

REPORT ON AFRICA REGIONAL JUDGES' FORUM

21-23 JUNE 2023

JOHANNESBURG, SOUTH AFRICA

A. INTRODUCTION

This report documents the attendance of Justices Mathaba and Makhetha to the Africa Regional Judges Forum (ARJF) in Johannesburg, South Africa between the 21st and 23rd June 2023. The Forum was supported by the United Nations Development Programme (UNDP) and the Southern African Litigation Centre (SALC). The report is structured around the presentations that were made during the two-day period as well as the recommendations. Participants included members of the judiciary from common-law countries including Botswana, Eswatini, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Nigeria, the Gambia, Sierra Leone, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.

B. ABOUT AFRICA REGIONAL JUDGES' FORUM

The Forum was first convened in 2014, in response to the 2012 report of the Global Commission on HIV and the Law, *Risks, Rights & Health*, which emphasised the protective role of law in promoting the rights of marginalised populations and reducing the number of new HIV infections. Since then, the platform has maintained a growing network of prominent judges across Africa who meet annually to share knowledge and discuss developments in jurisprudence relating to HIV, TB, sexual and reproductive health and rights and the law.

C. OBJECTIVES OF THE JUNE 2023 FORUM

The June 2023 Forum aimed at providing judicial participants with a platform to reflect on the role of the judiciary in advancing non-discrimination, equality, inclusion, participation in society and access to services for marginalized populations in the context of HIV, sexual and reproductive health and development, including key populations, young people and people in places of detention.

D. ARRANGEMENT OF THE MEETING & LOGISTICS

The meeting was a two-day closed session, followed by an in-depth half-day follow-up on the 2022 meeting on prison oversight mechanisms. The Forum took the form of panel discussions and inputs from members of the judiciary and technical experts, interspersed with presentations by resource persons (technical experts, representatives of key and vulnerable populations, staff of UNDP and SALC) as appropriate, to provide information, review experiences and challenges and share recent jurisprudence in the region on selected topics. The participants from Lesotho were fully sponsored by the organisers.

E. PRESENTATIONS AND DISCUSSIONS

Judicial participants shared the experiences of their respective countries, reflecting on specific developments on progressive jurisprudence in the region, as well as countering developments that infringe the rights of the marginalised populations and limit inclusive development. The presentations were based on decided cases from various jurisdictions within the region. Topics for discussion included, *inter alia*, the following:

- The role of the judiciary in defending the constitution, the rule of law, judicial independence and justice for all in a democratic state.
- The role of an independent judiciary in countering shrinking civic space since independence and limitations on rights to freedom of expression, association and assembly in Africa.
- The role of the courts in countering misuse of and/or excessive police powers, reflecting on jurisprudence against police torture on innocent civilians. Notably, Lesotho presented on the judgment delivered by the Chief Justice in *Khabanyane v Commissioner of Police and Others (CIV/T/254/2016) [2023] LSHC 211* to demonstrate how Lesotho Courts frown at unlawful assaults by police on the marginalised in society. Additional input came from Justice Ntaba of Malawi on her judgement regarding police ‘sweeping exercises’ and arbitrary mass arrests under vagrancy laws. Justice Barishaki Cheborion from Uganda also shared points on his judgement on the nullification of parts of Uganda’s public order law, which gave police excessive powers to prohibit public gatherings and protests.
- The role of the courts in enforcing health rights and protecting all persons against discrimination and developing equality jurisprudence in a contested terrain – The presentations provided an overview of jurisprudence on bodily autonomy, sexual and reproductive health and rights for all, highlighting legal remedies used by the courts to support access to health rights, including sexual and reproductive health and rights for key and vulnerable populations.

The case of *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others (SA 6/2022; SA 7/2022) [2023]*

NASC 14 was discussed. In that case the victims' applications for citizenship were rejected by the Government in terms of the Namibian immigration laws based on their same-sex relationships. The High Court reversed the decision holding that same sex relationships are worthy of being afforded the same rights as other citizens. The presenters underscored the role of judges in ensuring that homosexual litigants are not judged and are treated with respect like other human beings. The importance of judges remaining true to their oath and not being influenced by their own religious beliefs in discharging their judicial functions was also highlighted.

F. FOLLOW UP SESSION ON PRINSONS' OVERSIGHT

The Forum was concluded with a follow-up meeting on the 23rd June 2023, to further the 2022 forum discussion on the implementation of independent prisons' oversight by the judiciary. The discussion highlighted the role of the judiciary in ensuring independent and consistent oversight of places of detention in Africa, reflecting on Malawi, Uganda and Botswana Principles of judicial oversight. The content of judicial oversight of places of detention proposed guidelines and checklist for oversight visits, principles of judicial oversight, the role of families in prisoner support and prison oversight, assessing the factors which contribute to a high percentage of Pretrial Detention (PTD) in a prison, an example of coordinated prison visits, the importance of visiting child detention facilities and the use of mobile courts in prison oversight to address prison overcrowding (examples from Malawi, Kenya and Ghana), instilling prison oversight by apex courts.

The discussion on the topic revealed that persons deprived of their liberty are particularly vulnerable to diseases and less likely to have the means to improve their health. It was noted that such diseases as HIV, hepatitis and active tuberculosis (TB) are prevalent in prisons and other closed settings across the world. HIV and TB are also leading causes of death in prisons and other closed settings. Poor prison conditions, including overcrowding, poor ventilation, hygiene and nutrition, contribute to the prevalence of disease in such environments, whilst poor health care in places of detention exacerbate illness and transmission. Prevention and care are further hampered by stigma and discrimination, lack of staff training, inadequate medical and psychosocial services, violence and lack of protection of vulnerable persons in detention facilities.

G. CONCLUSION

The forum was vital, as it brought together judges, civil society, members of key populations and other community groups to learn and exchange real-life experiences of how the law impacts people's lives. The meeting provided a valuable opportunity for participants to share experiences and insights, discuss challenges, hear personal testimonies from key and vulnerable populations, and review relevant new developments in jurisprudence affecting the rights of key and vulnerable populations in the region.

From the inputs made at the meeting it is evident that the judiciary has such a crucial role to play in addressing human rights issues for the marginalised populations in society. The presentations emphasised the importance of ongoing sensitization of the judiciary to continue to expand an understanding of human rights issues affecting marginalized populations in Africa, looking at how the courts have been used to protect the rights of such vulnerable communities.

Recommendations

- In the meantime, the UNDP maintain and support an online platform (“Community of Practice), where members stay in touch with each other, share and access resources, hold learning events and continue to collaborate with each other, between meetings. It is accordingly recommended that the Honourable Judges of the High Court be given a chance and take turns to participate in the ARJF annual meetings to enable all to access the platform in order to stay relevant with progressive developments affecting our jurisprudence in the region.

- The importance of judicial inspectorate for correctional services cannot be overemphasized if courts were to understand living conditions in correctional centres. Appreciating living conditions in correctional facilities can also help inform appropriate sentences to impose. It is therefore recommended that even in the absence of fully fledged legal framework in support of judicial oversight, at least resources be availed to Inspecting Judge to start visiting correctional centres. All that is required to start is fuel, boarding and lodging where necessary. The reports from these visits will be shared with other judges and relevant stakeholders.

The two judges express their appreciation to the Chief Justice for their nomination to attend the ARJF for their exposure and personal growth. The late submission of the report is highly regretted. It was considered prudent to wait for individual presentations made at the meeting as promised so they may be shared with the report, but to date same have not been provided. Nonetheless list of cases and material discussed during the Forum is attached to this report as appendix A. It

will also be emailed for ease access to the links where some of the cases are hosted.

Appendix A

African Regional Judges' Forum 21-22 Jun 2023

Forum Meeting Resources

Below is an accessible list of case law, regional commitments and guidance, and presentations discussed during the two-day African Regional Judges' Forum held in Johannesburg from June 21-22, 2023.

Kindly note that:

- The resources are organised as per the sessions during the two-day judges' forum.
- The resources are all hyperlinked. Clicking on each resource will take you to the resource on a web site. In some cases, the links will lead you to a Google Drive folder, where the documents are organised in alphabetical order.

SESSION 1: IN DEFENCE OF THE CONSTITUTION, RULE OF LAW AND JUDICIAL INDEPENDENCE

[NGO Co-ordination Board v Eric Gitari & 5 Others Supreme Court of Kenya at Nairobi, Petition No.16 of 2019](#)

[W Mutunga 'The vision of a Kenyan sovereign nation' The Star, Nairobi, June 2023](#)

SESSION 2: ENFORCING CIVIC RIGHTS IN CONTENTIOUS CASES

[Attorney General of Botswana v Rammoge and Others, Civil Case No. CACGB-128-14](#)

[Chimakure and Another v Attorney General of Zimbabwe \[2014\] JOL 32639 \(ZH\)](#)

['Enforcing rights in contentious cases: Protecting LGBTQI rights' Marcus, G Presentation in session on Enforcing Civic Rights in Contentious Cases](#)

[Federation of African Journalists and 4 Ors vs The Republic of The Gambia \(ECW/CCJ/APP/ 36 of 2015\) \[2018\] ECOWASCJ 4](#)

[Media Council of Tanzania and Others v Tanzania, Reference No. 2 of 2017 \[2019\] EACJ](#)

[Mwenda and Another v Attorney General \(2010\) AHRLR 224 \(UgCC 2010\)](#)

[Peta v Minister of Law, Constitutional Affairs and Human Rights \(Constitutional Case 11 of 2016\) \[2018\] LSHC 3](#)

Qwelane v South African Human Rights Commission and Another (South African Holocaust and Genocide Foundation and Others as amici curiae) 2022 (2) BCLR 129 (CC)

Simelane N.O. and others vs Minister of Commerce Industry and Trade and others (34 of 2022) [2023] SZSC 10

SESSION 3: PROTECTING AGAINST MISUSE OF POLICE POWERS

Francis Tumwesigye Ateenyi v. Attorney-General Constitutional Petition No 36 of 2019 UGCC

Gwanda v S [2017] MWHC 23

Khabanyane v Commissioner of Police and Others (CIV/T/254/2016) [2023] LSHC 211

Lazarus v GRN (Ministry of Safety and Security) (I 2954-2015) [2017] NAHCMD 249

Officer Commanding Mafeteng Police Station v Tjela (C of A (CIV) 45 of 2020) [2021] LSCA 23

The State v The Officer In-Charge| Ex Parte: Banda & Others [2022] MWHC 139

South Africa Social Security Agency and another v Minister of Social Development and others [2018] ZACC 26

Uganda v. Lule & Ors [2023 UGCC 98]

SESSION 5: ENFORCING HEALTH RIGHTS FOR ALL

Attorney General vs Rebeca Z. Gyumi (Civil Appeal No. 204 of 2017) [2019] TZCA 348

Centre for Domestic Violence Prevention and Others v Attorney General of Uganda (Constitutional Petition No. 13 of 2014) [2021] UGCC 20

Center for Health, Human Rights and Development (CEHURD) & 3 Ors v Attorney General (Constitutional Petition No. 16 of 2011) [2020] UGCC 12

Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania ACERWC Communication No: 0012/Com/001/2019, Decision No 002/2022

Mokhele and Others v Commander, Lesotho Defence Force and Others (CIV/APN 442 of 16) [2018] LSHC 2

PAK & another v Attorney General & 3 others (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR)

SESSION 6: THE ROLE OF THE JUDICIARY IN PROTECTING PERSONS FROM DISCRIMINATION

Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others (SA 6/2022; SA 7/2022) [2023] NASC 14

Lühl v Minister of Home Affairs and Immigration (HC-MD-CIV-MOT-GEN-2021/00094 [2021] HAHCMD 168

S and Attorney General, Minister of Education (the Education Division Manager Southern Region), Headmaster Blantyre Girls Primary School; Ex parte Mbewe (A minor through his father and next friend Wisdom Mahara Mbewe) and Registered Trustees of the Centre of Human Rights Education, Advice and Assistance (CHREAA) Judicial Review Case 55 of 2019) [2023] HM 7

SESSION 7: REGIONAL JURISPRUDENCE AND DEVELOPMENTS IN AFRICA

ACHPR Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services - ACHPR/Res.260(LIV)2013

ACHPR Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity - ACHPR/Res.275(LV)2014

ACHPR Resolution 290 on the Need to Conduct a Study on HIV, the Law and Human Rights ACHPR/Res.290(EXT.OS/XVI) 2014

ACHPR Resolution 376 on the Situation of Human Rights Defenders in Africa ACHPR/Res.376(LX) 2017

ACHPR Resolution 534 on Renewal of Mandate, Appointment of Chairperson, and Reconstitution of Committee on Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV ACHPR/Res.534 (LXXIII) 2022

ACHPR Resolution 552 on the Promotion and Protection of the Rights of Intersex Persons in Africa - ACHPR/Res.552 (LXXIV) 2023

ACHPR (2012) General Comments on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

ACHPR (2014) General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

ACHPR (2014) Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights

ACHPR (2017) Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa: Luanda Guidelines

ACHPR (2017) The Guidelines on Combating Sexual Violence and its consequences in Africa

ACHPR (2017) Principles on the Decriminalisation of Petty Offences in Africa

ACHPR (2018) Guidelines on Freedom of Association and Assembly in Africa

ACHPR (2018) HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses — Report on the Study of the African Commission on Human and Peoples' Rights

ACHPR & ACERWC (2017) Joint General Comment of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage

ECOWAS Regional Strategy on HIV, TB, Hep B&C AND SRHR among Key Populations, 2020

Final presentation 'Overview of key human rights documents to protect the rights of vulnerable populations in the context of HIV, King, Justice J. Presentation in session on regional jurisprudence and developments in Africa

AU (1998) Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Request for an Advisory Opinion submitted by the Pan African Lawyers Union (PALU) on the compatibility of vagrancy laws with the African Charter, Request No. 001/2020: Advisory Opinion of the African Court on Human and Peoples' Rights, July 16 2021

SADC PF (2008) Model Law on HIV in Southern Africa

SADC PF (2016) Model Law on Eradicating Child Marriage and Protecting Children already in Marriage

SADC PF (2018) Minimum Standards for the Protection of the Sexual and Reproductive Health of Key Populations in the SADC Region

SADC PF (2021) Model Law on Gender-Based Violence

September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC)

SESSION 8: PROTECTING AGAINST MISUSE OF CRIMINAL PROCEDURES

COI & GMN v. Principal Magistrate Ukunda Law Courts & 4 others Civil Appeal No. 56 of 2016 [2018] eKLRIN

E.L. v R (Criminal Case 36 of 2016) [2016] MWHC 656

R v Willy (Criminal Review 6 of 2021) [2022] MWHC 143

'The place of scientific evidence and impartiality in judicial decision-making' Ntaba, J
Presentation in session on misuse of criminal procedures