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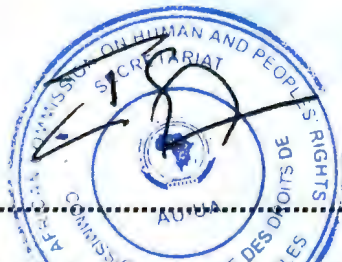
COMMUNICATION 785/22

Selemabothokgo Magdeline Rchidi

V

Republic of South Africa

*Adopted by the
African Commission on Human and Peoples' Rights
During the 83rd Ordinary Session held in Banjul from 2nd to 22nd May 2025,
Banjul, The Gambia*



Hon. Commissioner Idrissa Sow
Chairperson to the African Commission
on Human and Peoples' Rights



Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples'
Rights

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Decision Of The African Commission on Human and Peoples' Rights on Admissibility

Communication 785/22 Selemabothokgo Magdeline Rachidi and the Republic of South Africa

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the Complaint on the 16th of February 2022.
2. The Complainant is Selemabothokgo Magdeline Rachidi, a South African citizen, employed by the Limpopo Department of Health hereinafter referred to as Limpopo Health Department) as a Staff nurse at the Mankweng Hospital. The Respondent State is the Republic of South Africa.
3. According to the Complainant, she was translated from Staff Nurse to Professional Nurse.
4. She was enrolled in that capacity on the 31st of May 2019 and began performing the duties of Professional Nurse on the 1st of June 2020.¹
5. The Complainant avers that on 14 September 2020, the Department of Health, by letter addressed to the Chief Executive Officer of Mankweng Hospital reversed the translation and decided that the payments made to the Complainant as Professional Nurse with effect from the 1st of June 2020, be recovered by way of deductions from her salary.²
6. According to the letter of the 14th of September 2020, the reason for the reversal was that the Complainant had been wrongfully translated as she was not eligible for appointment to the position of Professional Nurse at the time of her translation.³

1 Complainant's Observations on Admissibility and Merits, para 41 (Hereinafter referred to as the Complainant's Observations)

2 Complainant's Observations, para 35

3 Complainant's Observations para 36; Annexure SMR4





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7. On the 28th of October 2020, the Complainant received a letter from the the Acting Chief Executive Officer of the Mankweng Hospital notifying her of the Limpopo Health Department's decision.⁴
8. The Complainant then seized the Labour Court of South Africa in ***Selemabothokgo Magdeline Rachidi v The Head of the Department of Health and 2 others, Case No. J1231/20*** (Labour Court Case No. J1231/20) seeking urgent interim relief to halt the deductions from her salary.⁵
9. On 17 November 2020, the Labour Court dismissed the application, for lack of jurisdiction, indicating that the matter falls under the competence of the Bargaining Council or the Arbitration of the Bargaining Council, if unresolved by the Arbitration of the Bargaining Council.⁶
10. Subsequently, the Complainant seized the High Court with an urgent application in ***Selemabothokgo Magdeline Rachidi v Head of Department of Health Limpopo and another, Limpopo Division, Polokwane, Case No: 2628/2021*** (High Court Case No: 2628/2021), which on 23rd April 2021, was struck off from the roll, for lack of urgency.⁷
11. The Complainant then filed an urgent Application for direct access at the Constitutional Court in ***Selemabothokgo Magdeline Rachidi v Head of Department of Health Limpopo and Another, Case CCT 134/21*** (Constitutional Court Case CCT 134/21) which was on 3rd May 2021 dismissed because no case was made out for urgency and direct access.⁸
12. After this, the Complainant approached the Commission on 16 February 2022.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

13. The Complainant submits that the Respondent State has violated Articles 1, 5, 7(1), 7(1)(a), 7(1)(b), 7(1)(c), 15 and 19 of the African Charter on Human and Peoples' Rights (the Charter).

PROCEDURE

14. The Complaint was received on the 16th of February 2022 by email from the Legal Representative of the Complainant.

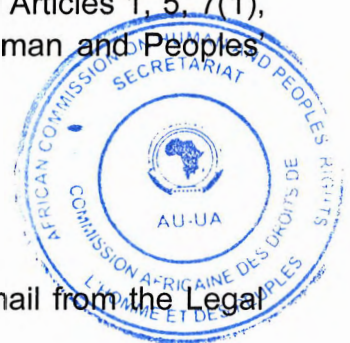
⁴ Complainant's Observations para 37-38; Annexure SMR5

⁵ Complainant's Observations, para 43

⁶ Complainant's Observations, para 43

⁷ Complainant's Observations, para 22

⁸ Complainant's Observations, para 26-29





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15. The Secretariat acknowledged receipt of the Complaint on the 2nd of March 2022 by letter Ref:ACHPR/COM/168/22.
16. The Communication was seized and the Complainant invited to submit observations on Admissibility and Merits on the 16th of June by letter Ref:ACHPR/STC/COM/785.22/519/2022.
17. The Complainant submitted the Observations on Admissibility and Merits via email dated 28 June 2022.
18. By letter Ref:ACHPR/COM/785/22/RSA/267/2023 dated 6th March 2023, the Secretariat acknowledged receipt of the Complainant's Observations on Admissibility and Merits, and the same were transmitted to the Respondent State by Note Verbale Ref:ACHPR/COM/785/22/RSA/269/2023.
19. By Note Verbale Ref:ADD-18/2/AU/ACHPR/1/28/02/23/6361 dated 26 April 2023, the Respondent State requested extension of time to submit its reply.
20. On the 26th of April 2023, the Secretariat wrote to the Respondent State via Note Verbale Ref:ACHPR/COMM/784/785/786/787/788/22/RSA/509/2023 informing them of the Commission's decision to grant an extension of time. The Secretariat also wrote to the Complainant informing her of the same.
21. The Respondent State submitted its observations on Admissibility and Merits by Note Verbale Ref:ADD-18/2/AU/ACHPR/1/26/05/23/6394 dated 26 May 2023.
22. By letter dated 26 May 2023, the Secretariat wrote to the Complainant transmitting the Respondent State's reply and inviting her to submit a rejoinder if they so wished.

PRAYERS

23. The Complainant, accordingly, prays for an order as follows:

- A. That it is declared that the Respondent violated the Complainant's rights under Articles 1, 3(1), 5, 7(1), 7(1)(a), 7(1)(b), 7(1)(c), 15 and 19 of the African Charter on Human and People's Rights.
- B. That the Respondent is ordered to pay compensation in the amount of \$200 000 (Two Hundred Thousand US Dollars) to the Complainant within three (3) months from the date of this Order.
- C. Further orders as the Commission deems fit to grant in the circumstances.

THE SUBMISSIONS FROM THE COMPLAINANT ON ADMISSIBILITY





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24. The Complainant submits that her Complaint discloses the identity and therefore complies with Article 56(1).⁹
25. Regarding Article 56(2), the Complainant propounds that the Complaint alleges violations of rights guaranteed under the Charter and in those circumstances conforms with the Charter as well as the Constitutive Act of the African Union (AU).¹⁰
26. The Complainant argues that the allegations raised in the Communication do not contain disparaging or insulting language.¹¹
27. On the requirement in Article 56(4), the Complainant avers that the claims for violations in the present Communication and the allegations therein are not based exclusively on news disseminated through the mass media. Instead, they are based on the decisions by the authorities or institutions and courts of the Respondent in the Republic of South Africa and the court proceedings which took place within the domestic courts of the Respondent. For this reason, the Complainant submits that she has satisfied the requirement for admissibility.¹²
28. The Complainant submits that she has exhausted all local remedies in the Respondent State as she has litigated through all the local courts, all the way up to the Constitutional Court which is the apex Court of the Respondent State.¹³
29. It is submitted that the Complainant filed an urgent application for an interim order at the High Court, Limpopo Division, Polokwane on the 19th of April 2021, which application was struck off the roll for lack of urgency on the 23rd of April 2021.¹⁴
30. Aggrieved by the order of the High Court, the Complainant approached the Constitutional Court seeking an order for direct access to set aside the judgment and order of the High Court, on 03 May 2021, the Constitutional Court dismissed the Complainant's application.¹⁵
31. The Complainant argues that the Communication complies with Article 56(6) of the Charter in that the Constitutional Court handed down its Order on 03 May 2021 and the Complaint was finalised on the 13th of May 2021, and sent to the Commission at the end of May 2021.¹⁶
32. Furthermore, the Complainant avers that the Secretariat of the Commission states that the Complaint was received on 16 February 2022 as opposed to the aforementioned end of May 2021. They argue that in any event, if the date of 16th of February 2022 is taken, it would still be a reasonable amount of time within which to file the Complaint.¹⁷

9 Complainant's Observations, para 6

10 Complainant's Observations, para 8-9

11 Complainant's Observations, para 10-11

12 Complainant's Observations, para 12

13 Complainant's Observations, para 13

14 Complainant's Observations, para 14-15

15 Complainant's Observations, para 16-17

16 Complainant's Observations, para 20

17 Complainant's Observations, para 21





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33. Finally, the Complainant submits that the Communication complies with Article 56(7) of the Charter as there was never settlement of issues by parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or any legal instrument of the African Union.¹⁸

THE SUBMISSIONS OF THE RESPONDENT ON ADMISSIBILITY

34. The Respondent State submits that the Communication is inadmissible, and they primarily focus on the requirement to exhaust local remedies under Article 56(5).
35. The Respondent State observes that the Complainant's position that simply litigating to the Constitutional Court is sufficient as it is the apex court, they submit that the Complainant still had available domestic remedies that she ought to have exhausted prior to approaching the Commission.¹⁹
36. It is submitted by the Respondent State that the order of the Limpopo High Court to strike off the Complainant's case for lack of urgency was not final as the matter was not adjudicated on the Merits.²⁰
37. To these ends, the Respondent State propounds that the Complainant could have set down the matter again on the normal roll in accordance with the rules of procedure prevailing in the Respondent State.²¹
38. The Respondent State avers that the Complainant also has a remedy at her disposal at the Labor Court, in which by urgent or normal roll she may seek an order against the Limpopo Health Department to cease the deductions under the Basic Conditions of Employment Act, No.75 of 1997.²² It is submitted in this regard that there is precedent in the Labour Court of the Respondent State reiterating its jurisdiction over salary deduction disputes under the Basic Conditions of Employment Act.²³
39. It is also the submission of the Respondent State that the Complainant may still approach the Bargaining Council and lodge an Unfair Labour Practice Dispute.²⁴
40. According to the Respondent State, this was the position of Judge Snyman in para 51 of the Labour Court's judgment against the Complainant's Application.²⁵
41. In light of the foregoing, the Respondent State submits that the Complainant has not exhausted local remedies and the Respondent State's legal order is better placed to provide redress to the Complainant, should those fail then she may pursue international remedies.²⁶

18 Complainant's Observations, para 23

19 Respondent State's Reply on Admissibility and Merits, para 20-23 (Hereinafter referred to as the Respondent State's Reply)

20 Respondent State's Reply, para 25-26

21 Respondent State's Reply, para 27-30

22 Respondent State's Reply, para 35

23 Respondent State's Reply, para 36-38

24 Respondent State's Reply, para 39

25 Respondent State's Reply, para 39

26 Respondent State's Reply, para 17-23





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42. The Commission observes that the Respondent State does not contest any of the other grounds for admissibility as enshrined in Article 56 of the Charter.²⁷

THE COMMISSION'S ANALYSIS ON ADMISSIBILITY

43. A Communication submitted in terms of Article 55 must satisfy the seven requirements in Article 56 of the Charter in order to be declared admissible.

44. The Commission recalls that the conditions outlined in Article 56 of the Charter are cumulative and should all be adequately fulfilled for a communication submitted in conformity with the terms of Article 55 to be admissible. Consequently, non-fulfillment of any one of these conditions is liable to render a communication inadmissible.²⁸ The Commission now considers the submissions of the parties in light of these requirements *seriatim*.

Article 56(1) of the Charter

45. Article 56(1) of the Charter states that "Communications relating to Human and Peoples' Rights... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity..." The requirement here is that complainants or authors of complaints proffer their identity²⁹ and contact details³⁰ to enable the Commission to adequately process the communication through assurances of continued interest in the matter.³¹ In the present case, the Communication is brought by Selemabothokgo Magdeline Rachidi, who is legally represented by one Advocate Shadreck Tebeile. The parties are adequately identified, the Communication duly complies with Article 56 (1) of the Charter.

Article 56 (2) of the Charter

46. Article 56(2) of the Charter states that "Communications...received by the Commission shall be considered if they are compatible with the Charter of the Organization of African Unity or with the present Charter." In **Communication 709/19 – Senator Jean-Pierre Bemba Gombo v. Democratic Republic of Congo**, the Commission interpreted Article 56(2) of the Charter to require compatibility with the Constitutive Act of the African Union or the Charter, and with the four (4) aspects of its competence,

²⁷ Respondent State's Reply, para 18

²⁸ Communication 304/2005 - FIDH & Others v Senegal (2006) ACHPR para 38

²⁹ Communication 308/05 - Michael Majuru v Zimbabwe, 24 November 2008, para 71.

³⁰ Communication 70/92_9 - Ibrahima Dioumessi, Sekou Kande, Ousmane Kaba v Guinea, 7 October 1995, para 11.

³¹ Communication 277/2003-Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana, 12 October 2013, para 97.





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namely competence *ratione personae, materiae, temporis* and *loci*.³² Concerning the former, the Commission notes that this Communication seeks the protection of human rights which is one of the objectives of the Constitutive Act of the African Union, provided for in Article 3 (h) thereof. Furthermore, nothing in the Complainants' submissions and Complaint reveals any incompatibility with the Charter. Concerning jurisdiction, the Commission is satisfied that the Respondent State is party to the Charter; the Complaint alleges *prima facie* violations of rights protected by the Charter; the Complaint is brought in respect of violations that occurred after [the] Respondent State's ratification of the Charter.³³ It follows that the Complainant has satisfied Article 56(2) of the Charter.

Article 56 (3) of the Charter

47. Article 56(3) of the Charter states that "Communications ...received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity (AU)". In ***Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe***, the Commission held that "in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice."³⁴
48. Having analyzed the submissions of the Complainant, the Commission has not come across any language that appears to be aimed at unduly impairing the esteem of either the Respondent State or the African Union. In light of the foregoing the Commission finds that Article 56(3) of the Charter has been complied with.

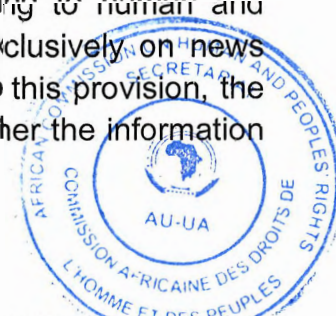
Article 56 (4) of the Charter

49. Article 56(4) of the Charter states that "Communications relating to human and Peoples' Rights... shall be considered if they are not based exclusively on news disseminated through the mass media". In shedding more light to this provision, the Commission averred that "the issue therefore should not be whether the information

³² Para 26-29

³³ Communication 266/03, 27 May 2009, para 71

³⁴ Communication 284/03, 3 April 2009, para 91.





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was gotten from the media, but whether the information is correct' and whether the complainant tried to verify the truth"³⁵ This interpretation from **Jawara** was adopted with approval in **Ahmed Ismael and 528 Others v. the Arab Republic of Egypt**.³⁶ In the present Communication, the Complainant has presented evidence in the form of the letter reversing her translation; the letter seeking recovery of salaries paid to her as Professional Nurse; court documents as well as her payment records. The Commission is of the opinion that the Complainant has not relied exclusively on news disseminated through the mass media and thus this communication satisfies the provision of Article 56(4) of the Charter.

Article 56[5] of the Charter

50. Article 56(5) of the Charter states that "Communications relating to human and Peoples' Rights... shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." The Commission requires exhaustion of local remedies where they are 'available, effective and sufficient to redress the alleged violation'.³⁷ An available remedy is one where 'the petitioner can pursue it without impediment'.³⁸ An effective remedy will be one that 'offers a prospect of success'.³⁹ A remedy will be sufficient 'if it is capable of redressing the complaint'.⁴⁰
51. The Commission recalls that an effective remedy will be one that 'offers a prospect of success',⁴¹ and 'upon success, the appropriate relief is one that is capable of adequately and timely redressing the specific violation suffered'.⁴² It should also be noted that a prospect of success of a remedy need not be 'certainty or guarantee of a favourable outcome for the complainant' but simply an assurance of full and fair examination of the legal issues and arguments.⁴³ In determining the propensity of a remedy to offer real prospects of success the Commission will assess the nature of the complaint, the 'general legal and political context' of the remedies, and the complainant's personal circumstances.⁴⁴
52. The Complainant argues that they exhausted local remedies when they approached the Constitutional Court which is the highest Court in the Respondent State. The

³⁵ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 25 and 26.

³⁶ Communication 467/14, 27 May 2016.

³⁷ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

³⁸ Communication 317 / 2006 - The Nubian Community in Kenya vs The Republic of Kenya, 30 May 2016, para 55.

³⁹ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

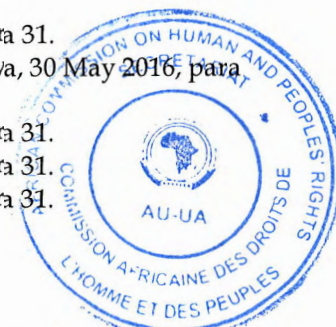
⁴⁰ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

⁴¹ Communication 147/95-149/96: Sir Dawda K. Jawara v Gambia (The), 11 May 2000, para 31.

⁴² Communication 445/13- Human Rights Council and Others v. Ethiopia, 19 May 2016

⁴³ Communication 445/13- Human Rights Council and Others v. Ethiopia, 19 May 2016

⁴⁴ Communication 445/13- Human Rights Council and Others v. Ethiopia, 19 May 2016





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Respondent State contends that the Complainants did exhaust local remedies because they prematurely and unsuccessfully approached the Constitutional Court before exhausting the remedies in the lower courts, in accordance with the procedural law of South Africa.

53. The Respondent State argues that the Complainant ought to have (i) re-enlisted her application in High Court Case number 2628/2021 under the normal roll after it was struck off the urgent roll; (ii) sought an order from the Labour Court for the Limpopo Health Department to cease monthly deductions on her salary in terms of the Basic Conditions of Employment Act; and (iii) lodged an unfair labour practice proceedings against the Limpopo Department of Health at the Bargaining Council.
54. The Commission will now turn to examine whether the litigation that happened in Labour Court case No. J1231/20; High Court case number 2628/2021; and CCT Case 134/21 exhausted local remedies.
55. The Commission notes from the judgment of the Labour Court which found firstly that the Complainant had no grounds for declaratory relief because she was in no imminent risk of unilateral salary deductions given that the Limpopo Health Department had committed to consulting with her on the *modus* of such deductions;⁴⁵ secondly that the Complainant had wrongfully relied on a Constitutional Provision to challenge a matter regulated by legislation, to the detriment of the principle of subsidiarity;⁴⁶ and thirdly that the Court had no jurisdiction to decide her case given that it was a dispute between her and her employer, lawfully governed by the Bargaining Agreement and under the jurisdiction of the Bargaining Council;⁴⁷ and finally that she ought to have approached the Bargaining Council for conciliation of the matter and in the event that it is not resolved, refer it to arbitration.⁴⁸
56. Following the Handing down of the Labour Court Judgment on the 17th of November 2020, the Complainant then on the 19th of April 2021 approached the High Court by Notice of Motion seeking urgent relief to halt the salary deductions, which application was struck off the roll for lack of urgency on the 23rd of April 2021. Following her Strike-out at the High Court, the Complainant then approached the Constitutional Court on an urgent basis seeking direct access to challenge the decision of the High Court, which application was dismissed on the 3rd of May 2021.
57. The Commission takes the view that the present Communication did not exhaust local remedies because it is quite clear that not only did the Complainant go on a frolic of her own much to the breach of the procedure of the Respondent State as aptly explained by the Labour Court, but also, and as a consequence, omitted multiple remedies which were at her disposal.

⁴⁵ Case No. J1231/20, para 26-33

⁴⁶ Labour Court Case No. J1231/20, para 37-50

⁴⁷ Labour Court Case No. J1231/20, para 56

⁴⁸ Labour Court Case No. J1231/20, para 51-56





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58. The Commission notes firstly that the Complainant has not approached the Bargaining Council for the settlement of her dispute through conciliation (and if unsuccessful, arbitration) as indicated by the Labour Court but instead took her matter to the High Court where it was promptly dismissed.
59. Secondly, the Commission recognizes that the High Court's decision to strike her application off the urgent roll was not a final decision. As has been submitted by the Respondent State, the Complainant could still re-enlist her matter on the normal roll. Instead of doing that the Complainant decided to approach the Constitutional Court where her application was dismissed for lack of merits and urgency. It is therefore clear to the Commission as submitted by the Respondent State that the Complainant has residual domestic remedies under the domestic legal order which are at her disposal. The Commission takes the view that the present Communication is not compliant with Article 56(5) as the Complainant has not exhausted local remedies.

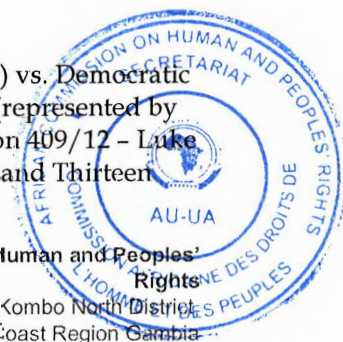
Article 56(6) of the Charter

60. Article 56(6) of the Charter states that Communications relating to human and Peoples' Rights... shall be considered if they: are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter." The Commission notes that the present Communication has not exhausted local remedies. Furthermore, the Commission recalls that the requirement under Article 56(6) is for the Complainant to submit her Communication within a reasonable time from the time local remedies were exhausted, accordingly exhaustion is a prerequisite of submission. In addition, the Commission has previously decided that the time of exhaustion of local remedies is the starting point for the computation of time within which to submit the Communication to the Commission.⁴⁹ Where local remedies have not been exhausted, there is no plausible basis from which to compute time for submission of the Communication to the Commission or even assess reasonableness of that time. It follows therefore that where the Complainant has not exhausted local remedies, it suffices to say that Article 56(6) has not been complied with.

Article 56(7) of the Charter

61. Article 56(7) of the Charter states that "Communications relating to human and Peoples' Rights... shall be considered if they: do not deal with cases which have been

⁴⁹ Communication 278/2003 - Promoting Justice for Women and Children (PROJUST NGC) vs. Democratic Republic of Congo, 12 October 2013, para 76; Communication 340/07 - Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe, 4 June 2014, para 100; Communication 409/12 - Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others, 30 April 2014, para 107.





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settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the 25 Organization of African Unity or the provisions of the present Charter.” The rule is based on the *non bis in idem* and *res judicata* rules.⁵⁰ The Commission has previously found in **Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others** that the provision requires that a case “no longer be under consideration under an international dispute-settlement procedure”⁵¹ Further, that the other international body must have decided the case on the merits and there is a ‘final settlement’ by that body.⁵² The settlement must, as the Commission has previously stated, a human-right adjudicatory body.⁵³ In the present case, there is no evidence to suggest that this matter was settled by another international adjudicatory body. It thus complies with sub-Article 7 of the Charter.

THE COMMISSION’S DECISION ON ADMISSIBILITY

62. The Commission finds that:

- A. The present Communication does not comply with Article 56(5) and 56(6) of the Charter;
- B. The Communication is declared inadmissible.

**Done at the 83rd Ordinary Session of the Commission held in Banjul, The Gambia
from the 2nd to the 22nd of May 2025**

⁵⁰ Communication 260/02 - Bakweri Land Claims Committee v Cameroon, 4 December 2004, para 52.

⁵¹ Communication 409/12, 30 April 2014, para 112.

⁵² Communication 260/02 - Bakweri Land Claims Committee v Cameroon, 4 Dec 2004, para 52 and 53.

⁵³ Communication 279/03-296/05 - Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, 27 May 2009, para 103.

