

Diarra & Ors v Mali (ruling) (2022) 6 AfCLR 443

Application 008/2018, *Fousseyni Diarra Salifou Coulibaly, Yacouba Sanogo, Issa Diakite, Kissima Bathily, Siriman Macalou, Abdoulaye Traore, Moctar Gueye, Awa Cisse, and Oumar Keita v Republic of Mali*

Ruling, 22 September 2022. 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 all nationals of the Respondent State and former laboratory assistants employed by the Respondent State. The Applicants brought this Application, alleging that the Respondent State violated their human rights in relation to the process leading to their retrenchment. Upholding the Respondent State's objection, the Court held that the Applicants had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible.

Admissibility (exhaustion of local remedies, 34-42)

I. The Parties

1. Mr. Fousseyni Diarra and nine (9) others¹ (hereinafter referred to as "the Applicants") are all Malian nationals and former laboratory assistants in the mineral testing laboratory (hereinafter referred to as "ANALABS Mali SARL"). They allege that their rights were violated in connection with the procedure in relation to their retrenchment.
2. The Application is filed against the Republic of Mali (hereinafter "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986 and to the Protocol on 20 June 2000. The Respondent State also deposited, on 19 February 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 (NGOs).

¹ Salifou Coulibaly, Yacouba Sanogo, Issa Diakite, Kissima Bathily, Siriman Macalou, Abdoulaye Traore, Moctar Gueye, Awa Cisse, Oumar Keita.

II. Subject of the Application

A. Facts of the matter

3. The Applicants allege that ANALABS Mali SARL specializes in testing for gold content through the use of chemicals. According to the Applicants, blood tests should be carried out periodically to monitor the blood lead levels of employees. They further aver that these blood tests were not carried out regularly as some employees had gone more than two years without being tested due to negligence on the part of the company's management. They also affirm that for this reason some former workers started to feel unwell due to lack of effective protection.
4. They further aver that they were retrenched on 29 January 2009, for economic reasons, without any support and without medical assistance, in violation of all the legal and regulatory provisions under the mines collective agreement.
5. Later, the Applicants sued ANALABS Mali SARL before the Kayes Labour Court on 13 February 2012. By Decision No 017 JGT 12 of 29 March 2012, the said Court ordered ANALABS Mali SARL to carry out the lead test or be liable to a penalty of Two Hundred Thousand (200,000) CFA francs per day of delay (see paragraph 37). This decision was confirmed by Judgment No 7 of 4 April 2013 rendered by the Social Division of the Kayes Appeal Court. The Applicants again filed a new case before the Kayes Appeal Court seeking to obtain payment of the provisional fine imposed by the aforementioned Judgment No 017 JGT 12 of 29 March 2012. In a penalty enforcement hearing, the President of the said Court, by Order No 9 dated 31 July 2013, granted their request and ordered ANALABS Mali SARL to pay them an amount of Eighty-Six Million Two Hundred Thousand CFA francs (86,200,000).
6. Following appeal by ANALABS MALI SARL, the Social Division of the Kayes Appeal Court, by its Judgment No 15 of 26 August 2013 set aside the said order on the ground that there was no need for the penalty to be paid, and declared that it lacked jurisdiction to rule on the request relating to the defreezing of assets submitted by the Company and referred it to the civil Judge of Kayes.

B. Alleged violations

7. The Applicants aver that the unjustified delay in the hearing of the

case constitutes a violation of their rights under Articles 7(1)² and 26 of the Charter, 2(3) and 14 of the International Covenant on Civil and Political Rights (the ICCPR).

8. The Applicants submit that the ANALABS Mali SARL refuses to execute the decision of the Court of Kayes ordering them to pay the Applicants an amount of Two Hundred Thousand CFA francs (200,000) per day of delay for not having undertaken the lead test. As the company did not comply, the amount of the fine is Seventy-Eight Million Six Hundred and Seventy-One Thousand Eight Hundred and Forty (78,671,840) CFA francs.

III. Summary of the Procedure before the Court

9. The Application was filed on 20 February 2018. On 9 August 2018, the Application and submissions on reparations were served on the Respondent State.
10. All pleadings were filed within the time limits set by the Court and duly notified to the other Party.
11. Pleadings were closed on 12 April 2019 and the Parties were duly notified.

IV. Prayers of the Parties

12. The Applicants pray the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible and well-founded;
 - iii. Enforce court decisions and restore the rights of the former workers in question;
 - iv. Order the Respondent State to execute Decision No 017/JGT 12 of 29 March 2012 in accordance with *res judicata* or be fined Four Million (4,000,000) CFA FRANCS per day of delay to be paid to each worker;
 - v. Order Two Hundred Million (200,000,000 FCFA) to be paid as damages to the ten former workers for the harm caused;
 - vi. Pay a cash amount of Seventy-Eight Million Six Hundred and Seventy-One Thousand Eight Hundred and Forty (78,671,840 FCFA) to the Applicants under the authority of *res judicata*;
 - vii. Order an exit medical examination of the former workers in a neutral clinic at the expense of the Respondent State, the issuance of a medical certificate, as well as the lead tests;

2 Article 7(1)(d) of the Charter.

- viii. Order provisional enforcement of the decision to be taken on half of the rights.
- 13.** In their Reply, the Applicants pray the Court to order the Respondent State to take the following measures:
 - i. Bear the costs of the proceedings to the tune of Three Million (3,000,000) CFA francs;
 - ii. Pay the costs of the lawyer's round-trip transportation and accommodation to the tune of Four Million (4,000,000) CFA francs, that is, a total of Seven Million (7,000,000) CFA francs in respect of cost of proceedings, coverage and round-trip transportation;
- 14.** For its part, the Respondent State prays the Court to:
 - i. Declare the Application inadmissible in form and at most unfounded on the merits and dismiss the Applicants in all their prayers;
 - ii. Find that the Respondent State did not violate Article 7(1) of the Charter;
 - iii. Find that the Respondent State did not violate Article 26 of the Charter;
 - iv. Find that the Respondent State did not violate Article 2(3) of the International Covenant on Civil and Political Rights;
 - v. Find that the Respondent State did not violate Article 14 of the International Covenant on Civil and Political Rights;
 - vi. Declare that the Respondent State did not commit any prejudicial acts in relation to the Applicants and dismiss all their prayers;
 - vii. Declare that Judgment No 15 of 26 August 2013 of the Kayes Appeal overturning the said order has put an end to the Applicants' hopes insofar as it has become final, in the absence of the Applicants filing a cassation appeal against the said judgment;
 - viii. Find that the Applicants have not produced proof of prejudicial acts they suffered and the causal link of the prejudice,
 - ix. Dismiss the Applicants' other request as unfounded;
 - x. Afford the Respondent State the full benefit of its submissions.

V. Jurisdiction

- 15.** Under Article 3 of the Protocol:
 - 1. 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.
 - 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 16.** Rule 49(1) of the Rules provides: "[T]he Court shall conduct preliminary examination of its jurisdiction ... in accordance with

the Charter, the Protocol and these Rules “.³

17. The Court notes that the Respondent State does not raise any objection based on jurisdiction. Nevertheless, the Court must, on its own initiative, satisfy itself that it has the material, personal, temporal and territorial jurisdiction to hear the Application.

18. Having found no evidence on record that it lacks jurisdiction, the Court finds that it has:
 - i. Personal jurisdiction, insofar as the Respondent State is a party to the Protocol and has deposited the Declaration provided for in Article 34(6) of the Protocol, which allows individuals to bring cases directly before it, pursuant to Article 5(3) of the Protocol
 - ii. Material jurisdiction insofar as the Applicants allege violations of Articles 7(1) and 26 of the Charter, the right to be tried in a timely manner provided for in Articles 2(3) and 14 of the ICCPR,⁴ these being human rights instruments ratified by the Respondent State, which the Court can interpret and apply, in accordance with Article 3 of the Protocol
 - iii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above-mentioned instruments, in relation to the Respondent State.
 - iv. Territorial jurisdiction, insofar as the acts occurred in the territory of the Respondent State, a State Party to the Protocol.
19. Based the foregoing, the Court finds that it has jurisdiction to hear the present Application.

VI. Admissibility

20. Under Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.”
21. In accordance with Rule 50(1) of the Rules of Court,⁵ “[t]he The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2)

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

4 The Respondent State became a Party to the ICCPR on 16 July 1974.

5 Rule 40 of the Rules of Court of 2 June 2010.

of the Protocol and these Rules”.

- 22.** Rule 50(2) of the Rules, which is essentially restates the provisions of Article 56 of the Charter, provides as follows:

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

- 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 the Court is seized with the matter, and
- g. Do not deal with cases which have been settled by those States 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.

- 23.** The Respondent State raises an objection based non-exhaustion of local remedies. The Court will therefore examine this objection (a) before ruling, if necessary, (b) on the other admissibility requirements.

A. Objection based on non-exhaustion of local remedies

- 24.** The Respondent State submits that while the Applicants vaguely indicate the violations of their rights (only Articles 7(1) and 26 of the Charter and Articles 2(3) and 14 of the ICCPR and the measures and injunctions sought are cited), they do not provide evidence of the exhaustion of local remedies. It submits that the Applicants can in no way claim to have exhausted all local remedies as required by Rule 34(4) of the Rules of Court and that, consequently, the Court will not fail to find that the Applicants have violated the said Rule and will consequently declare the Application inadmissible in form.

- 25.** The Respondent State considers that it is constant that the provisional execution of the fine of Two Hundred Thousand (200,000) FCFA per day of delay, is of right because the judgment which ordered it is final. However, the Applicants have not proven that ANALABS Mali SARL and the Respondent State failed comply with the court decision, as the beneficiaries have made

no attempt to enforce the judgment.

26. The Respondent State points out that, on the contrary, documents attached to the Application by the Applicants, namely, copy of service of a certificate of no contest, a copy of the certificate of no appeal, prove sufficiently that the latter voluntarily refrained from exercising the cassation appeal remedy against Judgment No 15 of 26 August 2013 of the Kayes Appeal Court setting aside Order No 9 of the President of the Labour Court of Kayes awarding them a provisional cash payment in the amount of Eighty-Six Million Two Hundred Thousand (86,200,000) FCFA.
27. The Respondent State contends that the Applicants cannot deny that the Code of Civil Procedure of the Respondent State provided them with the cassation appeal remedy of appeal against the said judgment. It contends that the Applicants refrained from filing a cassation appeal against the judgment of the Kayes Appeal Court and that the Respondent State could not be blamed for this.
28. The Respondent State submits that in reality, the former workers of ANALABS Mali SARL were only concerned with obtaining the payment of the fine imposed by the Tribunal, showing little interest in taking the lead test ordered by the Tribunal, contrary to what they would have this Court believe. Also, having voluntarily refrained from exhausting all the local remedies available to them under the Code of Civil Procedure of the Respondent State, the Applicants are ill-advised to bring their case before this Court.

29. The Applicants consider that once the rights of one or more nationals of a State signatory to the Charter are violated, it is for the Court to assess and establish the law, that there is indeed evidence that the rights of the Applicants have been blithely violated by the Respondent State and that there is clear and unambiguous evidence that it is the Respondent State that halted the implementation of a decision of the Kayes Court with the complicity of ANALABS to harm the former workers.
30. The Applicants consider that the Respondent State's arguments lacked legal basis insofar as the judgments of the Appeal Court are enforceable. This is especially so since a certificate of non-appeal was issued by the Registrar on 18 September 2013 and attached to the docket thereby proving sufficiently that ANALABS MALI SARL was convicted but never complied with the judgment.

Another certificate of non-appeal was issued on 19 May 2014 by the registrar of the Kayes Appeal Court showing that a certificate of no appeal was filed against the judgment within the legal time limits. The two certificates of non-appeal confirm that the Applicants made no effort to obtain the payment of the fine.

31. The Applicants contend that refraining from obtaining the payment of a fine imposed by a judgment is a matter for the Court to assess in terms of the admissibility of the case, hence the admissibility of the Applicants' Application. They further contend that: "[M]ultinational enterprises (MNEs) must respect the internationally recognized human rights of those affected by their activities, they must contribute to economic, environmental and social progress with a view to achieving sustainable development". They consider that the States must watch over the companies to ensure strict respect of laws and texts.
32. The Applicants reproach the Respondent State for its refusal to submit to court decisions that are favourable to them, in particular, Judgment No 017/JGT/12 of 12 March 2012 of the Kayes Court and confirmatory Judgment No 7 of 4 April 2013 of the Kayes Appeal Court, which ordered ANALABS Mali SARL to have its employees take the lead test or be liable for a fine of Two Hundred Thousand (200,000) CFA francs per day of delay.
33. They consider that States must ensure strict compliance with laws and regulations by companies and that the Respondent State must take responsibility for these grave human rights violations, that is, an injunction of a court decision.

34. The Court recalls that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, the local remedies to be exhausted are ordinary judicial remedies unless the proceedings in respect of those remedies are unduly prolonged.
35. The Court underlines that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be available to the applicants without impediment, effective and satisfactory in the sense that they are "found satisfactory by

the complainant or are capable of redressing the complaint “.⁶

36. The question to be decided is whether there is an effective and satisfactory remedy available to the Applicants in the Respondent State’s judicial system.
37. The Court notes that following a summons served on ANALABS Mali SARL to appear before the Labour Court of Kayes, on 29 March 2012, the said Court, by Judgment No 17, dismissed the Applicants’ request for gratuity and ordered ANALABS Mali SARL to have the Applicants take a lead test or be liable for a fine of (200,000) CFA Francs for each day of delay, from the notification of the decision.
38. Subsequently, ANALBS filed a first appeal No 18/RG dated 24 May 2012 before the Social Chamber of the Court of Appeal of Kayes against Judgment No 17 of 29 March 2012. The said chamber, by Judgment No 7 of 4 April 2012 dismissed ANALABS Mali SARL’s appeal as unfounded and confirmed the judgment of the labour court in all its provisions.
39. Next, the Applicants again filed a new application with the Kayes Labour Court seeking payment of the provisional fine imposed by Judgment No 17 JGT 12 of 29 March 2012. The President of the said Kayes Labour Court, by Ordinance No 9 dated 31 July 2013, granted their request by ordering ANALABS Mali SARL to pay the Applicants the sum of Eighty-Six Million Two Hundred Thousand (86,200,000) CFA francs.
40. Later, by Appeal No 14 of 1 August 2013, ANALABS Mali SARL appealed Ordinance No 9 of 31 July 2013 issued by the President of the Kayes Labour Court. The Kayes Appeal Court, by its Judgment No 15 of 26 August 2013, set aside the said order on the ground that there was no need to pay the fine and declared that it lacked jurisdiction rule on the company’s request for defreezing of assets.
41. The Court notes that the Applicants had the possibility of filing a cassation appeal before the Supreme Court against Judgment No 15 of the Social Division of the Kayes Appeal Court rendered on 26 August 2013.⁷ In accordance with Article L217 of Act No 92-020 of 23 September 1992 of the Labour Code of the Respondent State: “The Supreme Court shall hear cassation appeals against final

6 *Lohé Issa Konaté v Burkina Faso*, Judgment (merits) (5 December 2014); 1 AfCLR 314, § 108.

7 See *Moussa Kanté and thirty-nine (39) others v Republic of Mali*. ACHPR, Application No 06/2019, Judgment of 25 June 2021§ 35; *Former SOMADEx workers v Republic of Mali*, ACtHPR, Application No 06/2018, Judgment of 2 December 2021, §54.

judgements and judgements of the Appeal Court. Appeals shall be lodged and heard in accordance with the forms and conditions laid down by the laws on the organization and procedure of the Supreme Court.” They submitted a certificate of non-appeal, which is proof that they had voluntarily abandoned this remedy. Moreover, the Appeal Court referred them back to the civil court to continue their action.

42. Based on the foregoing, the Court upholds the objection based on non-exhaustion of local remedies and finds that the Application does not meet the requirement of Articles 56(5) of the Charter and Rule 50(2)(e) of the Rules.⁸

B. Other admissibility requirements

43. Having found that the Application does not meet the requirement of Rule 50(2)(e) of the Rules, the Court need not rule on the admissibility requirements under Article 56(1), (2), (4), (6) and (7) of the Charter and Rule 50(2)(a), (b), (d), (f) and (g) of the Rules, insofar as the admissibility requirements are cumulative. Therefore, if one requirement is not met, the Application is inadmissible.⁹
44. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

45. The Court notes that the Parties have each requested the Court to order the other Party to bear the costs. However, Rule 32(2) of the Rules¹⁰ provides as follows: “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.
46. In view of the circumstances of this case, the Court decides that each Party shall bear its own costs.

8 Rule 46(5) of the Rules of Court of 2 June 2010.

9 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 246, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

10 Rule 30(2) of the Rules of Court of 2 June 2010.

VIII. Operative part

47. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Upholds* the objection based on admissibility for non-exhaustion of local remedies;

iii. *Declares* the Application inadmissible.

On costs

iv. *Orders* that each Party shall bear its own costs.