

# A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights

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## Summary

*This article examines the case of Mtikila & Others v Tanzania before the African Court on Human and Peoples' Rights. The application centres on Tanzania's prohibition on independent candidates running for public office, with the applicants alleging that this prohibition violates article 2 (freedom from discrimination), article 10 (freedom of association) and article 13(1) (the right to participate in government) of the African Charter on Human and Peoples' Rights. The case is the first to be decided on its merits at the African Court, the first to find in favour of the applicants and the first to consider the issue of reparations and damages. The article examines the arguments of both the applicants and Tanzania, including Tanzania's reliance on the 'claw-back' provisions found in articles 27(2) and 29(4) of the African Charter, before assessing and analysing the African Court's findings. The article highlights the African Court's findings that are likely to require further clarification in the future, as well as the possible precedents that the findings set. The article concludes by stating that, while the African Court should be commended for the delivery of its first judgment on the merits, Tanzania's approach to the judgment could be indicative of difficulties the African Court will encounter as it enters an era of judgment compliance by member states.*

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**Key words:** *Human rights; African Court on Human and Peoples' Rights; right to participate in government; freedom of association; election law*

## 1 Introduction

The following is a summary and analysis of *Mtikila & Others v Tanzania*,<sup>1</sup> a case heard before the African Court on Human and Peoples' Rights (African Court). The African Court rendered its judgment on 14 June 2013, with a further ruling on reparations on 13 June 2014.<sup>2</sup> The case concerns three applicants: two Tanzanian non-governmental organisations (NGOs); the Tanganyika Law Society and Human Rights Centre; and Reverend Christopher R Mtikila.<sup>3</sup> The applicants' cases were broadly the same: that current Tanzanian election laws prohibiting independent candidates from running for public office were in breach of various articles of the African Charter on Human and Peoples' Rights (African Charter), the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (Universal Declaration) and the rule of law.<sup>4</sup> The case is a watershed moment for African human rights as it is the first case in which an applicant successfully navigated through the African Court's restrictive jurisdictional requirements relating to individuals and NGOs, thus allowing the African Court to consider for the first time a case on its merits. That the African Court found in favour of the applicants is also significant, as is the subsequent reparations ruling, another first for the African Court. The article will provide an in-depth analysis of the jurisdictional issues, the parties' submissions and the African Court's findings. The article, however, argues that, whilst the African Court's ruling in *Mtikila* should be welcomed, it also raises a number of questions which will need to be answered in subsequent judgments with regard to jurisdiction and admissibility, as well as a warning of the potential hazards facing the African Court as it ventures into a new era of seeking compliance with its judgments by member states.

## 2 Background

In 1992, amendments to the Tanzanian Constitution required all candidates for presidential, parliamentary and local government

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1 *Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania* App 009/2011; *Reverend Christopher R Mtikila v The United Republic of Tanzania* App 011/2011 14 June 2013 (Judgment).

2 *Reverend Christopher R Mtikila v United Republic of Tanzania* App 011/2011 13 June 2014 (Reparations Ruling).

3 Judgment (n 1 above) paras 1 & 2.

4 Judgment paras 4, 78, 89.2 & 120.

elections to be members of and sponsored by a political party.<sup>5</sup> In 1993, Mtikila filed a case before the Tanzanian High Court challenging these amendments, arguing that the prohibition on independent candidates conflicted with the Tanzanian Constitution.<sup>6</sup> On 24 October 1994, the Tanzanian High Court found in favour of Mtikila and declared the amendments unconstitutional.<sup>7</sup> Prior to this judgment, on 16 October 1994 the Tanzanian government tabled a Bill in parliament seeking to prohibit independent candidates.<sup>8</sup> On 2 December 1994 parliament passed the Bill, which in effect restored the position prior to the High Court's judgment and continued the ban on independent candidates.<sup>9</sup>

In 2005, Mtikila brought another case before the Tanzanian High Court, again arguing that the ban on independent candidates was unconstitutional.<sup>10</sup> Again, the Tanzanian High Court found in his favour and allowed independent candidates.<sup>11</sup> In 2009 the Tanzanian Attorney-General appealed to the Tanzanian Court of Appeal.<sup>12</sup> On 17 June 2010, the Tanzanian Court of Appeal reversed the High Court's decision and once again prohibited independent candidates.<sup>13</sup> In its decision, the Court of Appeal found that the issue of independent candidates was essentially political and, therefore, had to be resolved by parliament.<sup>14</sup> Following this decision, parliament commenced with a consultation aimed at obtaining the view of Tanzanian citizens on the possible amendment to its Constitution.<sup>15</sup> When the case came before the African Court, this consultation was ongoing and independent candidates remained prohibited.<sup>16</sup>

### 3 Admissibility

The African Court first sought to establish the admissibility of the applicants' case before considering jurisdiction, an approach which was not unanimously supported amongst the bench.<sup>17</sup> Tanzania

5 Judgment para 67. For a detailed review of the 1992 reforms to the Tanzanian Constitution, see M Wambali 'The practice on the right to freedom of political participation in Tanzania' (2009) 9 *African Human Rights Law Journal* 203.

6 Judgment (n 1 above) para 68.

7 Judgment para 69.

8 Judgment para 70.

9 Judgment para 71.

10 Judgment para 72.

11 As above.

12 Judgment para 73.

13 As above.

14 Judgment para 74.

15 As above.

16 Judgment paras 74 & 75. For a summary of the case procedure, see Judgment paras 5-65.

17 See separate opinion of Vice-President Fatsah Ouguergouz (Ouguergouz opinion); separate opinion BM Ngoepe J (Ngoepe opinion); separate opinion of Gerard Niyungeko J (Niyungeko opinion) discussed below.

affirmed that it had ratified the African Charter and the Protocol on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and, importantly for the case to proceed to be considered on its merits, that it had in addition signed the special declaration allowing individuals and NGOs to submit claims directly.<sup>18</sup> However, Tanzania made two challenges to the admissibility of the case, namely, the applicants' (i) failure to exhaust local remedies; and (ii) delay in filing applications.<sup>19</sup>

### 3.1 Failure to exhaust local remedies

Tanzania submitted that the applicants had failed to exhaust local remedies,<sup>20</sup> a challenge that has since become a default amongst member states facing cases ostensibly on their merits.<sup>21</sup> With regard to Mtikila, Tanzania argued that the Tanzanian Court of Appeal had stated that the issue of independent candidates was an issue for parliament, that parliament had tabled a Bill dealing with the proposed constitutional consultation and that a consulting body had been set up to review the Tanzanian Constitution.<sup>22</sup> Therefore, as a citizen of Tanzania, Mtikila would have the opportunity to take part in that consultation and to give his views.<sup>23</sup>

The applicants responded that parliament and the constitutional review process did not constitute viable local remedies as found in the African Court Protocol and African Charter, as the remedy to be exhausted was a judicial one.<sup>24</sup>

The African Court agreed that the remedies to be exhausted were primarily judicial since these met the criteria of 'availability, effectiveness and sufficiency'.<sup>25</sup> It found that the political process relied on by Tanzania was not freely accessible to each individual, was discretionary, could be abandoned at any time, and that the outcome

18 Judgment (n 1 above) para 3, referring to arts 5(3) and 36(4) of the African Court Protocol. For a detailed review of the relevant articles and observations on the rule of the African Court, see GJ Naldi 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 *African Human Rights Law Journal* 366-392.

19 Judgment (n 1 above) paras 79, 80 & 80.1 on failure to exhaust local remedies; Judgment para 80.2 on unreasonable delay in filing the applications.

20 Judgment para 80.1.

21 See *Lohé Issa Konaté v Burkina Faso* App 004/2013 5 December 2014, paras 74-115; *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso*, App 013/2011 14 June 2013, paras 55-113.

22 Judgment (n 1 above) para 80.1.

23 As above.

24 As above.

25 Judgment (n 1 above) para 82.1, referring to remedies envisaged by art 6(2) of the African Court Protocol read together with art 56(5) of the Protocol. The African Court considered *Jawara v The Gambia*, (2000) AHRLR 107 (ACHPR 2000); *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999); *Velásquez-Rodríguez v Honduras* IACHR (29 July 1988) Ser C/Doc 4; *Akdivar & Others v Turkey* (1996) ECHR 21893/93.

depended on the will of the majority.<sup>26</sup> The African Court concluded that, no matter how democratic the constitutional review process is, it cannot be equated to an independent judicial process for protecting African Charter rights.<sup>27</sup> Based on this finding, the African Court observed that, as the Court of Appeal is Tanzania's final court of appeal, Mtikila had exhausted local remedies.<sup>28</sup> This finding may be seen as the African Court refusing to allow member states to simply create review processes under the guise of consultations in order to forestall potential applicants' cases before the African Court, a welcome stance given the potential vague and wide-ranging temporal and geographic scope of any such 'consultation' which could lead, if allowed to stand as a legitimate opposition to exhausting local remedies, to applicants waiting for months, if not years, for such consultations to end before properly exhausting local remedies. Regarding NGOs, the African Court stated that it was not necessary for them to institute the same proceedings as Mtikila as the outcome would be the same,<sup>29</sup> thus giving NGOs a wide-ranging scope to circumnavigate exhaustion of local remedies issues, since an NGO can use this precedent to join applications before the African Court where it can demonstrate that the individual applicant has done the work of taking the case through various national courts.<sup>30</sup>

### 3.2 Delay in filing applications

Tanzania also submitted that the applicants took an unreasonably long time to bring their applications before the African Court.<sup>31</sup> It argued that the Tanzanian Court of Appeal handed down its judgment on 17 June 2010 and the applicants did not file their applications until 2 and 10 June 2011 respectively.<sup>32</sup>

The applicants responded that there had been no undue delay.<sup>33</sup> They argued that within four months of the Court of Appeal's decision, Tanzania held national elections in which functionaries were preoccupied, that they had to wait to see how parliament responded to the Court of Appeal's judgment, and that time should run from the time when parliament failed to act.<sup>34</sup>

The African Court found that the applicants were entitled to wait for the reaction of parliament to the Court of Appeal's judgment.<sup>35</sup> The Court found that the period of just under one year between the date of the Court of Appeal's judgment and the applicants filing their

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26 Judgment (n 1 above) para 82.3.

27 Judgment para 82.3.

28 As above.

29 As above.

30 See also *Zongo* (n 21 above) paras 107-112.

31 Judgment (n 1 above) para 80.2.

32 As above.

33 Judgment para 81.2.

34 As above.

35 Judgment para 83.

case was not unreasonably long.<sup>36</sup> The African Court's Statute and Rules do not prescribe a time limit for the filing of applications before the African Court. Accordingly, the African Court's willingness to consider applications filed just under one year from the final decision of the domestic court's decision may be seen, if not as a definitive measure, at the very least as a useful barometer for future applicants concerned as to whether their application may be considered unreasonably delayed, and retains the African Court's flexibility in addressing the issue of delayed filings in future cases.

## 4 Jurisdiction

Having dispensed with Tanzania's submissions regarding the admissibility of the applicants' cases, the African Court proceeded to consider (i) Tanzania's submissions on the temporal jurisdiction of the African Court;<sup>37</sup> and (ii) *proprio motu*, other jurisdictional issues.

### 4.1 Temporal jurisdiction of the African Court

Tanzania argued that, at the time of the alleged violation of the applicants' rights, the African Court Protocol had not come into operation and that, therefore, the African Court had no jurisdiction to hear the matter.<sup>38</sup>

In response, Mtikila submitted that a distinction should be made between normative and institutional provisions. He argued that the rights sought to be protected were already contained in the African Charter, to which Tanzania was a party. He contended that, although the African Court Protocol came into operation later, it was only a mechanism to protect these African Charter rights and, therefore, the matter was not time-barred.<sup>39</sup>

The African Court rejected Tanzania's argument, finding that as Tanzania had ratified the African Charter by the time the alleged violations had occurred, the African Charter bound Tanzania and that, therefore, it was under a duty to protect the rights found therein.<sup>40</sup> The African Court also noted that at the time the Court Protocol was ratified, the alleged violations were still continuing and were so up to the time of the hearing, by which time Tanzania had also made its special declaration allowing individuals to apply directly to the African Court.<sup>41</sup>

This approach sets a potentially important precedent for the African Court. It can be read to mean that applicants' rights are protected

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36 As above.

37 Judgment para 80.3.

38 As above.

39 Judgment para 81.3.

40 Judgment para 84.

41 As above.

from the time a member state ratifies the African Charter rather than the African Court Protocol. This means that applicants could bring cases related to rights violations that occurred before the ratification of the African Court Protocol, therefore giving applicants a much wider scope. Given that all African Union (AU) member states, apart from South Sudan, have ratified the African Charter, this potentially leaves the door open to applicants from member states who have not yet ratified the African Court Protocol to bring cases in the future for violations that are occurring now or in the past, once the member state in question does ratify the African Court Protocol. For example, Cameroon became the most recent member state to sign the African Court Protocol,<sup>42</sup> but it ratified the African Charter on 20 June 1989.<sup>43</sup> Putting aside issues of direct access for individuals and NGOs (Cameroon is yet to sign the special declaration), the approach adopted here by the African Court could open the door for applications relating to Cameroon going back to 1989, the date of its ratification of the African Charter, rather than from August 2015 when it ratified the African Court Protocol. Given that any delay in bringing a case relating to the period 1989-2015 is because Cameroon had not signed the African Court Protocol until August 2015, it remains open whether the African Court would allow the applications on the basis of their being reasonably delayed.

#### 4.2 Material and personal jurisdiction of the African Court

Although no other jurisdictional arguments were raised by Tanzania, the African Court provided, *proprio motu*, a short analysis of the reasons why it considered the case admissible.<sup>44</sup> It noted that the alleged violations fell within the scope of its jurisdiction,<sup>45</sup> and that the applicants, as Tanzanian NGOs and citizens, were entitled to bring their case directly before the African Court as Tanzania had signed the special declaration pursuant to articles 5(3) and 36(4) of the African Court Protocol.<sup>46</sup> This *proprio motu* step was not required and may be as a result of the case being the first to be tried on its merits.<sup>47</sup>

### 5 Merits

Having rejected Tanzania's arguments both on admissibility and jurisdiction, and having satisfied itself *proprio motu* on its jurisdiction,

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42 Cameroon deposited its ratification on 17 August 2015. See <http://www.african-court.org/en/index.php/news/latest-news/606-cameroon-becomes-29th-au-member-state-to-ratify-protocol-on-establishment-of-african-court-on-human-and-peoples-rights> (accessed 9 October 2015).

43 <http://www.achpr.org/instruments/achpr/ratification/> (accessed 9 October 2015).

44 Judgment (n 1 above) paras 85-88.

45 Judgment para 85.

46 Judgment para 86.

47 In the subsequent *Zongo* and *Konaté* judgments (n 21 above), the African Court did not follow the same procedure.

the African Court proceeded, for the first time in its existence, to assess the merits of the applicants' case.<sup>48</sup>

### 5.1 Applicants' submissions

Both applicants argued that the amendments to Tanzania's Constitution prohibiting independent candidates violated Tanzanian citizens' rights under the African Charter, namely, (i) the right to freedom of association pursuant to article 10; (ii) the right to participate in public/governmental affairs pursuant to article 13(1); and (iii) the right against discrimination pursuant to article 2.<sup>49</sup>

The applicants also argued that the prohibition violated Tanzanian citizens' rights under other international human rights law instruments, specifically (i) the equal right of men and women to the enjoyment of all civil and political rights pursuant to article 3 of the ICCPR; (ii) the right to take part in government pursuant to article 25 of the ICCPR; (iii) freedom of association pursuant to article 22 of the ICCPR and article 20 of the Universal Declaration; (iv) and the right to take part in the government of one's country, directly or through freely-chosen representatives, pursuant to article 21(1) of the Universal Declaration.<sup>50</sup> Mtikila also contended that Tanzania violated the rule of law by instituting a constitutional review process to settle an issue pending before the courts.<sup>51</sup>

In greater detail as regards freedom of association, the applicants argued that freedom of association was a core principle in monitoring the actions of government. As to the right not to be discriminated against and the right to equality, the applicants argued that the prohibition on independent candidates had the effect of discriminating against the majority of Tanzanians. The applicants explained that, although the law prohibiting independent candidates applied to all Tanzanians equally, its effects were discriminatory because only those who are members of and sponsored by political parties may seek election.<sup>52</sup>

As to the rule of law, Mtikila argued that the rule of law was a principle of customary international law and that by initiating a constitutional amendment to settle a legal dispute pending before a domestic court which nullified the court's judgment, Tanzania abused the process of constitutional amendment and, therefore, the principle of the rule of law.<sup>53</sup>

48 Judgment (n 1 above) paras 89-126.

49 Judgment paras 4, 76(a), 76(b), 78, 89.2, 89.3, 91 & 93.

50 Judgment paras 92 & 93.

51 Judgment para 120.

52 The applicants cited in particular *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 64, where the African Commission held, inter alia, that any 'measure which seeks to exclude a section of the citizenry from participating in the democratic processes is discriminatory and falls foul of the [African] Charter'.

53 Judgment (n 1 above) para 120.



Each party's request to rectify the alleged violations, however, differed slightly. The NGOs requested (i) a finding that Tanzania was in breach of articles 2 and 13(1) of the African Charter and articles 3 and 25 of the ICCPR;<sup>54</sup> (ii) an order rectifying the situation;<sup>55</sup> (iii) an order for Tanzania to report to the Court within 12 months of its decision;<sup>56</sup> and (iv) that Tanzania paid its costs.<sup>57</sup> Mtikila, on the other hand, requested (i) the African Court to make a finding that Tanzania had violated his rights;<sup>58</sup> and (ii) Tanzania to provide compensation for the ongoing denial of his rights.<sup>59</sup>

## 5.2 Tanzania's response

Tanzania essentially had one argument in response to the applicants' various complaints; that the prohibition of independent candidates was essential to maintain peace in Tanzania. In particular, Tanzania submitted that the ban on independent candidates was a way of 'avoiding absolute and uncontrolled liberty' which would lead to 'anarchy and disorder', and that the prohibition was necessary for good governance and unity.<sup>60</sup> Specifically regarding government leadership, Tanzania argued that the prohibition was necessary for 'national security, defence, public order, public peace and morality'.<sup>61</sup> It argued that the requirements for registering a political party, described by the applicants as onerous, were in fact necessary to avoid tribalism.<sup>62</sup>

Regarding the right to freely participate in the government of one's country, Tanzania again argued that the prohibition on independent candidates was a 'necessity' for social reasons.<sup>63</sup> In support, Tanzania relied on the Inter-American Court of Human Rights case of *Castañeda Gutman v Mexico*,<sup>64</sup> arguing that the introduction of independent candidates depended on the social needs of a state and its 'historical reality'.<sup>65</sup> Tanzania explained that following independence, it initially had a multi-party system but then instituted a one-party system to cement national unity.<sup>66</sup> It stated that it reintroduced multi-party democracy in the early 1990s with independent candidacy

54 Judgment para 76(a).

55 Judgment para 76(b).

56 Judgment para 76(c).

57 Judgment para 76(e). The NGOs also requested any other remedy or relief the African Court deemed necessary to grant. See Judgment para 76(d).

58 Judgment (n 1 above) para 77 (a).

59 Judgment para 77(b). Importantly, in terms of the later Reparations Ruling, Mtikila reserved the right to substantiate his claims for compensation and reparations. See Judgment para 77(c).

60 Judgment paras 90-95.

61 Judgment paras 90.1 & 94.

62 Judgment paras 90.1 & 102.

63 Judgment paras 94 & 101.

64 IACHR (6 August 2008) Ser C/Doc 184, paras 192 & 193.

65 Judgment (n 1 above) paras 103 & 107.3.

66 Judgment para 104.

prohibited.<sup>67</sup> Tanzania argued that this prohibition was necessary at a time when it was a young democracy in order to strengthen multi-party democracy.<sup>68</sup> In response to questions put to Tanzania during the hearing, it explained that the prohibition was also necessary due to the structure of Tanzania, being comprised of mainland Tanzania and Zanzibar, and that the requirement that political parties have a minimum number of members from mainland Tanzania and Zanzibar had so far resulted in no tribalism in Tanzania.<sup>69</sup> Tanzania further argued that the law that sets out procedures for how individuals can participate in government was reasonable.<sup>70</sup>

Regarding the right to freedom of association, Tanzania argued that no one was forced to stand for political position; that it was rather a matter of personal ambition.<sup>71</sup> With particular reference to Mtikila, Tanzania submitted that he had never been prevented from participating in politics, that he belonged to a political party and had contested the presidential election but had lost.<sup>72</sup>

With regard to the right not to be discriminated against and the right to equality, Tanzania maintained that the law prohibiting independent candidates was not discriminatory as it applied equally to all Tanzanians.<sup>73</sup> As to the rule of law, Tanzania submitted that it fully adhered to principles of the rule of law, including the separation of powers and independence of the judiciary as provided for in the Tanzanian Constitution. Tanzania argued that constitutional review and amendment were not new phenomena in Tanzania and that the Constitution had undergone 14 such amendments.<sup>74</sup> It pointed out that article 98(1) of the Tanzanian Constitution allowed amendments at any time when the need arises and that, therefore, the issue of a violation of the rule of law did not arise.<sup>75</sup>

### 5.3 African Court's findings

#### 5.3.1 Right to participate freely in the government of one's country

The African Court considered in detail article 13(1) of the African Charter.<sup>76</sup> It emphasised that article 13(1) was an individual right and

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67 As above.

68 As above.

69 Judgment para 102.

70 As above.

71 Judgment para 90.3.

72 Judgment paras 90.3 & 96.

73 Judgment para 90.2.

74 Judgment para 120.

75 As above.

76 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.'

not a right attributed to groups,<sup>77</sup> and found that its 'patently clear terms' meant that a requirement that an individual be a member of a political party 'surely derogates' from the right.<sup>78</sup> This may be seen as the African Court adopting a strict reading of article 13(1) of the African Charter, and in particular the words 'freely' and 'directly', by finding that the right to participate in government goes further than a right found through the possibility of joining a political party, as argued by Tanzania, but instead as a right which allows a citizen to participate freely and directly and, therefore, independently. The African Court proceeded to examine whether this derogation was justifiable under articles 27(2)<sup>79</sup> or 29(4)<sup>80</sup> of the African Charter,<sup>81</sup> both 'claw-back' provisions allowing for the derogation of rights when weighed against the rights of others or for the strengthening of social or national solidarity. Specifically, the African Court examined the jurisprudence pertaining to a state's restriction of a citizen's rights and when it may be considered proportionate.<sup>82</sup> In particular, it recalled that the African Commission on Human and Peoples' Rights (African Commission) had found that the 'only legitimate reasons for limitations to the rights and freedoms of the African Charter' are found in article 27(2) of the African Charter, and that for a right that is effected through a law of 'general application', the question of whether it is proportional can be answered by weighing the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal.<sup>83</sup> It further noted that the 'legitimate state interest' must be 'proportionate with and absolutely necessary for the advantages which are to be obtained'.<sup>84</sup> It also noted that the European Court of Human Rights and Inter-American Court of Human Rights take similar approaches on the restriction of rights.<sup>85</sup>

The African Court also considered the United Nations (UN) Human Rights Committee's General Comment 25 on article 25 of the

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77 Judgment (n 1 above) paras 97 & 98.

78 Judgment para 99.

79 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

80 '[T]o preserve and strengthen social and national solidarity, particularly when the latter is threatened.'

81 Judgment (n 1 above) para 100.

82 Judgment paras 106.1-106.5.

83 Judgment para 106.1, referring to *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998); *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).

84 Judgment (n 1 above) 106.1

85 Judgment paras 106.2-106.5, referring to *Handyside v United Kingdom* ECHR (7 December 1976) Ser A 24; *Gillow v United Kingdom* ECHR (24 November 1986) Ser A 109; *Olsson v Sweden* ECHR (24 March 1988) Ser A 130; *Sporrong & Lonnroth v Sweden* ECHR (23 September 1982) Ser A 52; arts 30 & 32(2) American Convention on Human Rights; *Baena Ricardo & Others v Panama* IACHR (2 February 2001) Ser C/Doc 72. See also Judgment (n 1 above) para 107.1.

ICCPR,<sup>86</sup> and found that limitations to African Charter rights and freedoms are only those set out in article 27(2) of the African Charter and that such limitations must be proportionate to the legitimate aim pursued.<sup>87</sup>

In the present case, the African Court found that there was nothing in Tanzania's arguments to demonstrate that the restrictions on the right to participate freely in the government fell within the permissible restrictions set out in article 27(2) of the African Charter, and that prohibition was not proportional to the claim by Tanzania of fostering national unity and solidarity.<sup>88</sup>

The African Court distinguished the present case from *Castañeda* relied on by Tanzania, stating that in that case, the Inter-American Court of Human Rights found that individuals had other options to seek public elective office, in particular pointing out that, apart from being a member of a political party and being sponsored by that party, prospective candidates in Mexico could also be sponsored by a political party without it being necessary to be a member, or that an individual could easily form a political party since the requirements were not arduous.<sup>89</sup> The African Court found that in the present case, the only option available to Tanzanians was membership of and sponsorship by a political party.<sup>90</sup> It observed that a person's freedom to choose a candidate of their choice was, therefore, restricted to those sponsored by a political party,<sup>91</sup> therefore finding that the requirement that a citizen must be a member of a political party is 'an unnecessary fetter' that denies citizens direct participation, which amounts to a violation of their rights.<sup>92</sup>

The African Court's approach here to the claw-back provisions found in articles 27(2) and 29(4) of the African Charter is likely to play an important role in future cases as the African Court moves forward and considers more cases on their merits. The Court made it clear that these provisions could only be used in limited circumstances and

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86 Judgment para 105.4, referring to the UN Human Rights Committee's General Comment 25 on art 25 of the ICCPR, para 17: 'The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.'

87 Judgment (n 1 above) para 107.1.

88 Judgment para 107.2.

89 Judgment para 107.3.

90 As above.

91 Judgment para 109.

92 As above. The Court also found that Tanzania could not use art 13(1) of the African Charter as a reason for not complying with international standards. Citing the African Commission's findings, it found that, having ratified the African Charter, Tanzania was under an obligation to enact laws which are in line with the African Charter. See Judgment (n 1 above) para 109, referring to *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 50.

could not be used as a catch-all for member states to hide behind by arguing that any laws which may violate the African Charter, or other international human rights instruments, could be justified by the need to consider the rights of others or for national or social solidarity. It means that member states seeking to rely on these provisions will have to work much harder to justify the violations, other than simply arguing that it was necessary for the greater good or for social necessity, which is essentially what Tanzania did in this case without pointing to specific examples.

The African Court also dismissed Tanzania's argument that Mtikila had formed his own political party, as in no 'way absolv[ing] [Tanzania] from any of its obligations',<sup>93</sup> thus demonstrating that, even if an applicant has managed to circumnavigate a violated right, this does not absolve the member state's actions which violated the right in the first place, or nullify the need for the African Court to make a finding and recommendations for rectification. The African Court confirmed that these types of cases should not be considered as 'personal action[s]' since, if there is a violation, it affects all Tanzanians.<sup>94</sup> Despite the fact that Mtikila had set up a political party, the African Court found that, should he wish to again stand as an independent candidate, he had the right to insist on the 'strict observance of his Charter rights'.<sup>95</sup> The African Court considered it arguable that, even if Mtikila continued as a member of his own political party, he still had the right to challenge the prohibition of independent candidates.<sup>96</sup> Again, this stance shows that Mtikila's ability to surmount the violation does not negate the African Court's duty to consider the application not as a narrow issue affecting one individual or NGO, as Tanzania appeared to argue, but instead as a violation affecting every citizen of Tanzania.

### 5.3.2 Right to freedom of association

The African Court also considered a possible violation of article 10 of the African Charter.<sup>97</sup> The African Court considered that freedom of association is negated if an individual is forced to associate with others or if other people are forced to join up with the individual.<sup>98</sup> It, therefore, found that by requiring individuals to belong to and be sponsored by a political party, Tanzania had violated the right to

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93 Judgment (n 1 above) para 110.

94 As above.

95 As above.

96 As above.

97 'Every individual shall have the right to free association provided that he abides by the law.' The African Court recognised the applicant's reliance on art 20 of the Universal Declaration and art 22 of the ICCPR. See Judgment (n 1 above) para 112.

98 Judgment para 113.

freedom of association as individuals are compelled to join or form an association before seeking election.<sup>99</sup> Thus, the African Court interpreted the right to freedom of association widely, incorporating not only the right to associate with others, but also the right *not* to be forced to associate with others as occurs when one is required to join a political party to run for public office.

The African Court again recalled that articles 27(2) and 29(4) of the African Charter allowed state parties some measure of discretion,<sup>100</sup> but it was not satisfied that the 'social needs' argument raised by Tanzania meant that the use of these claw-back provisions justified limiting the right to freedom of association.<sup>101</sup> The African Court, therefore, concluded that there had been a violation of article 10 of the African Charter.<sup>102</sup> The African Court demonstrated that it was willing to consider the claw-back provisions in articles 27(2) and 29(4) of the African Charter, but that the standard for applying them was high. Tanzania had simply not done enough to justify any interference with the right to freedom of association, again laying the onus firmly on member states seeking to use these provisions to demonstrate clearly why it should be used, above and beyond the vague and wide-ranging 'social needs' argument Tanzania sought to rely on.

### 5.3.3 Right not to be discriminated against and the right to equality

As to the right not to be discriminated against, the African Court understood the discrimination claimed by the applicants to be between Tanzanians who are not members of a political party, and therefore cannot run for election, and those who are members and therefore can.<sup>103</sup> Based on this understanding, the African Court considered the right not to be discriminated against related to the right to equal protection by the law as guaranteed by article 3(2) of the African Charter,<sup>104</sup> and that, in light of article 2 of the African Charter,<sup>105</sup> the alleged discrimination may be related to a distinction based on 'political or any other opinion'.<sup>106</sup>

The African Court, therefore, considered whether Tanzania's arguments, namely, that the particular structure of the Tanzanian mainland and Zanzibar and its history, required a 'gradual construction of a pluralist democracy in unity' reasonably justified the

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99 Judgment para 114.

100 Judgment para 112.

101 Judgment para 115.

102 As above.

103 Judgment paras 116-118 & 119.

104 'Every individual shall be entitled to equal protection of the law.'

105 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

106 Judgment (n 1 above) para 119.

'difference in treatment' between Tanzanians who are members of a political party and those who are not.<sup>107</sup>

Having already indicated that similar 'social needs' grounds could not justify restrictions on the right to participate in government and the right to freedom of association, the African Court considered that these same grounds could not legitimise the restrictions not be discriminated against and the right to equality before the law. The African Court, therefore, concluded that there had been a violation of articles 2 and 3(2) of the African Charter.<sup>108</sup> This approach is certainly a wide interpretation of article 3(2) of the African Charter, as the African Court effectively read that the enjoyment of rights includes not only race, ethnic group, political status or other delineated categories, but also the status of non-membership of a political party.

#### 5.3.4 Breach of the rule of law

With respect to Mtikila's arguments regarding a breach of the rule of law, the African Court found that the concept of the rule of law was an all-encompassing principle under which human rights fall, and so cannot be treated in abstract or wholesale.<sup>109</sup> It found that Mtikila's claim was not related to a specific right and that, therefore, the issue of the violation of the principle of the rule of law did not properly arise.<sup>110</sup> While article 3(1) of the African Court Protocol allows for applications alleging violations of not only the African Charter but other international human rights instruments which the member state in question has ratified, it appears that an application alleging a breach of the rule of law is not precise enough to be considered by the African Court. In doing so, the African Court appears to approach the rule of law as an all-encompassing principle under which specific allegations of specific violations, such as the right to participate in government or the right to freedom of association, can be brought. This approach is likely to forestall any further applications brought by future applicants for a violation of the rule of law, who can instead focus on which specific alleged errors were committed under specific human rights instruments.

#### 5.3.5 Alleged violations of the ICCPR and Universal Declaration

The African Court noted that, according to article 3(1) of the African Court Protocol, it had jurisdiction to interpret international treaties.<sup>111</sup> However, having considered the alleged violations under the relevant provisions of the African Charter, it did not deem it necessary to consider the application of such international treaties.<sup>112</sup> Whilst the

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107 As above.

108 As above.

109 Judgment para 121.

110 As above.

111 Judgment para 122.

112 Judgment para 123.

African Court's clarification of article 3(1) of the Court Protocol should be seen as a confirmation that it has the jurisdiction to hear applications alleging violations of not only the African Charter but other international human rights instruments, the decision not to examine the allegations and make findings is disappointing. Although the African Court found violations of the African Charter, violations of other international human rights instruments should not be seen as an 'either/or' option. The African Court had the opportunity to not only state that it has jurisdiction over other international human rights instruments, but also to undertake an examination of the allegations. Without a thorough and detailed explanation as to why, despite having jurisdiction, the African Court simply elects not to examine the alleged other violations. It can be argued that in addition to fully exercising its power, the African Court's examination of violations of other international human rights instruments would also provide the applicants with a complete picture of the violation of their rights and accurately describe the member state's violations on multiple levels. It is to be hoped that future cases seek to examine all violations, although the precedent set in this case appears to have also been followed in the recent case of *Zongo*.<sup>113</sup>

## 6 Separate opinions

Of the nine judges to sit on the case, Judges Ouguergouz, Ngoepe and Niyungeko attached separate opinions.<sup>114</sup> In his separate opinion, Judge Ouguergouz stated that, whilst he was of the view that there had been a violation of articles 2, 3(2), 10 and 13(1) of the African Charter, the reasons given had not been articulated with sufficient clarity.<sup>115</sup> He also argued that the African Court should have first dealt with the issue of jurisdiction before considering admissibility.<sup>116</sup>

With regard to jurisdiction, Judge Ouguergouz argued that the African Court must first satisfy itself as to its jurisdiction to hear an application even where parties have failed to raise it as an argument.<sup>117</sup> In particular, he argued that the issue of jurisdiction must be considered at personal, material, temporal and geographical levels.<sup>118</sup> As to personal jurisdiction, Judge Ouguergouz argued that the African Court properly considered that as Tanzania had signed the special declaration allowing individuals to bring cases and that the

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113 See generally *Zongo* (n 21 above), where the African Court failed to consider alleged violations of the ICCPR or Universal Declaration, despite these being raised by the applicants.

114 See separate opinions (n 17 above).

115 Ouguergouz opinion (n 17 above) para 1.

116 As above.

117 Ouguergouz opinion para 2.

118 Ouguergouz opinion para 5.



NGOs held observer status before the African Commission, it had personal jurisdiction.<sup>119</sup> He argued that objections to material and temporal jurisdiction were implicitly raised by Tanzania.<sup>120</sup> With regard to material jurisdiction, Judge Ouguergouz noted that Tanzania objected to Mtikila relying on the treaty establishing the East African Community, which was not in existence at the time Mtikila took his case to court in 1993.<sup>121</sup> He argued that the African Court should, therefore, have determined whether the treaty establishing the East African Community was applicable.<sup>122</sup> In this regard, he argued that it was for the African Court to determine which treaties and conventions should be considered 'relevant human rights instruments'.<sup>123</sup>

With regard to temporal jurisdiction, Judge Ouguergouz argued that in dealing with Tanzania's objections, the African Court should have made a clearer distinction between the obligations of Tanzania under the African Charter and its obligations under the African Court Protocol and 'optional declaration'.<sup>124</sup> He argued that the African Court should have made it clear that its jurisdiction was based solely on the Court Protocol and the optional declaration.<sup>125</sup> He argued that the critical date in determining temporal jurisdiction was the date on which Tanzania deposited the special declaration under article 34(6) of the Protocol, not from the entry into force of either the African Charter or Protocol.<sup>126</sup> He, therefore, contended that any alleged violations prior to 29 March 2010, when Tanzania deposited the special declaration, did not fall within the temporal jurisdiction of the African Court other than where the violations bear a 'continuous character'.<sup>127</sup> This approach would mean that applications against member states could only run from the date of signature of the special declaration and not from the date of ratification of the African Charter, as found by the majority. As discussed above, the approach adopted by the majority has the potential to result in applications dating back many years, before a member state signed the African Court Protocol or special declaration and may lead to a number of matters which would otherwise not fall within the jurisdiction of the African Court being within its jurisdiction. Certainly, the approach

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119 Ouguergouz opinion paras 6-8. Judge Ouguergouz noted that with regard to geographical jurisdiction, there could be no dispute considering the nature of the violations. See Ouguergouz opinion (n 17 above) para 9.

120 Ouguergouz opinion para 10.

121 Ouguergouz opinion paras 11 & 12. Judge Ouguergouz noted Tanzania's arguments that the Treaty establishing the East African Community was not a human rights instrument and was therefore extraneous to the case. Ouguergouz opinion para 12.

122 Ouguergouz opinion para 13, referring to arts 3(1) & 7 of the African Court Protocol and Rule 26(1) of the Rules of the Court.

123 Ouguergouz opinion paras 14-16.

124 Ouguergouz opinion para 20. See also Ouguergouz opinion paras 17-19.

125 Ouguergouz opinion para 20.

126 Ouguergouz opinion para 22.

127 Ouguergouz opinion paras 22 & 23.

advocated by Judge Ouguergouz would limit applications to those alleging violations since ratification of the Court Protocol or special declaration but, importantly, could still encompass applications alleging violations that start prior to the member state signing the Protocol and/or special declaration which are continuous in nature and run after the ratification of the Protocol or special declaration.

Judge Ouguergouz also provided a brief comment on the admissibility of the applications of the two NGOs.<sup>128</sup> In his opinion, the African Court should have considered the NGOs' 'interest to act' and determined whether the NGOs had such an interest, thus allowing them to bring cases independently rather than on behalf of Mtikila.<sup>129</sup> The standing of NGOs is likely to be an issue which occurs more often in the future. Whereas other African human rights institutions, such as the African Committee of Experts on the Rights and Welfare of the Child, have made it clear that NGOs themselves may bring cases against member states,<sup>130</sup> so far the African Court has only entertained applications from individuals and NGOs. The Rules of the African Court and Court Protocol do not preclude an NGO from bringing a case on its own *per se*, but this issue will need to be addressed in future applications. Judge Ouguergouz's suggested approach of considering an NGO's 'interest to act' as a potential middle ground would at least ensure an NGO seeking to join an application has some nexus to the violation being alleged.

Judge Ouguergouz also considered the merits of the applications.<sup>131</sup> He argued that the barring of independent candidates does not, in itself, amount to a violation of articles 10 and 13(1) of the African Charter as it can only be a violation if it is considered an unreasonable or illegitimate limitation to the exercise of the rights.<sup>132</sup> He argued that the judgment would have benefited from being clearer that it is the test on whether the *limitations* are reasonable that was the key issue rather than the contravention of the articles themselves.<sup>133</sup> He argued that, unlike articles 22 and 25 of the ICCPR, articles 10 and 13(1) of the African Charter do not provide 'in a satisfactorily manner' for the freedom of association and the right of citizens to freely participate in the government of his or her country.<sup>134</sup> He submitted that the main weakness in the impugned

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128 Ouguergouz opinion paras 24-27.

129 Ouguergouz opinion paras 26-27.

130 See eg *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine Pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal* (15 April 2014) Dec 003/Com/001/2012, paras 16-24.

131 Ouguergouz opinion (n 17 above) paras 28-38.

132 Ouguergouz opinion para 28, referring to *Castañeda* (n 64 above).

133 Ouguergouz opinion para 34. Judge Ouguergouz suggests that para 109 of the Judgment should be located 'upstream', whilst para 108 of the Judgment is extraneous.

134 Ouguergouz opinion para 29.

African Charter articles is the 'claw-back' clauses they contain<sup>135</sup> and that, therefore, these articles should be interpreted along the same lines as article 25 of the ICCPR which allows for 'reasonable' restrictions, for example the age of the person.<sup>136</sup> He argued that article 27 of the African Charter may serve as a useful tool in assessing which limitations on the impugned articles could be considered reasonable as they suggest that the only limitations would be those required to ensure 'respect for the right of others, collective security, morality and common interest'.<sup>137</sup> Therefore, it lies with the respondent state to show that limitations meet this test.<sup>138</sup> Judge Ouguergouz noted that Tanzania failed to provide such proof.<sup>139</sup> In effect, Judge Ouguergouz left the door open for the use of claw-back provisions in certain circumstances where its use reaches the threshold allowing a member state's legislation to ostensibly violate its citizens' African Charter rights, but that it is for the member state to demonstrate that this in fact is the case.

He further argued that, having found that Tanzania had violated articles 10 and 13(1) of the African Charter, the African Court could only have found that there was a violation of articles 2 and 3(2) of the African Charter.<sup>140</sup> He explained that the African Court should have started its reasoning by clearly indicating the distinction in scope between articles 2 and 3 of the African Charter,<sup>141</sup> and that different treatment does not necessarily mean discrimination.<sup>142</sup> Only after having discussed these premises should the African Court have dealt with the objective and reasonable nature of the limitations and rules that the aim of the difference is not legitimate in light of the African Charter.<sup>143</sup>

Judge Niyungeko's separate opinion addressed two issues, namely, (i) the order of treatment of admissibility and jurisdiction; and (ii) the African Court's grounds and reasoning in deciding whether it had

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135 Ouguergouz opinion para 30.

136 As above.

137 Ouguergouz opinion paras 30-32. Judge Ouguergouz argues that para 112 of the Judgment confirms that art 27 of the African Charter may be viewed as a general claw-back provision.

138 Ouguergouz opinion para 33.

139 Ouguergouz opinion para 34.

140 Ouguergouz opinion para 35.

141 Ouguergouz opinion para 37. Judge Ouguergouz submits that non-discrimination under art 2 of the African Charter applies only to rights guaranteed under the African Charter, whereas the principles of equality under art 3 of the African Charter applies to all the rights protected in the municipal system of a state party, even if they are not recognised in the African Charter. See Ouguergouz opinion para 36.

142 Ouguergouz opinion para 37, referring to General Comment of art 26 of the Second International Covenant that differentiation is not discrimination if it is based on objective and reasonable criteria and if the aim is legitimate in light of the Covenant; *Lithgow v United Kingdom* ECHR (8 July 1986) Ser A 102 para 177.

143 Ouguergouz opinion para 38.

*ratione temporis* jurisdiction.<sup>144</sup> With regard to the order of considering the jurisdiction and admissibility of the application, Judge Niyungeko noted that this was the first time the African Court had considered the admissibility of the application before jurisdiction.<sup>145</sup> Judge Niyungeko argued that the African Court's failure to explain why it considered admissibility first might leave an impression of inconsistency and a lack of coherence.<sup>146</sup> He also argued that the change in approach posed a problem of principle.<sup>147</sup> In his opinion, the African Court is unable to consider the admissibility of the application before it has satisfied itself as to jurisdiction.<sup>148</sup> He likened admissibility to a limb of the merits of the case and argued that there was little sense in a judge considering what he was requested to do without first determining whether he could do it.<sup>149</sup> Pointing to Rule 39 of the Rules of the African Court, Judge Niyungeko argued that it was clear that jurisdiction should be dealt with first, and only hereafter should admissibility be considered.<sup>150</sup> There certainly seems to be merit in Judge Niyungeko's arguments, since a court or tribunal can have jurisdiction over a matter but not find the applicant admissible, but can never consider a case admissible if it does not have jurisdiction. To this end, it should be noted that in the more recent case of *Zongo*, the African Court elected to consider jurisdiction in a separate hearing before ultimately proceeding to consider the merits in a later hearing, giving some credence to the dissenting opinions filed in this case.<sup>151</sup>

As to *ratione temporis* jurisdiction, Judge Niyungeko viewed the finding that the continuing nature of the violation surmounted any temporal issues 'in order'.<sup>152</sup> He, however, argued that the African Court's analysis on the prior ratification of the African Charter was 'difficult to grasp',<sup>153</sup> as Tanzania's arguments related to the date of entry into force of the African Court Protocol, whilst the African Court's response was to invoke the date of entry into force of the African Charter.<sup>154</sup> In his opinion, the African Court should have made it clear that, although Tanzania was bound by the African Charter, it lacked the temporal jurisdiction as long as the Court Protocol conferring jurisdiction on it was not yet operational.<sup>155</sup> Judge Niyungeko described the African Court's failure to consider the date of entry into force of the Court Protocol, which confers jurisdiction on

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144 Niyungeko opinion (n 17 above) para 1.

145 Niyungeko opinion para 3.

146 As above.

147 Niyungeko opinion para 4.

148 As above.

149 As above.

150 Niyungeko opinion paras 5-7.

151 See *Zongo* (n 21 above).

152 Niyungeko opinion (n 17 above) para 11.

153 As above.

154 As above.

155 Niyungeko opinion paras 12 & 17.

the African Court, when assessing Tanzania's submissions on temporal jurisdiction, as 'simply inconceivable'.<sup>156</sup> Again, as discussed above regarding Judge Ougergouz, Judge Niyungeko's approach appears to have merit since the majority's approach of the operational date being from ratification of the African Charter, which occurred many years earlier, widens the possible scope of application well beyond the date from which the member state ratified the Protocol creating the African Court.

Judge Ngoepe's separate opinion also dealt with the issue of whether, when writing a judgment, the African Court should always deal first with admissibility and thereafter with jurisdiction or *vice versa*.<sup>157</sup> He likened the argument to that of the chicken and the egg, and strongly advocated the need for flexibility.<sup>158</sup> He further argued that this change of approach also raised a 'problem of principle', namely, whether it is possible for the African Court to consider the admissibility of the application before having satisfied itself that it has jurisdiction.<sup>159</sup> He argued that the African Court could not consider admissibility first as jurisdiction is not 'all-embracing', and that, therefore, jurisdiction should be considered first.<sup>160</sup> As discussed above, whilst flexibility is preferred, especially in the embryonic stages of the African Court, an application can be within the jurisdiction of the African Court but not be admissible, but it can never be admissible if not within the African Court's jurisdiction.

## 7 Compensation, reparation and costs

Recalling article 27(1) of the African Court Protocol and Rule 63 of the Rules of the Court, which allow the African Court to make orders of compensation or reparation, the African Court noted that Mtikila had reserved his right to elaborate on his claim for compensation or reparation but had not done so.<sup>161</sup> The African Court, therefore, did not make a finding on the issue, but called upon Mtikila, if he so wished, to exercise this right.<sup>162</sup> As to the request by the NGOs that the African Court order Tanzania to pay their costs, the Court noted that Rule 30 of the Rules stated that '[u]nless otherwise decided by the Court, each party shall bear its own costs'. Taking into account all the circumstances of the case, the African Court was of the view that there was no reason to depart from the provisions of this Rule.<sup>163</sup> The

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156 Niyungeko opinion para 16.

157 Ngoepe opinion (n 17 above) para 1. Judge Ngoepe noted that in the present case, unlike in previous judgments, the African Court elected to deal with admissibility first and then with jurisdiction.

158 Ngoepe opinion paras 2 & 3.

159 Niyungeko opinion para 4.

160 As above.

161 Judgment (n 1 above) para 124.

162 As above; Reparations Ruling (n 2 above) para 6(4).

163 Judgment (n 1 above) para 125.

ruling that the NGOs should bear their own costs is disappointing and could be seen as setting a precedent whereby, even if successful, NGOs will not be able to recoup costs. This may lead to NGOs not wanting to incur financial costs with no prospect of recompense. In a scenario such as this case, it cannot be said that Tanzania would not be in a position to pay some or all of the costs of the NGOs. This may deter future applicants from bringing cases when they know that they are unlikely to recover the costs of the case. In the more recent case of *Zongo*, the African Court appears to follow the same approach in refusing to award costs to the NGO,<sup>164</sup> although it should be noted that the African Court did grant a token sum for moral damages suffered by the NGO.<sup>165</sup>

On 13 June 2014, following written submissions by Mtikila and Tanzania, the African Court reconvened to consider the issue of compensation and costs, for the first time in the Court's existence.

In his submissions, Mtikila argued that the ban on independent candidates required him to join different political parties and later to set up his own party.<sup>166</sup> He submitted that the ban also led him to engage in litigation, including before the African Court.<sup>167</sup> Mtikila's claim for costs and expenses, therefore, included the cost of setting up his political party and participating in elections, and the cost of litigation at the domestic level and before the African Court.<sup>168</sup> He claimed costs and expenses totalling Tsh 4 168 667 363 (approximately \$2 500 000).<sup>169</sup> He also claimed lawyers' fees of \$60 250 for litigation before the African Court.<sup>170</sup>

Mtikila also claimed moral damages occasioned by stress and moral harm exacerbated by incidents of police searches and loss of the opportunity to participate in the affairs of his country.<sup>171</sup> His claim for moral damages amounted to Tsh 831 322 637 (approximately \$500 000).<sup>172</sup>

In addition to his claim for damages, costs and expenses, Mtikila also requested the African Court to set a time line for Tanzania's compliance with the African Court's findings, requesting that

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164 See *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso* (5 June 2015) App 013/2011 (*Zongo Reparations Judgment*) para 72.

165 See *Zongo Reparations Judgment* (n 164 above) para 67.

166 *Reparations Ruling* (n 2 above) para 16.

167 As above.

168 *Reparations Ruling* para 18.

169 As above.

170 *Reparations Ruling* para 19.

171 *Reparations Ruling* para 17.

172 As above.

Tanzania reports every three months on its compliance until the African Court is satisfied that its findings have been complied with.<sup>173</sup>

Tanzania disputed all Mtikila's claims for reparations.<sup>174</sup> It argued that the issue of African Charter violations did not arise since Mtikila had decided to divert to the system of independent candidature only after his party had been refused registration.<sup>175</sup> It submitted that Mtikila's party was refused registration because he had refused to comply with the legal requirements required by all political parties and, therefore, could not claim to have been prevented from participating in public affairs or forced to join a political party.<sup>176</sup>

In addition, Tanzania argued that since Mtikila had failed to claim for the moral damages in either his application or at the domestic level, therefore failing to exhaust local remedies, the claim should be dismissed.<sup>177</sup> It also argued that Mtikila had exaggerated his claims for moral damages and the loss of opportunity to participate in public affairs.<sup>178</sup> In support of this, Tanzania argued that Mtikila premised the loss of opportunity to participate in public affairs on 'very varied and unpredictable political, social and economic factors',<sup>179</sup> and that Mtikila had participated voluntarily in the political processes.<sup>180</sup> It further argued that the inclusion of Tsh 25 000 for the provisional registration of his party was disputed as Mtikila had to follow the procedure to register the party, and that, therefore, this loss should not be attributed to it since this was a legal requirement.<sup>181</sup> Tanzania further argued that the current constitutional review process was sufficient reparation for the non-pecuniary damages.<sup>182</sup>

Tanzania further argued that Mtikila had also exaggerated costs and expenses.<sup>183</sup> It contended that the costs of Mtikila's independent presidential campaign should also be disallowed, since Tanzania did not allow independent candidates.<sup>184</sup> Tanzania further argued that that the itemised expenses in Mtikila's income and expenditure account were contrary to the Political Parties Act and Election Expenses Act and was 'fabricated and exaggerated'.<sup>185</sup> It contended that it should be given ample opportunity to challenge, verify and authenticate all the expenses claimed.<sup>186</sup>

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173 Reparations Ruling para 20.

174 Reparations Ruling paras 24(i)-(viii).

175 Reparations Ruling para 23(i).

176 As above.

177 Reparations Ruling para 23(ii).

178 Reparations Ruling para 23(iii).

179 As above.

180 As above.

181 Reparations Ruling para 23(iv).

182 Reparations Ruling para 23(ix).

183 Reparations Ruling para 23(v).

184 Reparations Ruling para 23(vi).

185 Reparations Ruling para 23(vii).

186 As above.

Finally, Tanzania submitted that Mtikila's claim for costs for domestic litigation was against the African Court's order that each party shall bear its own costs.<sup>187</sup> It noted that Mtikila had failed to detail the costs or to provide evidence.<sup>188</sup> It argued that, since the domestic court had not awarded costs, the African Court could not do so as this would usurp the jurisdiction of the national courts.<sup>189</sup> Tanzania also disputed Mtikila's claim for costs of litigation before the African Court as his arrangement with counsel was *pro bono* and amounted to a 'retrospective acquisition of funds from the Court'.<sup>190</sup>

Mtikila replied that the costs of setting up his political party and subsequent costs of running it resulted exclusively from Tanzania's ban on independent candidates that had been found to be in violation of the African Charter.<sup>191</sup> He argued that the litigation before the African Court was a natural consequence of the ban on independent candidates,<sup>192</sup> and that the claim for stress and moral harm was a 'matter of common sense', especially since the requirement to start a political party and campaigns was a full-time work which prevented him from carrying out other full-time work, apart from his religious duties.<sup>193</sup> He argued that it was for Tanzania to show proof of errors in any of his claims for damages.<sup>194</sup>

With regard to claims for lawyers' fees for litigation in the African Court, Mtikila submitted that the expenses should be imputed to Tanzania as the African Court found it responsible for violating his African Charter rights, particularly since his claim for legal aid was denied.<sup>195</sup> He argued that Tanzania's response that independent candidacy remained banned highlighted the need for the African Court to draw up a 'precise calendar' to ensure that Tanzania complies with the African Court's judgment.<sup>196</sup>

In its finding on reparations, the African Court clearly identified the need for reparation and compensation for both pecuniary and non-pecuniary damages for individuals, and approached the issue of reparations from the welcome precedent of recognising that reparations could be awarded where a violation of the applicant's rights was found. The African Court specifically relied on the fundamental principle of international law that, where a violation of an 'international obligation' causes harm, there is an obligation to

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187 Reparations Ruling para 23(viii).

188 As above.

189 As above.

190 Reparations Ruling para 23(x).

191 Reparations Ruling para 25(iii).

192 As above.

193 Reparations Ruling para 25(iv).

194 Reparations Ruling para 25(v).

195 Reparations Ruling para 25(vi).

196 Reparations Ruling para 25(viii).



provide adequate reparation,<sup>197</sup> which is reflected in article 27(1) of the African Court Protocol.<sup>198</sup>

As regards the pecuniary damages, the African Court started by assessing the African Commission's jurisprudence that a member state that violates African Charter rights should take measures to ensure that victims are given effective remedies, including restitution and compensation.<sup>199</sup> However, the African Court stated that, whilst the African Commission has recognised the rights of victims to compensation, it had not yet identified which factors states should take into account in their assessment of the compensation due,<sup>200</sup> although it had stated that a member state should compensate a victim for the torture and trauma suffered in line with international standards, and should ensure that there is payment of a compensatory benefit.<sup>201</sup> The African Court also looked to the Inter-American Court of Human Rights which has made findings on pecuniary damages.<sup>202</sup> Whilst a logical starting point, it should be noted that the African Commission's approach to compensation relates to the evaluation and assessment of damages to be paid by the member state *itself*. In the case of the African Court, it is the Court that awards damages and not the member state. Therefore, whilst of some interest, a direct comparison between the African Commission regime and the African Court is limited.

The African Court noted that Mtikila had submitted income and expenditure statements, but held that there were 'no sufficient evidentiary elements presented to establish that these damages directly arose from the facts of this case' and the violations of the African Charter.<sup>203</sup> The African Court also noted that Mtikila had 'insisted' on presenting evidence at a hearing and had failed to present this evidence in written submissions<sup>204</sup> or to produce any receipts to support his expense claims.<sup>205</sup> The African Court, therefore, found that there was a lack of evidence to prove the 'causal nexus' between the facts of the case and the damages claimed by Mtikila, and rejected his claim of pecuniary damages.<sup>206</sup>

The African Court concluded by stating that it was not sufficient to show that a state had violated a provision of the African Charter, but that it was also necessary to prove the damages, and that, in principle,

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197 Reparations Ruling para 27, referring to *Factory of Chorzow (Ger v Pol)* PCIJ (13 September 1928) Ser A 17 para 29.

198 Reparations Ruling para 28.

199 Reparations Ruling para 29, referring to *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229(d).

200 Reparations Ruling (n 2 above) para 29.

201 As above.

202 As above.

203 Reparations Ruling para 30.

204 As above.

205 As above.

206 Reparations Ruling para 32.

the existence of a violation of the African Charter was not *per se* sufficient to establish a material damage.<sup>207</sup> Accordingly, the African Court set out in plain terms that, whilst it had the jurisdiction to award expenses and damages, these should be backed up by receipts and other evidence in order to be considered valid. As to the costs incurred by Mtikila in campaigning with his own political party, again, the African Court's decision demonstrates that it is not enough to make claims, but a clear causal link between the claim and the violation must be established. In theory, the requirement that a person must be a member of a political party and, therefore, must bear the cost or expense of setting up such a party, is directly related to the violation. However, what is clear from the African Court's decision is that an applicant must do more than simply point out expenses, but must also demonstrate a clear link, in the absence whereof it will not award expenses.

With regard to non-pecuniary damages, the African Court recalled that moral damages were not damages occasioning economic loss, but which cover suffering and afflictions caused to the victim, the emotional distress of family members and non-material changes in the living conditions of the victim and his family.<sup>208</sup> The African Court again recalled the African Commission's jurisprudence on compensation for torture and trauma suffered, and the Inter-American Court on Human Rights test that non-pecuniary damages 'may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them as well as changes of a non-pecuniary nature in the living conditions of the victims or their family'.<sup>209</sup> It also considered the jurisprudence of the European Court of Human Rights on the awarding of non-pecuniary damages, noting that such damages could include damages for pain and suffering, anguish and distress and loss of opportunity, but observed that damages were awarded in some cases, whilst in others the European Court refused to speculate.<sup>210</sup>

The African Court found that in the present case, Mtikila had failed to produce evidence to support the claim that the damages claimed were directly caused by the facts of the case.<sup>211</sup> Whilst refusing to speculate, the African Court also stated that the finding of violations of Mtikila's African Charter rights and the orders contained in the judgment were just satisfaction for the non-pecuniary damages claimed.<sup>212</sup> Whilst Mtikila had failed to convince the African Court to

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207 Reparations Ruling para 31.

208 Reparations Ruling para 33.

209 Reparations Ruling para 35, referring to *Villagran Morales et al v Guatemala* IACHR (26 May 2001) Ser C/Doc 77 para 84.

210 Reparations Ruling para 36, referring to *B v Austria* (1986) EHRR 409; *W v United Kingdom* (1987) EHRR 435; *P & Others v United Kingdom* (1999) EHRR 3.

211 Reparations Ruling para 37.

212 As above.

award non-pecuniary damages, this again may be seen as a welcome development in that it is recognised that non-pecuniary damages are within the remit of the African Court's powers to award damages, an approach which laid the foundation for the awarding of non-pecuniary damages in the recent *Zongo* reparations judgment.

As to legal expenses, the African Court accepted that expenses and costs formed part of the concept of reparations.<sup>213</sup> The African Court, however, found that Mtikila should have provided 'probative documents' and developed arguments relating to the evidence and, where financial claims were made, should have clearly described the items and the justification therefor.<sup>214</sup> It stated that the applicant bore the burden of proof, and that in the present case Mtikila had failed to properly develop his claims.<sup>215</sup>

Accordingly, the African Court rejected Mtikila's claims for pecuniary damages,<sup>216</sup> found that there was sufficient reparation for non-pecuniary damages,<sup>217</sup> dismissed the legal expense claims,<sup>218</sup> and found that each party should bear its own costs.<sup>219</sup> Whilst the African Court, therefore, dealt a blow to Mtikila himself due to a lack of evidence demonstrating a link between the alleged damages suffered or a failure to provide receipts and documentation, it was not a theoretical objection to the awarding of damages *per se*. This may, therefore, be seen as a positive step in the development of the award of damages at the African Court, as seen in *Zongo*, where the African Court took the foundations laid in Mtikila to proceed to award damages to the applicants – the first such award by the African Court.

With regard to compliance, the African Court noted Tanzania's reply at the reparations stage where it maintained that the judgment was wrong, since the law in Tanzania prohibited independent candidates from running for election.<sup>220</sup> The African Court expressed its 'concern' at this line of argument, compounded by Tanzania's failure to report to the African Court on the measures it was taking to comply.<sup>221</sup> The African Court, therefore, granted Mtikila's request for compliance, but extended the time for reporting, ordering Tanzania to report within six months from the date of the ruling on the implementation of the judgment.<sup>222</sup> Of course, such compliance can only occur where the member state in question acknowledges the validity of the judgment sought to be complied with. Perhaps of most concern in the reparations ruling is Tanzania's apparent lack of

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213 Reparations Ruling para 39.

214 Reparations Ruling para 40.

215 As above.

216 Reparations Ruling para 46(2).

217 Reparations Ruling para 46(1).

218 Reparations Ruling para 46(3).

219 Reparations Ruling para 46(7).

220 Reparations Ruling para 43.

221 As above.

222 Reparations Ruling paras 43 & 46(4).

understanding of the judgment itself. It is a disturbing development that, even having rendered the judgment, Tanzania still argued that it was wrong. This stance, clearly, is likely to weigh on the effectiveness of compliance in Tanzania, not only for this case but for future cases, and may have a bearing on how other member states facing judgments against them approach compliance.

The African Court, therefore, made a welcome initiative to *proprio motu* order 'measures of satisfaction'.<sup>223</sup> The African Court noted that, in light of its concerns over Tanzania's apparent continued dispute over its findings and failure to report on implementation, Tanzania should within six months of the reparations decision (i) publish the official English translation translated into Kiswahili at its own expense and publish in both English and Kiswahili, once in the official gazette and once in a national newspaper;<sup>224</sup> and (ii) publish the judgment in its entirety in English on an official website to remain available for one year.<sup>225</sup> The African Court ordered that nine months from the ruling, Tanzania should submit to the African Court a report on the above measures.<sup>226</sup> In this context, the African Court's *proprio motu* move to impose measures of satisfaction are welcome, although it must be said that these measures are not particularly onerous, but Tanzania's compliance would at least show some kind of recognition of the African Court's powers by Tanzania. At the very least, these measures appear to demonstrate the African Court's serious concerns over Tanzania's apparent failure to acknowledge the judgment.

## 8 Conclusion

Despite some disappointment regarding the lack of consideration of international human rights instruments, the awarding of costs and the need for clarification on certain issues, such as its temporal jurisdiction, the African Court should be commended for having delivered its first judgment on the merits. The judgment provides several well-reasoned findings, including those on the exhaustion of local remedies, and dismissing Tanzania's arguably-weak jurisdictional submissions, such as its 'social needs' arguments, which found little favour with the African Court, who required more to allow the claw-back provisions to override the violation of the applicant's rights as set out in the African Charter, especially given the fact that Tanzania had failed to provide concrete examples of where these needs arose, as discussed above.

While wanting to avoid conjecture, it is worth considering whether such concrete examples provided by Tanzania as to the kind of civil

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223 Reparations Ruling paras 44 & 45, referring to inherent powers under art 27 of the African Court Protocol.

224 Reparations Ruling paras 45(i) & 46(5)(i).

225 Reparations Ruling paras 45(ii) & 46(5)(ii).

226 Reparations Ruling para 46(6).

unrest or political tension alluded to may have amounted to a more persuasive argument in favour of the 'social need' for the prohibition of independent candidates. As it stands, the case sets an important precedent and will require member states to work somewhat harder than simply relying on 'justifiable restrictions' based on 'social needs' when introducing legislation or amending constitutions that ostensibly violate citizens' human rights.

Whilst the precedent set regarding claw-back provisions and the finding on violations themselves are encouraging, it is unfortunate that the African Court declined to discuss the potential violation of international treaties. As noted above, the African Court categorically states that international treaties, such as the ICCPR, are within its jurisdiction, which does at least solidify the jurisdictional position on international treaties. However, the African Court's decision not to consider the merits of the applicant's case is disappointing. The African Court appears to have adopted an 'either/or' approach. While the African Court found that Tanzania had violated the applicant's African Charter rights, this should not mean that the applicant's other rights under international treaties should be left unexamined. There may, of course, be practical reasons behind the African Court's decision not to go into the merits of international treaties, but in deciding not to consider these in detail, one is left wondering what the analysis may have brought about, while missing the possibility of further discussion and jurisprudence to guide future applications. Perhaps disturbingly, this 'either/or' approach was again followed in *Zongo*.

As to the issue of costs, it is discouraging to see the African Court rejecting the claim for costs by the NGOs.

Nevertheless, the African Court's clear position on its power to award damages should be welcomed. Unfortunately, without further information about Mtikila's claims, it is difficult to assess how detailed his expenses were, but it serves as a useful reminder to both applicants and counsel that claims will only be entertained where detailed records of expenses, costs and damages are maintained and submitted.

The reparations judgment also revealed that, at best, Tanzania appeared to be attempting the re-litigate the African Court's findings on the merits and, at worst, that it appeared to take the position that the judgment was wrong and that, therefore, it need not comply with it or entertain the subject of reparations. Either way, Tanzania appeared to have little interest in complying with the judgment. Bearing in mind Tanzania's failures thus far, it remains to be seen whether they will comply with these new orders and publish the judgment in the press and online. Clearly, in view of Tanzania's responses thus far, the issue of compliance should be of serious concern, and changes to Tanzania's electoral laws appear a while away yet.

Looking forward, with this judgment the African Court now enters an era of enforcement and many questions arise, such as how the Tanzanian government will react. How will the African Court react to Tanzania's reaction? Which other African countries have similar legislation? Will this decision require these states to also change their election laws? The reparations ruling does not paint a very bright picture of the dawn of this era of enforcement. However, in time all these questions will be answered. For now, *Mtikila* should be seen as a watershed moment and a progressive step by the African Court towards the protection of human rights in Africa.