The Respondent State reiterates that the Office of the Prosecutor General lacks jurisdiction to deal with the matter. The Respondent State further alleges that the complainants in the said criminal matter are different from the group of former workers that are before this Court.

27. In their Application, the Applicants aver that they sought administrative and political solutions to the matter which yielded no results, and that accordingly, on 1 February 2012, they filed a complaint before the Prosecutor of Commune III Court of First Instance, Bamako District. They allege that “[P]recisely a little over a year after the complaint, on 17 May 2013, they addressed a letter to the Attorney General at the Bamako Court of Appeal, giving an overview of the case and enclosing the various correspondence and measures realized ...”.
28. The Applicants argue that even though local remedies are available in the Respondent State to deal with the situation, the said remedies “... were in practice inaccessible, inefficient and insufficient”. Citing the jurisprudence of other courts, they argue that the requirement of exhaustion of local remedies can be valid only if the remedies are effective, and the requisite timeframes are not unduly prolonged.³
29. In their Reply, the Applicants refute the Respondent State’s argument that they ought to have filed a civil suit before the investigating judge, contending that the criminal complaint was aimed at ensuring that the violation of the rights guaranteed by the Respondent State are recognised.
30. The Applicants submit that filing of a civil suit before the investigating judge would require a decision from the Prosecutor General. Accordingly, in the absence of such a decision, the process could not proceed and they were obliged to wait for a response, which has been pending for five (5) years.
31. As regards continuation of the proceedings before the Labour Court, the Applicants submit that the fact of bringing a civil action

3 *Askoy v Turkey*, Application 21987/93. ECHR (1812/1996), cited in D Sullivan, *Présentation de la règle sur l’épuisement des voies de recours internes en vertu du Protocole facultatif à la CEDAW (Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW)*, (2008) 4. See also *ZT v Norway*, Application 2238/2003, Committee against Torture (2006), para 8.1; *Rosendo Radilla Pacheco v Mexico* Application 777/01, Inter-American Commission on Human Rights (12 October 2005), para 20.

does not preclude criminal proceedings.

32. The Applicants allege that the time between the filing of the criminal complaint and the date of referral of the case to the Court attest to the undue delay in processing appeals. This renders inapplicable the requirement of exhaustion of local remedies set out in Rule 40(5) of the Rules and Article 56(5) of the Charter.

33. The issue to be addressed is whether there is a remedy in the Respondent State's judicial system which the Applicants ought to have pursued to address the delay of the Prosecutor General's decision over their complaint.
34. In this regard, the Court recalls that in the matter of *Diakité Couple v Republic of Mali*,⁴ it held that under Article 62⁵ of the Mali Code of Criminal Procedure, "the petitioners had at least the opportunity to appeal directly to the investigating judge by filing a civil suit."
35. The Court found in that case that referral to the investigating judge was an effective and satisfactory remedy under Article 90 of the Mali Code of Criminal Procedure, which provides that: "The investigating judge shall, in accordance with the law, take all such acts of information as it deems useful for the manifestation of the truth",⁶ and Article 112⁷ of the same Code which gives the civil parties the right to participate in the procedure, including to appeal against the decisions of the investigating judge.
36. The Court has held in conclusion, that if the Applicants were not satisfied with the prolongation of the proceedings in respect of their criminal complaint before the Prosecutor General, they had the opportunity to appeal to the investigating judge or to file a civil

4 Application 009/2016. Judgment of 28 September 2017 (Admissibility), *Diakité Couple v Republic of Mali* (hereinafter referred to as *Diakité Couple v Mali* (Admissibility)), para 45.

5 Anyone who claims to be wronged by a crime or an offense may, by filing a complaint, bring a civil action before the competent investigating judge.

6 *Diakité Couple v Mali* (Admissibility), para 47.

7 Counsel for an accused person and the civil party, may both during investigation and after having communicated the proceedings to the registry, submit in writing at the hearing of new witnesses, adversarial pleadings, expert opinions and any such acts of investigation as they deem useful for the defense of the accused and in the interest of the civil party. The judge must justify the order by which he refuses to take additional measures of investigation requested of him.

suit.⁸

37. In the instant case, the Court notes that the Applicants filed a criminal complaint with the Respondent State's Office of the Attorney General on 1 February 2012, but until 1 July 2016, the date of the filing of their Application to this Court, their criminal complaint did not give rise to any decision. As far as this Court is concerned, in accordance with its abovementioned jurisprudence on the subject, the Applicants could have seized the investigating judge to avoid the alleged delay in the Attorney General's handling of the complaint. Having failed to pursue this remedy, the Applicants were not justified in submitting that the domestic proceedings were unduly prolonged.
38. In view of the foregoing, the Court finds the Applicants have not exhausted local remedies.

B. Conditions of admissibility not in contention between the Parties

39. Having concluded that the Application is inadmissible due to failure to exhaust local remedies, the Court does not have to pronounce itself on whether other conditions of admissibility enumerated in Rule 40 of the Rules have been met, in as much as the conditions of admissibility are cumulative.⁹
40. Based on the above, the Court declares the Application inadmissible.

VII. Costs

41. The Court notes that the parties did not submit on costs. However, Rule 30 provides that: "Unless otherwise decided by the Court, each party shall bear its own costs."
42. In view of the aforesaid provision, the Court decides that each party shall bear its own costs.

VIII. Operative part

43. For these reasons,
The Court

Unanimously:

On Jurisdiction

- i. *Dismisses* the objection regarding the lack of legal capacity of the Applicants;
- ii. *Declares* that it has jurisdiction.

On Admissibility

- iii. *Upholds* the Respondent State's objection that the Application is inadmissible for failure to exhaust local remedies;
- iv. *Declares* the Application inadmissible.

On Costs

- v. *Rules* that each party shall bear its own costs.