

Podiougou & Ors v Mali (ruling) (2022) 6 AfCLR 762

Application 004/2019, *Ibrahima Podiougou and 300 Others 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 who were seconded to a company involved in the mining of gold. 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, 31-37, 39-41, 45-46)

I. The Parties

1. Ibrahima Podiougou and three hundred (300) others (hereinafter, "the Applicants"),¹ are all Malian nationals and former employees of *Société Mines d'Or de Loulo* (SOMILO SA Loulo) seconded to Société Universal Prestation Services (UPS-RH) under the terms of a staff provision contract with Société BCM Mali. They allege a violation of their right to work due to the failure to pay their retrenchment entitlements.
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 (hereinafter, "the Declaration") by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

1 See List of Applicants Annexed.

II. Subject of the Application

A. Facts of the matter

3. The Applicants aver that they were employed by Universal Prestation Services (UPS), which is in charge of subcontracting staff and human resources, and were placed at the disposal of BCM Mali, the company in charge of operations at the *Société des Mines d'Or de Loulo* (SOMILO SA Loulo) gold mine.
4. The Applicants state that on 3 February 2009, the Director of BCM Mali SA addressed correspondence to UPS by which it served notice of termination of the staff supply and management contract between them, for economic reasons.
5. The Applicants aver that on 6 March 2009, UPS notified the Kayes Regional Director of Labour of a request for staff retrenchment addressed to BCM. A total of three hundred and one (301) workers, including twenty (20) staff representatives were concerned by the said request. They aver that on 19 February 2009, the Regional Director of Labour, by Letters No 0055/DRTEFP and N°0056/DRTEFP dated the same 19 February 2009, authorised the retrenchment of the workers concerned and also recommended the payment of their entitlements, in particular, salaries and benefits due to them until the date of effective retrenchment, comparative holiday allowance, redundancy allowance, issuance of work certificates and transportation of families for all staff recruited outside the usual place of employment at the time they were hired. They further aver that each worker was given notice of retrenchment.
6. The Applicants also aver that a list of the workers who were to face retrenchment was drawn up for this purpose. A specific amount was allotted to each worker, with the whole amount totalling One Billion Six Hundred and Ninety-Eight Million Four Hundred and Twenty-Five Thousand Eight Hundred and Seventy francs (1,698,425,870) FCFA for Two Hundred and Seventy-Five (275) workers.
7. They further consider that this amount paid by BCM Mali to cover the workers' entitlements was misappropriated by UPS, which paid only part of the said entitlements. According to the Applicants, out of the three hundred and one (301) workers initially concerned, only twenty-five (25) were paid some of their entitlements.
8. Finally, they aver that UPS allegedly laid off workers for economic reasons and then rehired the same workers while getting rid of the union leaders and other workers it had targeted.

9. In order to obtain relief, the Applicants initiated several legal proceedings before domestic courts. Believing that the domestic courts did not uphold their claims in the said proceedings, they brought the case before this Court.

B. Alleged violations

10. The Applicants allege:
 - i. A violation of Convention No 87 of the International Labour Organisation (ILO) on freedom of association;²
 - ii. A violation of Article L 257 of the Labour Code of Mali.³

III. Summary of the Procedure before the Court

11. The Application was received at the Registry on 14 January 2019 and served on the Respondent State on 20 May 2019.
12. On 20 June 2019, the Registry received the Respondent State's Response which was notified to the Applicants on the same day.
13. All pleadings and documents in the proceedings were duly notified to the Parties and they filed their pleadings within the time-limits prescribed by the Court.
14. Pleadings were closed on 30 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

15. The Applicants pray the Court to:
 - i. Order the payment of One Billion Six Hundred and Ninety-Eight Million Four Hundred Thousand Eight Hundred and Seventy francs (1,698,425,870) FCFA to two hundred and seventy-five (275) workers in accordance with the agreement signed between the UPS and the workers' representatives;
 - ii. Order the payment of Ten Million (10,000,000) FCFA to each employee as damages;

2 Ratified by Mali on 22 September 1960.

3 Article L.257: "All employers are prohibited from taking into consideration opinions, membership in a trade union or the exercise of trade union activity in making decisions concerning, in particular, hiring, the conduct and distribution of work, vocational training, promotion, remuneration and the granting of social benefits, and disciplinary and dismissal measures.
The company manager or his representatives shall not use any means of pressure in favour of or against any trade union organisation.
Any measure taken by the employer contrary to the provisions of the preceding paragraphs shall be considered abusive and shall give rise to damages.

- iii. Order the payment of Three Million (3,000,000,000) FCFA as damages;
 - iv. Order the issuance of work certificates for each ex-worker;
 - v. Order the payment of all arrears of contributions to the National Social Security Institute (NSSI) in respect of the three hundred and one (301) workers;
 - vi. Order the Republic of Mali to pay the Applicants an amount of One Billion (1,000,000,000) FCFA as arrears of the housing allowances, in accordance with the agreement signed on 8 December 2011 between the National Federation of Mines and Energy (FENAME) and the Mining Operators under the auspices of the Ministry of Mines;
 - vii. Order a penalty of Two Million (2,000,000) CFA francs per day of delay as from the pronouncement of the decision; and
 - viii. Order the provisional execution of the decision to be taken on half of the entitlements.
- 16.** The Respondent State prays the Court to take the following measures:
- i. Primarily, declare the Application inadmissible; and
 - ii. In the alternative, declare the Application unfounded and dismiss it.

V. Jurisdiction

- 17.** The Court recalls that Article 3 of the Protocol provides as follows:
- 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.
- 18.** Furthermore, under Rule 49(1) of the Rules of Court, “the Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”.
- 19.** Based on the above-mentioned provisions, the Court must, in each application, conduct an assessment of its jurisdiction and rule on objections thereto, if any.
- 20.** In the present case, the Court notes that the Respondent State does not raise any objection to its jurisdiction. The Applicants have not made any submissions on this issue either.
- 21.** Having found that nothing on record indicates that it lacks jurisdiction, the Court finds that it has:
- i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and non-governmental organisations to bring

cases directly before the Court.

- ii. Material jurisdiction, insofar as, with reference to its jurisprudence, “ [T]he fact that the provisions of the Charter are not specifically mentioned in an Application does not mean the Application is inadmissible, as long as the rights alleged to have been violated are guaranteed in the Charter or any other human rights instrument ratified by the State concerned”;⁴ even if they do not expressly mention the Charter, the Applicants allege violations relating to the economic rights contained in that instrument.
 - iii. Temporal jurisdiction, insofar as the alleged violations occurred after the Respondent State became a party to the Charter and the Protocol,⁵ which is the case here as indicated in paragraph 2 of this Ruling.
 - iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
- 22.** Based on the foregoing, the Court finds that it has jurisdiction to hear the present Application.

VI. Admissibility

- 23.** Article 6(2) of the Protocol provides that “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 24.** Under Rule 50(1) of the Rules of Court, “ The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.
- 25.** Under Rule 50(2) of the Rules of Court, which restates the provisions of Article 56 of the Charter it is provided that:
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

⁴ *Frank Omary and Others v United Republic of Tanzania* (28 March 2014) (admissibility) 1 AfCLR 358, § 93.

⁵ *TLS and Others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 84.

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 seised 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.
- 26.** The Court notes that the Respondent State raises an objection to admissibility based on non-exhaustion of local remedies. The Court will first rule on (a) that objection before considering, if necessary, (b) the other admissibility conditions.

A. Objection based on non-exhaustion of local remedies

- 27.** The Respondent State alleges that the Application does not meet the requirement of Article 56(5) of the Charter. It submits that that the Applicants did not exercise the legal and judicial remedies provided for by domestic procedural law, namely appeal and cassation. According to the Respondent State, even if the Applicants exhausted local remedies, they have not produced any formal evidence thereof.
- 28.** The Respondent State further alleges that the fact that the Applicants produced a copy of Decision No 24 of 14 April 2020, by which the Supreme Court of Mali dismissed their appeal, clearly demonstrates that they did not exhaust all local remedies. Lastly, the Respondent State contends that the fact that the Applicants unsuccessfully brought a case before the Ombudsman cannot absolve them from exhausting judicial remedies.
- 29.** For their part, the Applicants contend that it is incorrect to argue, as the Respondent State does, that the Tribunal declared their two above-mentioned applications inadmissible.
- 30.** According to the Applicants, domestic court proceedings on which the Kita Labour Court ruled relate to the summons of the trade union committee and that of the members. They further submit that the Court dismissed both actions even though the petition against BCM Mali was declared inadmissible and while the one against UPS was declared admissible.

31. The Court recalls that the remedies to be exhausted within the meaning of Rule 50(2)(e) of the Rules are ordinary remedies of a judicial nature.⁶ Moreover, it is not sufficient for the Applicants to allege a mere attempt to exercise such remedies. They must prove that they have exhausted all existing, available and effective remedies⁷ unless they can show the existence of an impediment attributable to the Respondent State.⁸ In any event, an application may only be brought before the Court after the highest domestic court has rendered a final decision on the issues raised in the Application.⁹
32. The Court notes that, in relation to the allegations made in the present Application, the Applicants initiated three sets of proceedings before domestic courts. The Applicants in the present Application are identical in whole or in part to the Applicants in the three proceedings in question. The same applies to the complaints raised in the said proceedings.
33. As regards the first set of proceedings, the Court notes that, by application of 20 December 2010, the members of the trade union committee of the *Confédération syndical des travailleurs du Mali* (CSTM) and the workers of UPS-RH SARL and BCM-Mali SA of Loulo, who are among the Applicants before the Court, brought an application before the Kita Labour Court against those two companies, seeking reinstatement, payment of salary arrears and damages. By decision of 22 February 2012, the Kita Labour Court declared the action against BCM-Mali SA inadmissible and that against UPS-RH SARL admissible before dismissing it as ill-founded. An appeal was then lodged against this judgment, which was upheld by the Kayes Appeal Court in a ruling dated 12 December 2013.
34. The Court observes that after this appeal decision by the Kayes Court, the applicants in question did not appeal to the Supreme Court as provided for in the above-mentioned Article L 217 of Act No 92-020 of 23 September 1992 on the Labour Code in the

6 *Tanganyika Law Society and Others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 31.

7 *Norbert Zongo and Others v Burkina Faso* (Preliminary Objections) (21 June 2013) 1 AfCLR 197, § 84; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 64; *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

8 *Benedicto Mallya v United Republic of Tanzania* (merits and remedies) (26 September 2019) 3 AfCLR 482, § 29.

9 See *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 94; see also *Peter Joseph Chacha v United Republic of Tanzania* (Admissibility) (28 March 2014) 1 AfCLR 398, § 142-145.

Republic of Mali, which provides:

The Supreme Court shall hear cassation appeals against final judgments and judgments of the Appeal Court. The appeal shall be filed and judged in the manner and under the conditions laid down by the laws on the organisation and procedure of the Supreme Court.

35. It emerges from these provisions that the Malian Supreme Court, the court of cassation, offered the Applicants, had they brought the matter before it, the possibility of amending or overturning the decision of the Kayes Appeal Court.
36. In this respect, the Court recalls, in line with its constant jurisprudence, that the cassation appeal is an effective remedy since it is likely, in certain cases, to change the substance of the contested decision; and that, without having exercised this remedy, one could not prejudge the outcome of the related proceedings.¹⁰
37. Based on the foregoing, the Court finds that local remedies were not exhausted in respect of the first proceedings before domestic courts, insofar as the Applicants did not exercise the cassation appeal remedy.
38. With regard to the second procedure, the Court notes that, by application of 22 March 2011, the CSTM-Loulo trade union leadership brought before the Kita Labour Court a claim for compensation for damages against BCM-Mali SA in favour of Moussa KANTE and four (4) other workers of the said company. This action was declared inadmissible by decision of 29 February 2012 for lack of standing.
39. The Court notes that the Applicants concerned by this second set of domestic proceedings did not exercise any other remedy to challenge the decision of the Kita Labour Court, nor did they attempt to bring an effective action before another domestic court. Indeed, the said applicants had the possibility of appealing to the Appeal Court, as they are allowed to do under Article L.213 of the Labour Code, which provides in its first paragraph that: "The judgments of the tribunal are final and not subject to appeal, except in respect of jurisdiction, where the amount of the claim does not exceed twelve (12) times the amount of the guaranteed inter-professional minimum wage", and in its second paragraph

10 *Moussa Kanté and Others v Republic of Mali*, ACtHPR, Application No 006/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 30-36; *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 91-94; *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, Judgment of 2 December 2021 (jurisdiction and admissibility), §§ 72-83; *Norbert Zongo et al v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 70.

that: “Above this amount, judgments may be appealed to the social division of the Appeal Court “.

40. The Court notes that the appeal remedy was indeed applicable to the Applicants in the present case insofar as the ground for which the Kita Labour Court dismissed their action was for lack of standing and not the amount of the claim. Moreover, the fact that the same Applicants, in the third proceeding examined below, challenged the decision of another labour court, namely, that of Kayes, first before the Appeal Court and then before the Supreme Court, proves that these remedies in superior courts were available but were not exercised in the second procedure.
41. In the light of the foregoing, the Court finds, with regard to this second set of proceedings before domestic courts, that all available local remedies were not exhausted.
42. Finally, as regards the third procedure, the Court observes that a few months after the decisions in the first two procedures were rendered, Moussa KANTE and three hundred (300) other workers and thirty (32) other temporary workers of UPS-RH Loulo, acting in their own names and for their own accounts, sued UPS-RH before the Kayes Labour Court for the same cause, namely the payment of salary arrears, damages and interest. The Kayes Labour Court dismissed the claims of the Applicants in question.
43. Following this judgment of the Kayes Court, the Applicants appealed to the Kayes Court of Appeal, which, by Judgment No 4 of 23 March 2017, upheld the Court's decision. The Applicants appealed this appeal judgment before the Supreme Court.
44. By its judgment No 17 of 14 April 2020, the Supreme Court declared their appeal inadmissible on the grounds that the Applicants did not put forward any grounds warranting cassation such as violation of the law, lack of legal basis or contradiction in the judgment.
45. The Court notes that this decision of the Supreme Court could have justified the exhaustion of local remedies. However, the Court recalls that, under Article 56(5) of the Charter, the exhaustion of local remedies is assessed at the date of filing the Application in the case under consideration.¹¹ It follows that in the present case, the principle of anteriority and exhaustion of local remedies was not respected insofar as the Applicants brought a case before this Court on 14 January 2019, whereas the Supreme Court rendered its decision after the said referral, that is, on 14 April

11 *Ghaby Kodeih and Nabih Kodeih v Republic of Benin*, ACtHPR, Application No 008/2020, Judgment of 23 June 2022, § 42.

2020. The present Application is therefore premature as regards the requests relating to the third procedure.

46. Based on the foregoing, the Court finds that the Applicants had not, as at the date of filing the present Application, exhaust local remedies as required by Rule 50(2)(e) of the Rules. Accordingly, it upholds the objection raised by the Respondent State on this issue.

B. Other conditions of admissibility

47. The Court recalls that the admissibility conditions of an Application filed with it are cumulative¹² so that if one of them is not met, the entire Application is inadmissible. In the present case, as the Application has not met the condition on exhaustion of local remedies, the Court, therefore, need not examine the other conditions under Rule 50(2)(e) of the Rules. The Court, therefore, declares the Application inadmissible and dismisses it.

VII. Costs

48. The Respondent State prays the Court to order that the Applicant bear its own costs.
49. The Applicants made no submission in this regard.

50. Rule 32(2) of the Rules¹³ provides: “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.
51. In view of the above provision, the Court decides that each Party shall bear its own costs.

12 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48.

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

VIII. Operative part

52. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

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

iii. *Declares* the Application inadmissible.

On costs

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