

Former Somadex SA Employees v Mali (admissibility)
(2021) 5 AfCLR 668

Application 006/2018, *Former Somadex SA Employees v Republic of Mali*

Ruling, 2 December 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicants are nationals of the Respondent State and former employees of a mining company with operations within the territory of the Respondent State. The Applicants alleged that they were forced to work under unfavourable conditions while some of their colleagues were unlawfully arrested and detained. They also alleged that they were dismissed illegally. They further claimed that their dismissal and overall ill treatment violated their human rights and that the Respondent State was complicit in their ill treatment and the dissolution of the company that mistreated them without fulfilling its obligations to its employees. The Court held that the Application was inadmissible for failure to exhaust local remedies.

Admissibility (identity of applicants, 41-44; exhaustion of local remedies, 52-56)

I. The Parties

1. The Applicants are Malian citizens and former employees of SOMADDEX SA¹ which was subcontracted by Morila SA to work on its gold mine at Mines d 'or Morila (Sikasso Region) within the Republic of Mali.² They challenge their dismissal and the non-payment by their employer of their performance bonus for exceeding production targets.
2. The Application is filed against the Republic of Mali (hereinafter referred to as "the Respondent State") 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 on 20 June 2000. The Respondent State also deposited with the African Union Commission Chairperson, on 19 February

1 See the list of the former employees annexed hereto.

2 SOMADDEX SA was a subcontracting company of Morila SA. According to the Application filed with the Court, the Applicants are four hundred forty-five (445) in total.

2010, the Declaration provided for in Article 34(6) of the Protocol, by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the case

3. In their Application, the Applicants allege that a production excess was achieved for the period 2000 to 2003, at the Morila SA gold mine, which produced a total of eighty-three tonnes two hundred and sixteen (83,216) kilograms per year over four (4) years of operation (2000, 2001, 2002, 2003),³ instead of the initial forecast of eleven (11) tonnes per year. According to the Applicants, the collective bargaining agreement that they signed with SOMADEx SA provided for the payment of a performance bonus in the event production targets were exceeded to the tune of Seventeen Billion (17 000 000) Francs CFA.
4. According to the Applicants, only a total of three hundred and fifty million (350,000,000) CFA francs were paid to the employees in this regard. SOMADEx has since refused to pay the remainder, in complicity with the Respondent State, and closed its doors for good between 2008 and 2009, without fulfilling its obligations to its former employees.
5. The Applicants further allege that as part of the initiatives to improve their working conditions, the Union Committee gave a strike notice on 21 June 2005. The notice announced a work stoppage for 6, 7, and 8 July 2005. However, the company's management considered this strike to be illegal on the grounds that the notice period provided for by law, that is, fifteen (15) days before the commencement of the strike, had not been observed. SOMADEx SA then sent a notice of dismissal to all employees. Subsequently, on 9 July 2005, SOMADEx SA dismissed the Allo Traoré Group and Two hundred Fifteen (215) others for gross misconduct after they had abandoned their posts. On 31 July 2005, the company decided to terminate the contracts of another Three hundred and Eleven (311) employees for abandoning their posts.

3 Year 2000: 4,208 Kg ; Year 2001 : 23,442 Kg ; Year 2002 : 38, 915 Kg ; Year 2003 : 16, 650 Kg.

6. The Applicants claim the termination of the employees' contracts was illegal and they denounced the undignified working and living conditions resulting from the non-payment of their performance bonus, despite the employees having obtained a decision in their favour during arbitration proceedings concluded on 10 February 2004.
7. The Applicants further state that on the night of 14 September 2005, two buses belonging to SOMADDEX were set on fire in the courtyard of the city's gendarmerie. Subsequently, thirty-two (32) former employees, including union representatives, were arrested and detained for several weeks without a committal order.
8. The Applicants claim that SOMADDEX accused them of having set the two buses on fire, as a result of which it terminated the contracts of another seventeen (17) employees.
9. Finally, the Applicants allege that the Respondent State was complicit in the dissolution of SOMADDEX SA, in order to obstruct the filing of new evidence to compel the company to fulfil its obligations in relation to the rights of its former employees. According to the Applicants, the company was subsequently restructured and renamed "MARS" before becoming "Goukoto Mining Services (GMS)". The Applicants contend that this was the reason the Sikasso Court on 26 May 2014 dismissed their case, on the ground that they lacked standing as former employees, given that there was no contractual link between them as employees and the renamed company.

B. Alleged violations

10. The Applicants allege a violation of their rights under Articles 3, 4, 6 and 7 of the Charter. They also claim that the termination of their contracts constitutes a violation of Article L231 of the Labour Code of the Respondent State⁴ and Convention No. 87 of the International Labour Organization (ILO) on Freedom of

4 Article L.231: A strike does not breach a contract of employment, except in cases of gross negligence on the part of the employees. Lockouts and strikes are unlawful during the conciliation procedure and once an arbitration decision has become enforceable. A lock-out or strike in violation of the provisions of the preceding paragraph shall entail.

a) for the employers:

- the paying employees for the days of wages lost as a result,
- ineligibility for membership of the chambers of commerce for three years.
- prohibition from being a member of the Higher Council of Labour and from participating in any way in a work enterprise or supply contract on behalf of the State or a public body.

b) for the employees:

Association and Protection of the Right to Organize of 4 July 1950.⁵

III. Summary of the Procedure before the Court

11. The Application was filed on 20 February 2018.
12. On 13 July 2018, the Registry requested the Applicants to file their submissions on reparations within thirty (30) days from the date of receipt.
13. On 27 July 2018, the Registry received the Respondent State's response and notified it to the Applicants on the same day for their Response within thirty (30) days from the date of receipt.
14. On 4 September 2018, the Registry received the Applicants' submissions on reparations which were notified to the Respondent State on the same day for its Response to be filed within thirty (30) days from the date of receipt.
15. On 12 March 2019, the Registry sent a reminder to the Respondent State, notifying it that the time limit for responding to the Applicants' submissions had expired, and requesting it to submit its Response within thirty (30) days from the date of receipt of the reminder.
16. On 17 April 2019, the Registry received the Respondent State's Response which was served on the Applicants on the same date with a request to respond within thirty (30) days from the date of receipt of the said notification.
17. On 18 July 2019, the Registry requested additional information from both Parties. By the same notice, the Registry informed the Parties that the title of the Application had been changed from "Yaya Fane and 43 others" to » Anciens travailleurs de SOMADEx SA versus Republic of Mali."
18. On 26 August 2019, the Registry received the Applicants' response to the request for additional information and notified it to Respondent State and on 3 October 2019, the Registry received the Respondent State's response.

- termination of the contract taking effect from the day of the cessation of work, with no rights other than the salary and the paid vacation allowance accumulated as of that date.

5 The Respondent State ratified the Convention on 22 September 1960.

19. On 16 October 2019 pleadings were closed and the Parties were duly informed.

IV. Prayers of the Parties

20. The Applicants pray the Court for the following orders:
- i. Declare that the thirty-two (32) imprisoned former employees have rights that must be respected and order the Respondent State to pay them the sum of ten million (10,000,000) CFA Francs each as damages for the harm suffered;
 - ii. Order the Respondent State to pay the sum of 17,000,000,000 (Seventeen Billion) CFA Francs to the former employees, as performance bonus that had not been paid by SOMADDEX SA ;
 - iii. Order the Respondent State to pay the sum of 6,000,000 (Six Million) CFA Francs to each employees, as compensation for the losses suffered;
 - iv. Order the Respondent State to pay the former employees the sum of 3,000,000,000 (three billion) CFA francs as accumulated salaries for the period between July 2005 and 31 December, 2017;
 - v. Order the Respondent State to issue a certificate of employment for each former employee;
 - vi. Order the Respondent State to pay a penalty of 2,000,000 (two million) CFA Francs per day of delay, starting from the Judgment date;
 - vii. Order the Respondent State to pay half of the sums listed in the judgment urgently;
 - viii. Order the Respondent State to pay legal costs;
 - ix. Order the Respondent State to pay Three Million (3,000,000) CFA Francs to cover the costs of the case;
 - x. Order the Respondent State to pay the round-trip transportation to the Court, and other living expenses of the lawyer, amounting to 4 Million (4,000,000) CFA Francs;
 - xi. Order the Respondent State to pay the sum of Seven Million (7,000,000) CFA Francs as costs of the proceedings.
21. For its part, the Respondent State prays the Court for the following:
- i. As a matter of form, declare the Application inadmissible on the grounds that it does not meet the admissibility requirements;
 - ii. Exceptionally, if the Court decides otherwise;
 - iii. On the merits, dismiss the Application as unfounded and dismiss all of the Applicants' prayers and order them to pay costs.

V. Jurisdiction

22. Article 3 of the Protocol provides:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
23. Furthermore, Rule 49(1) of the Rules⁶ provides: “The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”.
24. Based on the above provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.
25. The Court notes that the Respondent State has not raised any objections to its jurisdiction. Nevertheless, the Court must satisfy itself that it has jurisdiction before proceeding to examine the Application.
26. The Court observes that the violations alleged by the Applicants relate to proceedings before domestic courts which nevertheless concern rights under the Charter, namely, the right to equality before the law and the right to equal protection before the law, the right to life, the right to liberty and the right to a fair trial. The Court thus finds that its material jurisdiction is established.
27. With regard to its personal jurisdiction, the Court recalls that the Respondent State is a Party to the Protocol and that it has deposited the Declaration provided for in Article 34(6) of the Protocol with the Chairperson of the African Union Commission, as earlier outlined in paragraph 2 of this Ruling. The Court’s thus concludes that its personal jurisdiction is established.
28. With respect to its temporal jurisdiction, the Court notes that all of the violations alleged by the Applicants are based on the judgment of the Sikasso Labour Court No. 4 of 26 May 2014, that is, after the Respondent State became a party to the Charter and the Protocol and deposited the Declaration. The Court also notes

6 Rule 39(1) of the Rules of 2 June 2010.

that the alleged violations are continuous in nature.⁷

29. In view of the foregoing, the Court finds that it has temporal jurisdiction to hear the instant Application.
30. With regard to its territorial jurisdiction, the Court notes that the violations alleged by the Applicants all occurred in the territory of the Respondent State. The Court, therefore, considers that it has territorial jurisdiction.
31. In view of the foregoing, the Court concludes that it has jurisdiction to hear the instant Application.

VI. Admissibility

32. Article 6(2) of the Protocol provides: “[t]he Court shall rule on the admissibility of cases, taking into account the provisions of Article 56 of the Charter.”
33. Rule 49(1) of the Rules⁸ of Court further provides that “[t]he Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules.”
34. Rule 50(2) of the Rules,⁹ which restates in substance Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following requirements:

 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted 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
 - g. Do not deal with cases which have been settled by those States

7 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l’homme et des peuples v Burkina Faso (Preliminary objections)* (21 June 2013) 1 AfCLR 197, §§ 71 to 77.

8 Rule 39(1) of the Rules of 2 June 2010.

9 Rule 40 of the Rules of 2 June 2010.

involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

- 35.** The Respondent State has raised two preliminary objections to the admissibility of the Application. The first relates to the identity of the Applicants, and the second to the exhaustion of local remedies.

i. Objection based on identification of the Applicants

- 36.** The Respondent State submits that the application by the former employees is filed on behalf of a group called the Former Employees of SOMADDEX SA and that it is signed by one Yacouba TRAORE, who is their representative. However, in order to be able to bring legal action, an applicant must be a natural person enjoying the exercise of his or her civil rights, or a legal person under public or private law with legal personality.
- 37.** The Respondent State maintains that the said Former Employees of SOMADDEX SA do not have legal personality, or at least do not provide proof of their separate legal existence, which proof would give them standing to act, either as plaintiff or as defendant. The Respondent State further submits that the Court should note this legal and judicial anomaly, which makes the Application inadmissible, as it was filed in the name of a de facto group and not in the name of a legal person.
- 38.** The Respondent State points out that the group Former Employees of SOMADDEX SA represented by “Yacouba Traoré” have variously referred to themselves as “the Applicants” and sometimes as “Yaya Fane and 43 others” or represented by “Yacouba Traoré” and sometimes by “Allo Traoré” and others. In addition, the Respondent State also points out that information on the Applicants is incomplete, because the list produced includes only surnames, first names, numbers and signatures, with no indication of date of birth, nationality, place of residence, occupation or other descriptions.

39. For their part, the Applicants contend that the Respondent State's submissions are unfounded, since the application was filed with a special mandate before the Court, together with the list and the mandate legalized by the political authorities of the Respondent State. The Applicants allege that the mandate was granted in accordance with the relevant provisions of the Labour Code (Article 241) and Code of Civil, Commercial and Social Procedure, as well as the provisions of the, which are very clear: "Anyone who intends to represent or assist a party must prove that he has received the mandate or mission". (Article 424 of Code of Civil, Commercial and Social Procedure of the Respondent State).
40. The Applicants further submit that the Respondent State's Labour Code clearly demonstrates the weakness of the Respondent State's submissions. According to the Applicants, Mr. Yacouba Traoré was appointed by the Former Employees of SOMADIX SA and by the executive bodies of its trade union to defend the interests of the Employees. Moreover, his name appears in the conciliation minutes signed between Confédération Syndicale des Travailleurs du Mali CSTM and the Government of the Respondent State. The Applicants submit that the Application was filed with the Court with a warrant bearing the names, titles and registration numbers of all those concerned, and also that the said warrant was legalized by the competent authorities of the Respondent State.

41. The Court notes that pursuant to Article 56(1) of the Charter and Rule 50(2)(a) of the Rules, applications must identify the Applicant, even if the Applicant requests to remain anonymous.
42. In its jurisprudence,¹⁰ the Court has settled the issue of applicants' identification by holding that when a list of Applicants is filed, the Applicants are deemed to have been identified within the meaning of Rule 50(2)(a) of the Rules.
43. The Court notes that the docket of the Application before it contains a list of the names of the Applicants, who are the former

10 *Collectif des anciens travailleurs du Laboratoire ALS v Republic of Mali*, ACTHPR, Application No. 45/2016, Judgment of 28 March 2019 (jurisdiction and admissibility), § 23.

employees of SOMADEx SA.

44. The Court finds, therefore, that in filing the list, the Applicants have identified themselves in accordance with the provisions of Rule 50(2)(a) of the Rules.
45. In view of the foregoing, the Court dismisses the Respondent State's objection to the admissibility of the Application.

ii. Objection based on non-exhaustion of local remedies

46. The Respondent State submits that the Applicants have provided neither evidence of the exhaustion of local remedies nor evidence that the judicial authorities unduly prolonged the remedies available to them. The Respondent State further submits that the last judicial decision in this regard was rendered by the Sikasso Labour Court in the case between the Applicants and SOMADEx SA on 26 May 2014. The Applicants, according to the Respondent State, neither applied for an appeal or review of the decision but instead opted for non-judicial remedies by writing to the Mediator of the Republic and the Minister of Justice.
47. In addition, the Respondent State submits that some of the Three hundred and eleven (311) dismissed employees, including Allo Traore and Two hundred and fifteen (215) others, brought a case before the Sikasso Labour Court (Court of First Instance) by Application No. 21 /R.G/2009 dated 25 September 2009, and a case by Application No. 66/RG dated 13 May 2011. In its decision rendered on 13 December 2010, the Court of First Instance dismissed the Applicants' case on the grounds that their claims were without merit. The Applicants appealed the decision to the Social Chamber of the Bamako Court of Appeal, which declared the case inadmissible on 1 December 2011. Another group of former employees of the same company, including Yaya Fane and 80 (eighty) others, in turn also brought the case before the labour Court (Court of First Instance) of Sikasso on 18 November 2013. On 26 May 2014, the Tribunal dismissed their case due the Applicants' lack of standing.
48. The Respondent State further submits that the Applicants have not explained how its judiciary prevented them from exercising the available remedies. The Respondent State contends that the Applicants appear to be complaining about the excessive slowness of the judiciary in deciding their case, which allowed SOMADEx SA to fold up, legally transforming itself into MARS and then into GMS between 2009 and 2010. According to the Respondent State, the Applicants, having refrained from exercising the available remedies, cannot invoke any procedural

delay and it is, therefore, appropriate to dismiss their case before this Court.

- 49.** As for the other employees, who are also Applicants before this Court, the Respondent State submits that they cannot deny that they had the possibility of appealing the decision of the Court of First Instance, in addition to the possibility of appealing to the Cassation Court, which they did not do.

- 50.** For their part, the Applicants submit that in order to understand the circumstances of the case better, it is necessary to follow the development of the decisions of the Court of First Instance and the Court of Appeal in the Respondent State. The Applicants draw attention to the fact that they sent a letter of denunciation to the Minister of Justice dated 8 December 2014, referenced CATM 002 to which they did not receive a response. They also indicate that they wrote to the Ombudsman of the Republic, who replied by letter No. 446 dated 12 December 2014 dismissing their case on the grounds that the case was pending before the courts. The Applicants believe, therefore, that the excessive slowness of domestic procedures orchestrated by the courts of the Respondent State should not escape the scrutiny of the Court.

- 51.** According to the Applicants, the Respondent State was complicit in the dissolution of SOMADDEX SA between 2009 and 2010. The Applicants allege that the Respondent State obstructed the course of justice by concealing evidence that could have helped them to vindicate their rights. They thus submit that the Respondent State is responsible for the violation of their rights by SOMADDEX SA since the company changed its name to "Mars" before subsequently becoming "Goukoto Mining Services (GMS)", which contributed to the decision of the Sikasso Court in its judgment of 26 May 2014 dismissing the case for lack of standing.

- 52.** The Court recalls that according to Article 56(5) of the Charter and Rule 50(2) (e) of the Rules, local remedies that must be exhausted are ordinary judicial remedies, unless it is clear that the procedure for exhausting such remedies is unduly prolonged. The issue before the Court, therefore, is whether or not the Applicants have exhausted local remedies.
- 53.** The Court notes, from the documents on record, that the Applicants in the instant Application brought three separate actions before the courts of the Respondent State. First, Application No. 21 /R.G/2009 dated 25 September 2009, the Allo Traore Group and 215 (Two hundred and fifteen) other former SOMADEx SA employees brought an action before the Sikasso Labour Court (Court of First Instance). This case was dismissed on 13 December 2010 for lacking merit. Secondly, the same group of employees, by Appeal No. 66/RG of 13 May 2011 appealed to the Social Chamber of the Court of Appeal of Bamako against the decision of the Sikasso Court. By Judgment No. 101 dated 1 December 2011 the Social Chamber of the Court of Appeal declared the case inadmissible. Finally, Yaya Fane and 80 (eighty) other former SOMADEx SA employees brought a case before the Sikasso Labour Court (Court of First Instance) by Application No. 012/R. G/2013, this time against Goukoto Mining Service-SA. On 26 May 2014 the said Court, by Judgment No. 04, declared the case inadmissible for lack of standing in the absence of an employment contract binding the employees to Goukoto Mining Service-SA, the company against which they had brought the action.
- 54.** Given the foregoing, the Court finds that the group of Allo Traoré and two hundred fifteen (215) others had the possibility of appealing to the Supreme Court against Judgment No. 101 of 1 December 2011 rendered by the Social Chamber of the Court of Appeal of Bamako. This is in accordance with Article L217 of Law No. 92-020 of 23 September 1992 on the Labour Code of the Respondent State which provides that:

The Supreme Court hears appeals in cassation against final judgments and judgments of the Court of Appeal. The appeal is lodged and judged in the forms and conditions provided for by the laws on the organization and procedure of the Supreme Court.
- 55.** It is also to be noted that the above provision notwithstanding, Yaya Fane's group did not appeal against the decision of the Sikasso Court of First Instance No. 4 of 26 May 2014 before the Court of appeal (Article L213 of the Labour Code).
- 56.** In view of the foregoing, the Court considers that the Applicants did not exhaust the available local remedies. Consequently, the

Court finds that the Application does not meet the admissibility criteria provided for in Article 56(5) of the Charter.

B. Other admissibility requirements

- 57.** Having found that the Application is inadmissible for failure to exhaust local remedies, the Court does not need to consider the other admissibility requirements of Rule 50(2) of the Rules, which are restated in Article 56 of the Charter, because these requirements are cumulative such that if one of them is not met an application cannot be admissible.¹¹

VII. Costs

- 58.** In their submissions, both parties requested that the Court order that the other party bear costs of the proceedings.

- 59.** According to Rule 32(2) of the Rules:¹² “Unless otherwise decided by the Court, each party shall bear its own costs, if any”.
- 60.** Accordingly, the Court decides that each party shall bear its own costs.

VIII. Operative part

- 61.** For these reasons:

The Court:

Unanimously,

On jurisdiction

- i. *Declares* that it has jurisdiction.

On admissibility

- ii. *Dismisses* the objection to admissibility based on the identification of the Applicants;

11 *Collectif des anciens travailleurs du laboratoire ALS v Republic of Mali* (jurisdiction and admissibility), §39. *Mariam Kouma and Ousmane Diabaté v Republic of Mali*, (merits) Application No. 040/2016 Judgment of 21 March 2018 2 AfCLR 237, § 63.

12 Rule 30(2) of the Rules of 2 June 2010.

- iii. *Upholds* the objection to the admissibility of the Application on the ground of non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible.

On costs

- i. *Orders* that each Party to bear its own costs