

## **284/2003 - Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Republic of Zimbabwe**

### **Summary of Facts:**

1. This Communication is jointly submitted by *Associated Newspapers of Zimbabwe (PVT) Ltd (ANZ)* and *Zimbabwe Lawyers for Human Rights* (the Complainants) against the Republic of Zimbabwe (the Respondent State).
2. ANZ is a Company registered under the laws of Zimbabwe whose primary business is newspapers publishing. Since 1999, they have been publishing the Daily News, which is the largest-selling newspaper independent of government control in Zimbabwe.
3. The Complainants state that a new media law - the Access to Information and Protection of Privacy Act (AIPPA) was enacted in 2002 by the Respondent State. They claim that section 66 of AIPPA read together with section 72 purports to prohibit “mass media services” from operating until they have registered with the Media and Information Commission (MIC).
4. ANZ filed an application challenging the constitutionality of the provisions requiring it to register with the MIC. ANZ therefore declined to register until the question of the constitutionality of the AIPPA provisions it was challenging had been determined by the Supreme Court
5. In its judgement of 11 September 2003, the Supreme Court ruled that by not registering with the MIC, the ANZ had openly defied the law and as such were operating outside the law.
6. The Complainants claim that the Supreme Court declined to rule on whether or not the aforementioned provisions of the AIPPA were consistent with the Constitution but instead maintained that every law enacted in Zimbabwe remains valid and should be complied with until it is either repealed by an Act of Parliament or declared unconstitutional by the Supreme Court. In its ruling, the Supreme Court stated that ‘The applicant is operating outside the law and this Court will only hear the applicant on the merits once the applicant has submitted itself to the law’.
7. It is further alleged that following the Supreme Court decision, the Daily News was forcibly closed on 12 September 2003, ANZ assets were seized and several ANZ officials were arrested, while others were threatened with arrest and criminal charges.

8. Consequently, ANZ submitted its application for registration with the MIC on 15 September 2003 and on 18 September 2003, the High Court pending determination of the matter by MIC granted permission to the ANZ to publish the Daily News. The High Court also ordered the return of all the equipment seized and demanded an end to police interference with ANZ business activities.
9. On 19 September 2003, the MIC refused ANZ's application based on the Supreme Court finding that ANZ had been unlawfully operating its media business. ANZ appealed against the MIC's decision to the Administrative Court and on 24 October 2003, the Administrative Court unanimously set aside MIC's decision and held that the MIC was biased and improperly constituted. The Administrative Court also ordered the Board of the MIC to issue ANZ with a certificate of registration by 30 November 2003 failing which, ANZ would be deemed registered as from that date.
10. The Complainants state that following publication of the Daily News on 25 October 2003, police immediately moved back into the ANZ offices, stopped their work and prevented all further publication.
11. The Complainants argue further that since then, the authorities have prevented the re-opening of the newspaper offices. The computers and other equipment of the Company remain in the hands of the police and ANZ employees have been arrested and charged with criminal offences.
12. The Complainants argue that the current closure of the paper is causing irreparable harm to the freedom of expression and information and many other associative rights as delineated in the African Charter. They add that the closure is costing the ANZ 38 million Zimbabwean dollars per day in lost sales and advertising

### **Complaint**

13. The Complainants allege that Articles 3, 7, 9, 14 and 15 of the African Charter on Human and Peoples' Rights have been violated.

### **Procedure before the African Commission**

14. The Communication was hand-delivered to the Secretariat of the African Commission on 12 November 2003.
15. On 4 December 2003, the Secretariat acknowledged receipt of the Communication and informed the Complainants that the matter would be

scheduled for consideration by the African Commission at its 35<sup>th</sup> Ordinary Session.

16. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 21 May - 4 June 2004, the African Commission decided to be seized of the Communication.
17. By Note Verbale of 15 June 2004 addressed to the Respondent State and by letter of the same date addressed to the Complainant, the African Commission invited both parties to submit arguments on the admissibility of the Communication
18. By Note Verbale dated 16 September 2004 addressed to the Responding State and by letter of the same date addressed to the Complainant the Secretariat of the African Commission reminded both parties to submit their arguments on admissibility.
19. On 20 September 2004 the Secretariat of the African Commission received a Note Verbale from the Respondent State requesting that it be allowed to submit its arguments on admissibility by 30 October 2004.
20. By Note Verbale dated 23 September 2004, the Secretariat of the African Commission accepted the Respondent State's request that it submit its arguments on admissibility by 30 October 2004.
21. On 4 October 2004, the Secretariat received a supplementary brief and arguments on admissibility on the Communication from the complainant
22. By letter dated 7 October the Secretariat of the African Commission acknowledged receipt of the supplementary brief and arguments on admissibility submitted by the Complainant and by Note Verbale of the same date the Secretariat sent a copy of the said document to the Respondent State.
23. On 28 October 2004, the Secretariat of the African Commission received a Note Verbale from the Respondent State dated 25 October 2004 indicating that it received the supplementary brief of the complainant only on 20 October and it may not be able to submit its arguments by 30 October 2004 since the Supplementary Brief raises issues on the merits.
24. By Note Verbale dated 29 October 2004, the Secretariat wrote to the Respondent State informing it that as the matter is still at the admissibility stage, the Respondent State can submit its argument on admissibility for consideration by the African Commission at the 36<sup>th</sup> Ordinary Session.

25. On 29 October 2004, the Secretariat received the submission from the Respondent State and by Note Verbale of 3 November 2004 acknowledged receipt thereof.
26. By letter of 3 November 2004, the Secretariat of the African Commission forwarded the response of the State to the Complainant.
27. On 24 November 2004 the Complainant submitted a rejoinder to the State's response and this was also hand-delivered to the State delegation attending the 36<sup>th</sup> Ordinary Session of the Commission.
28. At its 36<sup>th</sup> Ordinary Session held in Dakar, Senegal, the African Commission heard both parties on the question of provisional measures and decided to grant the Complainants' request for provisional measures which called on the Respondent State to return the seized equipment of ANZ. The African Commission deferred its decision on admissibility pending the State's response to the complainant's rejoinder which was handed to the State during the session.
29. By Note Verbale of 25 December 2004, the State wrote to the Secretariat seeking clarification on the deadline it was expected to make its submission. By Note Verbale of 16 December 2004, the Secretariat informed the State that the communication will be considered at the 37<sup>th</sup> Ordinary Session of the African Commission.
30. By letter of 16 December 2004, the Secretariat informed the complainant of the African Commission's decision taken at its 36<sup>th</sup> Ordinary Session in Dakar, Senegal.
31. By Note Verbale of 16 February 2005, the Secretariat reminded the State to submit its arguments on admissibility before 16 March 2005.
32. By letter of 14 March 2005, the Officer of the Attorney General of Zimbabwe requested the African Commission for an extension to allow the State submit its arguments by 31 March 2005.
33. By letter of 18 March 2005 addressed to the Attorney General, the Secretariat granted the State an extension of thirty days and requested it to submit its arguments by 18 April 2005.
34. At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the Communication after receiving a Supreme Court ruling dated 15 March 2005 from the Respondent State in which the latter claims the complainant's grievances were addressed in the Court ruling.

35. By Note Verbale of 24 May 2005, the Respondent State was notified of the Commission's decision and requested to submit its arguments within three months of the notification. By letter of the same date, the Complainants were notified of the Commission's decision.
36. On 14 June 2005, the Secretariat of the African Commission received a letter from the Complainant in which the latter expressed concern at the Commission's decision to postpone consideration on admissibility of the Communication. The Complainant also expressed concern at the Commission's inaction on the State's failure to abide by its request for provisional measures.
37. On 7 July 2005, the Secretariat acknowledged receipt of the Complainants' letter of 14 June 2005 and informed the Complainant why the Communication was deferred.
38. At its 38<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 21 November - 5 December 2005, the African Commission considered the Communication and declared it admissible.
39. By Note Verbale dated 15 December 2005 and by letter of the same date, the State and the Complainants were notified of the African Commission's decision and requested to submit their arguments on the merits within three months of the date of notification.
40. By letter of 21 December 2005, the Complainant acknowledged receipt of the Secretariat's letter of 15 December and indicated that it will furnish its arguments on the merits "within the procedurally stipulated period".
41. By Note Verbale of 6 March 2006 and by letter of the same date, the Secretariat of the African Commission reminded the State as well as the Complainant to submit their arguments on the merits. Both parties were given until 31 March to do so.
42. On 3 April 2006, the Secretariat received a Note Verbale from the Embassy of the Republic of Zimbabwe in Ethiopia forwarding another Note Verbale from the Ministry of Foreign Affairs of the Republic of Zimbabwe requesting the Secretariat to extend the date of submission of its arguments to 15 April 2006.
43. By Note Verbale date 10 April 2006, the Secretariat of the African Commission acknowledged receipt of the Embassy's Note Verbale and obliged to the latter's request.

44. At the 39<sup>th</sup> Ordinary Session of the Commission, the Respondent State submitted on the merits and the Commission decided to defer further consideration of the Communication to its 40<sup>th</sup> session.
45. By note verbale of 29 May and letter of the same date, the Secretariat of the Commission notified both parties of the Commission's decision.
46. At its 40<sup>th</sup> Ordinary Session the Communication was deferred due to lack of time and the parties were informed accordingly.
47. At its 41<sup>st</sup> Ordinary Session the Communication was deferred to give the Secretariat more time to prepare the draft decision. During the same session the Secretariat received a supplementary submission from the respondent State.
48. By note verbale of 10 July 2007, and letter of the same date, both parties were notified of the Commission's decision.
49. At its 42<sup>nd</sup> Ordinary Session the Communication was deferred to verify the State's claim that it hadn't submitted on the merits and to allow it submit its arguments.
50. By note verbale of 19 December 2007, and letter of the same date, both parties were notified of the Commission's decision. The Respondent State was informed that it had in fact submitted on the merits and a copy of the State's submission was sent to both parties for ease of reference.
51. At its 43<sup>rd</sup> Ordinary Session held in Ezulwini, the Kingdom of Swaziland the Communication was deferred to allow the Secretariat incorporate the State's supplementary submission into the draft decision.
52. At its 44<sup>th</sup> Ordinary Session held in Abuja, Federal Republic of Nigeria, the Communication was deferred due to lack of time.

## **The Law Admissibility**

### **Complainants' submission on admissibility**

53. The Complainants submit that the Republic of Zimbabwe adopted an Act of Parliament on 13 March 2002, which obliged all media houses, journalists and all those working in the media profession to be registered or face closure. The Associated Newspapers of Zimbabwe ("ANZ") (publishers of the Daily News and the Daily News on Sunday) challenged the provisions of the Act under Section 24(1) of the Constitution of Zimbabwe (hereinafter the "Constitution" )

54. Section 24 (1) of the Constitution provides that in cases involving the Bill of Rights, one may approach the Supreme Court (hereinafter the “Court”) as the court of first instance. The ANZ challenged the Act on the basis of its likelihood to infringe freedom of expression, free and uninhibited practice of journalism. According to the Complainants, the Court declined to pronounce on the constitutionality of the Act and instead made a preliminary ruling that the ANZ had to and was supposed to comply with the provisions of the Act before challenging them as the ANZ was approaching the court with “dirty hands”.
55. According to the Complainants, the interpretation of the Constitution by the Court was contrary to the rights and freedoms guaranteed under the Charter. They believe that the application of the judicial doctrine of clean hands by the Court had a detrimental effect on the rights of the petitioners in the domestic courts. They argue that the reliance by the Court on the common law equitable doctrine of unclean or dirty hands in a matter not of an ordinary nature but one that is dealing with fundamental human rights and freedoms grievously affects the fundamental human right to due protection of the law and further undermines the predictability in human rights related issues.
56. The Complainants submit that the Constitution provides that laws which are inconsistent with the Constitution are void *ab initio*, and not voidable, as seemingly was the interpretation of the Court, noting that the interpretation by the Court of this particular provision of the Constitution clearly subordinates basic constitutional and human rights issues to general rules deciphered from ordinary case law mainly in English jurisdiction where their Lordships were never confronted with a matter involving violation of fundamental human rights. The unclean hands doctrine, according to the Complainants, was established to deal with principles of equity and stems from the law of equity. They argue that it cannot be applied in matters relating to extent of conformity of Acts of Parliament to the Constitution in a system of constitutional supremacy, separation of powers and the power of judicial review without leading to violation and infringement of fundamental rights and freedoms.
57. The Complainants submit that their contention before the Supreme Court was that the Act was contrary to the Constitution and other international instruments which provide for fundamental rights and therefore sought the protection of the Court and its decision on the constitutionality or otherwise of the Act. Instead of dealing with the merits of the claim the Court applied a procedural discretionary rule of practice thereby undermining the notion of constitutional supremacy and intermittently denying the Petitioners of an effective remedy.

58. The Court ruled that the ANZ had approached the court with dirty hands therefore the court could not attend to the merits of the case until the ANZ had obeyed the law which they deemed not to be law. Further the Court ruled that the Act was not blatantly unconstitutional.
59. The Complainants argue that as provided by the Constitution, any law which is contrary to the supreme law shall be impugned. The impugning of the law or sections of it can only be achieved if the law is put under a 'constitutional compliance test', which again in terms of the Constitution, that power lies with the Supreme Court. They claim that by failing to decide on the constitutionality of AIPPA, the Court abrogated its responsibility and duties as provided by the Constitution and one can reasonably conclude that the Court was in contravention of the Constitution, the Charter and other international instruments signed and ratified by the government of Zimbabwe which provide for appeal to competent bodies and equal protection of the law.
60. According to the complainants, without approaching the Court, or as in this case, the Court deciding to "shut the door in the face of the applicants", there is no other mechanisms of establishing the nature and extent of repugnancy of an Act of Parliament to the Constitution. In constitutional supremacy, they argue, jurisdictions matters relating to the constitutional conformity of any law deemed to be contrary to the Constitution there is no need to have that said by the Court since from the onset there is no law to argue about as provided by Section 3 of the Constitution.
61. As a result of the reliance on the unclean hands doctrine, the Complainants believe that the Court refused to hear the arguments of the ANZ on the merits of the case thereby refusing the petitioner of equal protection before the law and appeal to competent bodies. They refer to Section 24 of the Constitution which provides for the 'Enforcement of Protective Provisions' and states that "if any person alleges that the declaration of rights has been, is being or is likely to be contravened in relation to him...then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may subject to the provisions of subsection (3) apply to the Supreme Court for redress"
62. The above section they claim gives the Court original jurisdiction to enforce the provisions of the Bill of Rights, adding that the ANZ approached the Court to enforce the very same tenets establishing the Court, i.e. to protect fundamental rights as enshrined in the Bill of Rights, but the Court abrogated its duty to decide on the constitutional soundness or validity of the petition.
63. The Complainants submit that the absence of an effective remedy to violations of rights recognised in the Convention is itself a violation of the

Convention by the State Party in which the remedy is lacking. In that sense it should be emphasised that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.

64. According to the Complainants, a remedy which proves illusory because of the conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective, in the opinion of the Inter-American Courts on Human Rights.<sup>1</sup>
65. The Complainants further argue that the determination of one's rights by a competent and impartial tribunal is a procedural guarantee provided for in the Charter, adding that to determine whether ones' rights have been violated, the national body has to make an evaluation of the facts of the case on the merits. According to them, the Supreme Court avoided dealing with the petitioner's rights and the soundness of the claim, thereby depriving the petitioners of an effective remedy.
66. The Complainants finally submit that with the decision of the Supreme Court to decline to entertain the applicants, particularly given that the decision was taken by the respondent's most senior Court in the land and that the decision had the unanimous approval of all the justices of the Court, local remedies have been exhausted.

#### Respondent State's submission on admissibility

67. The Respondent State submitted its argument on admissibility on 2 November 2004. The State notes that the Complainants' application is based on section 24 of the Constitution of Zimbabwe which allows anyone who feels that the Declaration of Rights contained in the Constitution is being violated in relation to him/her should apply to the Supreme Court for relief. The State notes further that in the Complainants' application, they sought the nullification of the Access to Information and Protection of Privacy Act (AIPPA) on the grounds that the latter is *ultra vires* section 20 of the Republican Constitution.
68. The Respondent State submits further that at the time the application was filed with the Supreme Court, the First Complainant, the Associated Newspaper of Zimbabwe (ANZ) had not complied with section 66 of the AIPPA which makes it an offence to provide mass media services without registration. That the ANZ did not want to register in terms of the provisions of the AIPPA because it viewed the legislation as unconstitutional, and argued "it [could not] on conscience obey such a law".

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<sup>1</sup> Advisory Opinion OC 9/87, also Annual Report 39/96 Case 11.673 Santiago Marzioni.

69. The State added that the Supreme Court refrained from deliberating on the merits of the case, directing the Complainants to “first put its house in order”, either by registering or by refraining from carrying on mass media services, and thereafter approaching the courts. The State added that the Complainants did not comply with the Court order but instead went ahead to continue publishing. According to the Respondent State, this led to the closure of its two papers and seizure of its property by the Police. According to the Respondent State, the complainant subsequently made an application to register in terms of the AIPPA but this application was unsuccessful.
70. The Respondent State explains the background to the AIPPA and notes that the Act was enacted by the Parliament of Zimbabwe in 2002 to, among other things:
- a. provide members of the public with the right of access to information held by public bodies;
  - b. make public bodies accountable by giving a right to request correction of misrepresented personal information;
  - c. prevent the authorised collection, use or disclosure of personal information by public bodies;
  - d. protect personal privacy, to provide for the regulation of the mass media and to establish a Media and Information Commission.
71. It notes further that the regulation of the mass media constitutes part and not the sole provision of the Act, adding that prior to the enactment of the Act, there was no regulation of the press in the country and that the regulation was necessitated by a number of “irresponsible and misleading publications in the media...” According to the State, to address the security interests of the nation as well as protect the rights of others, the rights which “*hitherto the press enjoyed without statutory limitation were thus subjected to control*”, adding that this was intended to instil discipline and ensure responsibility within the profession.
72. The State notes further that notwithstanding the prohibition under the Act, section 93 allows any person who was lawfully operating a mass media service at the time of the coming into force of the Act to continue practising for a period of three months from the date of commencement of the Act. However, at the end of the three months, the necessary regulations were not in place, the period was extended to the end of December 2002. The State submits that Complainant’s averment that “publication is specifically allowed by the Law while any application for registration is pending”, is misleading.

73. The State submits that the Communication does not meet the requirements under Article 56 (3), (5) and (6) of the African Charter and should thus be declared inadmissible.
74. With regards to Article 56 (3), the State submits that the language used in the Communication and its attachments is disparaging of the Supreme Court of Zimbabwe. To support this claim the State refers the African Commission to paragraphs (r) (page 6), 13, 15, 17, 18, 26, 27, 30 and 31 in the Complainants' Summary of facts submitted on 10 November 2003. The State submits further that on 12 September 2003, the Complainants published an issue of its newspaper in which it stated *inter alia* that "...the handing down of the judgment marked a *sad day for Zimbabwe's constitutional history*. I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA , we would have had to hang first and challenge the penalty from hell". According to the State, this statement shows the contempt that the complainant has for the Supreme Court.
75. The State notes further that the implications of the statement and the paragraphs mentioned above includes the fact that:
- there is bias in the appointment of judges of the High Court and the Supreme Court because they are appointed by the President;
  - that the composition of the Supreme Court that heard the Complainants' matter was manipulated so that a junior judge, Judge Sandura, was omitted. The State claims that the use of the word "omitted" clearly connotes a motive by the Chief Justice to exclude Judge Sandura; and
  - that the Supreme Court was biased towards the government and therefore acted not as the judiciary but as a political agent of the Government.
76. The State notes that its submission should not be taken as an attempt to curtail freedom of expression and criticism of the judiciary but is intended to protect the dignity of the judiciary, adding that the language used by the Complainants go beyond mere criticism of the judiciary, that the language is discourteous, contemptuous and disparaging and is clearly intended to undermine the judiciary in the performance of its duties and hence the administration of justice. It notes further that fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in the public interest, and good faith and the public interest are ascertained from all the surrounding circumstances including the person responsible for the comments and the intended purpose sought to be achieved. The State concluded by stating that the Complainants operated in apparent defiance of the law and the decision of the Administrative Court and Supreme Court and now invites the African Commission to sanction its defiance of the law and did so in a

- language disparaging and insulting to the judiciary of Zimbabwe. It notes that the Judiciary in Zimbabwe cannot enter into public or political controversy as such involvement will bring the judiciary into disrepute and it is therefore improper for the Complainants to make such disparaging statements knowing very well that the judiciary cannot respond to the statements.
77. Regarding Article 56 (5) on the exhaustion of local remedies, the State notes that the Complainants indeed filed an application in terms of section 24 of the Constitution to challenge the constitutionality of AIPPA and argues that the judgment on the matter is not yet out not because the process is unduly prolonged but because of the Complainants' defiance of the law. The State notes that the Complainants, after refusing to comply with the AIPPA chose to comply with it later and is still pursuing its challenge of its constitutionality and if the Complainants are successful, they will be able to resume operations without going through the registration process.
78. The State notes that as at when the Complainants were submitting the Communication to the Commission during the 34<sup>th</sup> Ordinary Session in November 2003, there was an application in the Supreme Court they were pursuing to challenge the constitutionality of the AIPPA. The State notes further that the Minister of State for Information and Publicity and Cabinet appealed a decision that the Complainants should publish by 30 November 2004.
79. The State notes further that the provisional order sought by the Complainants demonstrates that it has not exhausted local remedies. The State referred the African Commission to the Complainants' statement in page 6 paragraph (r) that "[a]s a provisional measure necessary to uphold and protect the rights contained in the Charter and avoid irremediable damage, complainants ask the Commission to request that ANZ's computers and equipment be returned and it be allowed to resume publication on the Daily News immediately, *until its question whether the impugned sections of the Zimbabwe statute are consistent with the provisions of the Constitution of Zimbabwe has been properly heard and determined by an impartial tribunal*"
80. The State also submitted that it is misleading for the Complainants to argue that the Supreme Court did not consider the question of admissibility as the Court made an obiter statement on the question of constitutionality. The Respondent States finally notes that appeal by the Government of the Republic against the decision of the Administrative Court was heard together with the Complainants' constitutional application and judgment is awaited and as such, the African Commission cannot entertain the Communication until all local remedies have been exhausted.

### **African Commission's decision on admissibility**

81. The current Communication is submitted pursuant to Article 55 of the African Charter which allows the African Commission to receive and consider Communications, other than from States Parties. Article 56 of the African Charter provides that the admissibility of a Communication submitted pursuant to Article 55 is subject to seven conditions.<sup>2</sup> The African Commission has stressed that the conditions laid down in Article 56 are conjunctive, meaning that, if any one of them is absent, the Communication will be declared inadmissible.<sup>3</sup>
82. The Complainants in the present Communication argue that it has satisfied the admissibility conditions set out in Article 56 of the Charter and as such, the Communication should be declared admissible. The Respondent State on its part submits that the Communication should be declared inadmissible because, according to the State, the Complainants have not complied with Article 56 (3), (5) and (6) of the African Charter.
83. Article 56 (3) of the Charter requires that Communications submitted to the African Commission are not written in *disparaging* or *insulting* language directed against the State concerned and its institutions or to the Organization of African Unity (or African Union).
84. In the present Communication, the Respondent State argues that the Communication is written in a language insulting to the judiciary of the State. The State avers that the Complainants published an issue of its Newspaper (The Daily News) on 12 September 2003 in which it stated *inter alia* that "...the handing down of the judgment marked a *sad day for Zimbabwe's constitutional history*. *I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA , we would have had to hang first and challenge the penalty from hell*". According to the State, this statement shows the contempt that the Complainants have for the Supreme Court.
85. The State claims further that by stating in the Communication that a Judge of the Supreme Court - Judge Sandura, was *omitted* from the case Complainants were insinuating that the composition of the Supreme Court was manipulated. The State claims that the use of the word "omitted" in the

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<sup>2</sup> See Article 56 of the African Charter.

<sup>3</sup> See African Commission, Information Sheet No. 3.

- Communication clearly connotes a motive by the Chief Justice, who selects judges to sit on a case, to have excluded Judge Sandura and that there is bias in the appointment of judges of the High Court and the Supreme Court because they are appointed by the President, and that that the Supreme Court was biased towards the government and therefore acted not as the judiciary but as a political agent of the Government.
86. In response to the State's allegation of disparaging language, the Complainants refuted the allegation and noted that the language was necessary in that it sought to describe the effect of the judgment on the Complainants. The Complainants also described a number of situations in which it claims the Respondent State itself had made "uncharitable remarks against the same judiciary..." which they consider as insulting and disparaging and far removed from the "criticism that is contained in the Complainants' brief" which according to them "are aimed at showing the absence of a local remedy in the light of the decision by the Supreme Court".
87. The fundamental question that has to be addressed in the present Communication is *how far one can go in criticizing a judge or the judiciary in the name of free expression*, and whether the statement made by the Complainants constitutes *insulting* or *disparaging* language within the meaning of Article 56 (3) of the African Charter. Indeed, the Communication invites the Commission to clarify the ostensible relationship between freedom of expression and the protection of the reputation of the judiciary and the judicial process.
88. The operative words in sub-paragraph 3 in Article 56 are *disparaging* and *insulting* and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, *disparaging* means *to speak slightly of... or to belittle....* and *insulting* means *to abuse scornfully or to offend the self respect or modesty of...*
89. The judiciary is a very important institution in every country and cannot function properly without the support and trust of the public. Judges, by the very nature of the profession, speak in courts and courts only. They are not at liberty to debate or even defend their decisions in public. This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis, it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly, and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One such protective device is to

deter insulting or disparaging remarks or language calculated to bring the judicial process into ridicule and disrepute.

90. The freedom to speak one's mind and debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual officers. A clear line cannot be drawn between acceptable criticism of the judiciary and statements that are downright harmful to the administration of justice. Statements concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. Because of the grave implications of a loss of public confidence in the integrity of the judges, public comment calculated to bring the judiciary into disrepute and shame has always been regarded with disfavour.
91. 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. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.
92. The importance of the right to freedom of expression was aptly stated by the African Commission in Communications 140/94, 141/94, 145/94 against Nigeria<sup>4</sup> when it held that freedom of expression is  
a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression.

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<sup>4</sup> Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, 13<sup>th</sup> Annual Activity Report of the OAU, 1999–2000.

The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance

93. Over the years, the line to be drawn between genuine criticism of the judiciary and insulting language has grown thinner. With the advancement of the politics of human rights, good governance, democracy and free and open societies, the public has to balance the question of free expression and protecting the reputation of the judiciary. Lord Atkin expressed the basic relationship between the two values in *Ambard v A-G of Trinidad and Tobago* (1936) 1 All ER 704 at 709 in the following words:

but whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public act done in the seat of justice. The path of criticism is a public way...Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even through outspoken comments of ordinary men

94. More recently Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* (1994) 2 SA expressed the modern balance as follows:

Judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable...Criticism of judgments, particularly by academic commentators, is at times acerbic, personally oriented and hurtful...To some extent what in former times may have been regarded as intolerable must today be tolerated.... This, too, will help maintain a balance between the need for public accountability and the need to protect the judiciary and to shield it from wanton attack

95. In an open and democratic society individuals must be allowed to express their views freely and especially with regards to public figures, such views must not be taken as insulting. The freedom to speak one's mind is now an inherent quality of a democratic and open society. It is the right of every member of civil society to be interested in and concerned about public affairs – including the activities of the courts.

96. In the present communication, the Respondent State has not established that by stating that one of the judges of the Supreme Court was “omitted”

the Complainants has brought the judiciary into disrepute. The State hasn't shown the detrimental effect of this statement on the judiciary in particular and the administration of justice as a whole. In its submission to the Commission, the Complainants indicated that "... [t]he judges who issued the judgment sat as the country's constitutional court, constituted as usual by a bench of five. The country only has six Supreme Court judges. The most senior judge, Justice Sandura, was *omitted* from the Court's line-up, but he cannot now constitute a new bench, either by sitting alone or by sitting with acting judges of appeal". In the opinion of the Commission, the Complainants were simply stating a fact - a fact to demonstrate that in their view, it had approached the highest judicial body in the country. The use of the word "omitted" can not in the Commission's view be seen as disparaging or insulting to the judiciary. There is no evidence to show that it was used in bad faith or calculated to poison the mind of the public against the judiciary.

97. With regards the Respondent State's claim that the Complainants published an article with disparaging language in their Newspaper edition of 12 September 2003, the African Commission cannot make a pronouncement on the same as the purported statement does not form part of the complaint submitted to the Commission. Article 56 (3) of the Charter requires that *Communications submitted* to the African Commission are not written in *disparaging* or *insulting* language.... Communications within the meaning of Articles 55 and 56 refer to the *complaints* submitted by petitioners. These complaints invariably include other documentations submitted by the petitioner to support their case, such as annexes. Documents supplied by third parties or the Respondent cannot and should not form part of the complaint. In the present Communication, neither the complaint itself nor the annexes thereto made reference to the statement purportedly published by the Complainant in its Newspaper edition of 12 September 2003. For the above reasons, the Commission decline to uphold the Respondent State's argument that the Communication is written in disparaging and insulting language.

98. With regards the exhaustion of local remedies, Complainants submit that domestic remedies are ineffective, that the Respondent State has been given the opportunity to remedy the grievance submitted before the Commission but the State, through its courts, has proved unable to do so. The Respondent State on its part argues that the matter is still before the Supreme Court, the highest court in the country, and has been pending before the Court simply because of the Complainants' "defiance of the law".

99. It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted. The principle of the exhaustion of

- local remedies is contained in Article 56(5) of the African Charter and provides that Communications relating to human and peoples' rights referred to in Article 55 received by the African Commission shall be considered if they "*are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged*".
100. International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations.
101. The international bodies do recognize however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted and special circumstances where it might not be necessary to exhaust them. The African Commission has held that for the domestic remedies referred to in Article 56 (5) of the Charter to be exhausted they must be *available, effective and sufficient*. If the domestic remedies do not meet these criteria, a victim may not have to exhaust them before complaining to an international body. However, the complainant needs to be able to show that the remedies do not fulfil these criteria *in practice*, not merely in the opinion of the victim or that of his or her legal representative.
102. If a Complainant wishes to argue that a particular remedy does not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows: (a) the Complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) - this does not yet have to be proven; (b) the Respondent State must then show that the remedy is available, effective and sufficient; and (c) if the Respondent State is able to establish this, then the Complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective *in the specific case*, even if it may be effective in general.
103. In the present Communication, the Complainants and the Respondent State seem to have reached what the Commission would call a "*legal impasse*". The Complainants argue that the domestic remedy provided by the Respondent State is ineffective and cannot remedy their grievance,

while the State contends that the remedy is available and effective but the Complainants' defiance of the law has prevented them from using it. Usually, when there is a legal disagreement between two parties, the appropriate national institution to resolve that disagreement is the domestic courts. In the present Communication, the Complainants have been to the highest court of the country and the latter refused to hear and determine Complainants' grievance on the merits claiming Complainants have approached it with dirty hands. Complainants argue that on matters of fundamental human rights, as is the case with the present Communication, the dirty hands doctrine invoked by the Supreme Court cannot be used as it would be undermining the supremacy of the Constitution. According to the Complainants therefore, the domestic remedy available is not effective because it is incapable of redressing the grievance and that is why the matter has been referred to the Commission.

104. A brief account of the circumstances of the case would be helpful to determine whether Complainants' argument that there is no effective remedy or the State's contention that the Complainants have not exhausted domestic remedies is correct.
105. On 15 March 2002, the Respondent State enacted a law, the Access to Information and Protection of Privacy Act which required media practitioners to register their businesses before operating in the country. In terms of Section 93 of the Act, any person who immediately the Act became law was publishing a Newspaper was deemed to be lawfully registered for a period of three months, that is, up to 15 June 2002. It was envisaged that those who were required to register would apply and be registered within the three months period. However, the Regulations to the Act prescribing the various forms that had to be used for registration were published only on the date the three months was due to expire, 15 June 2002. This means that no application for registration could be made before 15 June 2002. To cater for this delay, section 8(2) of the Regulations provides that once a person has submitted an application for registration, then that person is permitted to carry on mass media activities while the application is being considered.
106. Meantime, the Complainants sought to challenge the constitutionality of the Act claiming the Act was unconstitutional and thus null and void *ab initio*. The Complainants applied to the Supreme Court for an order declaring certain provisions of the Act a nullity. The application was heard on 3 June 2003. On 11 September 2003, the Supreme Court handed down a ruling that it was not prepared to hear and determine the merits of the case until the applicant (the Complainants) had registered, that is, comply with the Act. A day after the ruling, that is, 12 September 2003, Complainants published an edition of their Newspaper, the Daily News. That same day,

- police visited the premises of the Complainants and evicted all employees there from.
107. After discussions with the police on 13 September 2003, Complainants were given permission to enter the premises with a few staff to prepare documents to apply for registration. On 15 September 2003, Complainants submitted application for registration to the Media and Information Commission and the application was duly acknowledged on the same day. On 16 September 2003, Respondent's agents - the police, raided the premises of Complainants seizing equipment – computers, printers and other office accessories belonging to Complainants. On 17 September Complainants went to the High Court seeking an order that Respondent vacates the premises and restore possession and control thereof to them and return all goods and equipment removed from the premises. On 18 September, the High Court ruled in favour of the Complainants and ordered the Respondent to return the property. The Court also noted that in terms of section 8 (2) of the Regulations, the Respondent has no legal right to prevent the applicant and its employees from gaining access to the premises of the applicant and carrying on its business of publishing a Newspaper.
108. On 19 September 2003, the MIC informed the Complainants that its application for registration could not be granted because Complainants have been operating illegally even after the Supreme Court Order of 11 September 2003 and that the Complainants had failed to accredit its journalists. On 23<sup>rd</sup> September 2003, the Complainants lodged an appeal with the Administrative Court of Zimbabwe against the decision of the MIC claiming that MIC was improperly constituted, acted *ultra vires* and that the Chairperson of the MIC was biased. On 24 October 2003, the Administrative Court upheld the arguments of the Complainants and ordered the MIC to grant a certificate of registration to the Complainants by the 30<sup>th</sup> of November 2003. Before the certificate could be issued and before the 30<sup>th</sup> of November 2003, Complainants went ahead and published on 25 November 2003, another edition of its Newspaper – The Daily News. The Respondent State claims it has appealed the decision of the Administrative Court and it is this appeal which the State is claiming is still before the courts and thus domestic remedies have not been exhausted.
109. In view of the above scenario, it is apparent to the African Commission that there are two matters that the Complainants have taken to the Courts of the Responding State. The one is a matter to declare the AIPPA unconstitutional, which the Supreme Court on 11 September 2003 declined to entertain on condition that Complainants comply with AIPPA – the same Act they sought to challenge before the Court. The second matter brought before the Administrative Court is the one to appeal against the decision of

the Media and Information Commission not to grant the complainant registration to operate media services. The Administrative Court ruled in favour of the Complainants and the State claims to have appealed the decision.

110. Both matters originate from the Complainants' desire to challenge the AIPPA. The matter for which the African Commission is called upon to decide is clear. It is the decision of the Supreme Court not to rule on the Complainants' challenge of the constitutionality of AIPPA. After the Supreme Court decision of 11 September 2003, the Complainants argue that there was no other court available in the country to hear the matter. Since the Complainants disagreed with the reasoning of the Supreme Court for not making a determination on the merits of the matter and since the Court sat as the highest court in the land on the matter, there was no other avenue for appeal. As far as the Complainants are concerned, the only domestic remedy available, the Supreme Court, was not able to deal with the particular case and as such was ineffective. The Complainants therefore approached the African Commission to seek redress. The Communication to the African Commission was submitted on 12 November 2003, twelve days before the decision of the Administrative Court on another matter – that dealing with the MIC's refusal to grant the Complainants a registration certificate.
111. In the opinion of the African Commission, the two cases, though stemming from the same matter, cannot be considered as pending before the courts of the Respondent State. The appeal of the Respondent on the Administrative Court's decision has no bearing on the case before the African Commission, because the Respondent State has not established that the Complainants intend to use the outcome of that case to revert to the Supreme Court to hear its original application on the constitutionality of AIPPA. Also, the fact that the Complainants submitted the present Communication to the Commission while the appeal on the other case was still pending indicates that the outcome of the appeal had no bearing on the case submitted to the Commission. There is no information submitted to the African Commission to the effect that the matter before it is on appeal. What the Commission knows is that the Supreme Court refused to hear the matter on the merits and ordered Complainants to go and put its house in order. Complainants have not indicated that they intend to put their house in order and revert to the Court.
112. In view of the above, the African Commission is of the view that the matter for which the State has appealed is not before it and has not been brought to it by any of the parties. However, on the matter submitted to it by the Complainants, the latter has demonstrated that it has seized the highest Court in the country and could not get appropriate remedy.

113. It is immaterial at this stage to discuss why the Supreme Court refused to hear the Complainants' case. What the Complainants need to do is to satisfy the African Commission that it approached the Supreme Court with the current grievance and failed to get remedy. This, in the opinion of the Commission, has been aptly demonstrated.
114. Regarding the Supreme Court ruling of 14 March 2005, the African Commission recognises the fact that the parties to the case are the same, that the subject matter is similar to those brought by the Complainants before the same Supreme Court in June 2003 and which the latter ruled on 11 September 2003 against the Complainants.
115. The question before the African Commission at this stage is not to determine whether the Complainant have, subsequent to the submission of the Communication to the Commission, had their grievances resolved, but rather whether at the time of submitting the Communication, domestic remedies were available, effective and sufficient.
116. The African Commission has held that a remedy is considered available if the petitioner can pursue it without impediment. In *communication 147/95 and 149/96*, the Commission held that a remedy is considered available only if the applicant can make use of it in the circumstances of his case. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.<sup>5</sup>
117. The facts as presented before the African Commission indicate that at the time the Communication was submitted the Complainants had approached the highest court in the Respondent State – the only domestic remedy available to address the grievance. The Court declined to make a determination on the merits of the case brought by the Complainants requiring the Complainants instead to undertake an action which was the very subject matter of the application.
118. By refusing to make a determination on the merits of the case and by “forcing” the Complainants to perform that which it was challenging before the Court, the Supreme Court effectively demonstrated its inability to address the question put to it by the Complainants and made domestic remedies unavailable and ineffective in the instance of the Complainants' case and left the latter with no other alternative than to resort to the international forum to seek protection.

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<sup>5</sup>. Sir Dawda Jawara v The Gambia, communication 147/95 and 149/96.

119. The availability of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because he is required by the same judiciary to first of all recognise that which he is challenging, local remedies would be deemed to be unavailable to him. In the present Communication, that seems to have been the case.
120. The Respondent State, without elaborating, also argues that the Complainants have not complied with Article 56 (6) of the African Charter. This sub-article provides that Communications referred to under Article 55 of the Charter 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 Communication was received at the Secretariat of the African Commission on 12 November 2003, two months after the Supreme Court refused to hear the matter on the merits. It is the opinion of the Commission that the Communication was submitted within a reasonable time.
121. For the above reasons, the African Commission declines to grant the Respondent State's request for the Communication to be declared inadmissible and upholds the Complainants' arguments that all the conditions under Article 56 have been met and thus declares the Communication admissible.

### **Submissions on the merits**

#### **Complainants' submissions on the merits**

122. The Complainants submit that, the Respondent State's court, by invoking the dirty hands doctrine and refusing to hear their case, violated their rights guaranteed in Articles 3, 7, 9, 14 and 15 of the African Charter. The Complainants are not asking the Commission to pronounce on the compatibility of the AIPPA to the African Charter.
123. Regarding the alleged violation of Article 3, they submit that the failure of the Supreme Court to decide whether the AIPPA was unconstitutional was a violation of their right to equal protection of the law, adding that this refusal 'collides not only with the letter and spirit of the Charter but more so with universal law as expressed in several other documents such as Article 2 (b) of the International Covenant on Civil and Political Rights, Article 8 of the Universal Declaration of Human Rights, as well as Articles 7 and 26 of the African Charter.
124. According to the Complainants, the relief sought by ANZ was a determination of the constitutionality or otherwise of an Act of Parliament,

and the Court was supposed to decide on the facts of the alleged violations and 'not on the presumption of non-compliance with an Act of Parliament'. That by deciding on a procedural aspect on a principle of equity which was not applicable to matters pertaining to human rights, the Court denied the ANZ the right to equal protection before the law as provided in the Charter.

125. The Complainants argue that the right to equal protection of the law is guaranteed in the constitution of the Respondent State thus: 'any one who has reason to believe that his fundamental rights are about to be violated or are likely to be violated can petition the Court for its immediate intervention'. The Complainants submit that 'to then rely on a doctrine of equity addressing an issue which is believed to stem from the rights protected by the constitution will not only be depriving the petitioner of an effective remedy but also denial of the right to protection of the law'.
126. Regarding allegation of violation of Article 7, Complainants argue that by refusing to hear the merits of their petition, the supreme court proved to be ineffective in acting both as the court of first instance in matters relating to human rights, and in their case, as final tribunal. They argue that for an appeal to a competent body to be considered to be effective, there must be an equally effective decision to remedy the violation of the right of the petitioner. The decision that results from the appeal need not be favourable to the petitioner but it must be considered effective in so far as it addresses the petition.
127. The Complainants argue further that the right to appeal to competent authorities on allegation of human rights violations should not be dealt with on procedural aspects only, but the competent body, in this case the Supreme Court, should make a decision based on the merits of the petition. According to the Complainants, in their case, the Court denied them the right to be heard and therefore denying them justice.
128. The Complainants indicate that the determination of one's rights by a competent tribunal is a procedural guarantee provided for in the Charter. To determine whether one's rights have been violated, the national body has to make a determination on the merits of the petition. In the present case, they argue, the Supreme Court refused to determine the merits of the case thereby depriving them of an effective remedy. The Complainants go further to state that the application of the clean hands doctrine in matters relating to constitutional challenges actually results in legal unpredictability and could ultimately lead to disorder, adding that non-judicial decision of a *bona fide* case deprives litigants as well as future actors of that knowledge of effective remedies, and the fact that an Act has been passed into law does not preclude one from challenging its constitutionality and the notion of complying with an illegality first does not tally with the notion of

constitutional supremacy and laws which are not in conformity with the constitution are void *ab initio*.

129. The Complainants further submit that by declining to decide on the constitutionality of the AIPPA, the Court abdicated on its primary duty as the protector of fundamental human rights and denied the petitioners the right to be heard and the protection of the law.
130. In conclusion, the Complainants submit that the role of the African Commission in the matter is not to interpret the law being challenged or declare that the decision of the domestic court was unconstitutional, but it is rather to establish whether the decision of the court is in violation of the Charter. They implore the Commission to find that by applying the unclean hands doctrine in matters relating to constitutional rights, the Supreme Court of Zimbabwe violated the rights guaranteed in the Charter, in particular, *equal protection of the law, fair trial and the right to appeal to competent bodies*.

#### ***Respondent State's submissions on the merits***

131. In its submissions, the Respondent State argues that all the Complainant's submissions are without merit. The State cited the Supreme Court decision in Association of Independent Journalists and Others vs. Minister of State for Information and Publicity and others, where it was held that any law that seeks to regulate the practice of journalism has to conform to the stringent requirements for a law abridging the right conferred by section 20 of the Constitution in order to be valid. The State emphasised that the Media Commission does not have any discretion and that anybody who complies with the requirements of section 79 is entitled to accreditation. According to the State, the implication is that, if the requirements are too onerous, then the regulations, including section 83 which prohibits practicing as a journalist without accreditation, could be held to be unconstitutional.
132. The Complainants indicate that, regulations require personal information which includes marital status, national identity number, residential address, criminal record and details of accreditation to a specific media house. They claim that for purposes of licensing, these requirements cannot be said to be onerous.
133. According to the Respondent State, statistics held by the Media and Information Commission portrayed that none of these requirements are onerous.
134. The Respondent State argues that the Complainants' claim that it is dangerous for journalists to disclose their residential address for fear of arrest after midnight cannot go unchallenged because there is no prove as

to the fact that any journalist has been arrested at midnight after having filed the application for accreditation.

135. The Respondent quotes Article 9(2) of the African Charter, where the African Commission in interpreting the phrase 'within the law' has said that the authorities should not override constitutional provisions and fundamental rights guaranteed by the Constitution and International human rights standards.<sup>6</sup> The Respondent recognises that national law cannot set aside the right to express and disseminate information which is recognised under international law.
136. Furthermore, the State contends that the Charter recognises the right of the State to justify resorting to limitation of the right which has to be justifiable in terms of international practice, and measures taken must be in line with protected interest, adding that Section 20(1) of the Zimbabwean Constitution is in line with Article 9(2) of the Charter. The Constitution provides for derogation of a fundamental right where the derogation is according to law.
137. The Respondent State submits further that, the legislation applies to all media houses and practitioners who wish to practice in Zimbabwe without posing any threat to the right of the public to receive information.
138. In addition to the above, that mere registration of the media does not inhibit the practice of journalism and that the Complainants' submission does not portray how exercise of that right is curtailed by the requirement of registration. The State quotes the wordings of Article 13 of the European Convention which grants an absolute right as opposed to Article 9(2) of the African Charter, adding that the interpretation by the American Convention is different from that in article 10.1 of the European Convention which empowers legislation in respect for licensing of broadcasting, television and cinema, and Article 9 of the African Charter which allows for the exercise of the right. Therefore, the State asserts, within the African Charter provisions, there is nothing that stops both technical and journalistic regulation as long as it is in accordance with the Charter.
139. The Respondent State contends that, the objective of regulating journalists is not to control them and to prevent or limit critical journalism, rather it is within the ambit of allowable derogations within the Charter.
140. According to the Respondent, the provisions being challenged by the Complainant may cause inconveniences to journalists. However, that they

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<sup>6</sup> Communication 101/1993.

are not arbitrary and oppressive and do not violate the right of freedom of expression.

141. The State further submit that, the accreditation of journalists and licensing of the media is constitutional and compliant to the Charter.
142. The Repondent therefore submit that both sections 79 and 80 of the AIPPA are not in contravention of Article 9 of the Charter. Furthermore, that the provisions of Article 27(2), in line with section 20(1) of the Constitution and section 80 of the AIPPA provide that the rights and freedoms of each individual shall be exercised with due regard to the rights, collective security, morality and common interest.
143. The Respondent State therefore prays that the Commission finds that the legislation in question does not violate Article 9 of the Charter as alleged by the Complainant.

***Respondent State's supplementary submissions on the merits***

144. During the 41<sup>st</sup> Ordinary Session, the Respondent State made a supplementary submission claiming that it never received the Complainant's submissions on the merits prior to submitting its original submission on the merits, adding that the supplementary submissions was meant to address the issues raised by the Complainants.
145. In its submissions, the Respondent State notes that Complainants argue that there are civil and criminal sanctions for *injuria* and defamation which already regulate the conduct of journalists and hence no need for further legislation, that registration requirements are unduly intrusive and burdensome, and that compliance with the requirements does not necessarily guarantee registration of a journalist as the MIC has the discretion to decide whether or not to register a journalist. The Respondent State claims that each of the Complainants' submissions referred to above and elsewhere are without merit.
146. The African Commission finds that supplementary submission of the Respondent State does not depart from its earlier submission summarised in paragraphs 131 – 143 of this decision.

***The African Commission's decision on the merits***

147. In the present Communication, the Commission is called upon to make a determination whether the decision of a domestic court, the highest court of the land in the Respondent State, not to hear a petition brought by the

Complainants because the latter came before the Court with ‘dirty hands’, is a violation of the Charter. In other words, did the Supreme Court violate the rights of the Complainants by invoking the equitable doctrine of ‘he who comes to equity must come with clean hands’? The Commission is not called upon to determine the constitutionality of the AIPPA which was the subject at issue before the Supreme Court. The Commission is also not called upon to determine whether the AIPPA or provisions thereof, violate the African Charter. It is called upon to determine whether by invoking the dirty hands doctrine, the Respondent State, through its Court, violated the right to have the Complainants’ cause heard, as guaranteed under Article 7 (1) (a) of the African Charter.

### ***What is the clean hands doctrine?***

148. According to the Black’s Law Dictionary (2000), the clean hands doctrine is an equitable principle which requires that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle such as good faith. It bars relief to persons who are guilty of misconduct in the matter for which they seek relief. It is a positive defense that is available where the complaint by the claimant is equitable.
149. Normally, equitable relief is generally available when a legal remedy is insufficient or inadequate to deal with the issue. These rights and procedures were created to provide fairness, unhampered by the narrow confines of the old common law or technical requirements of the law. It was recognised that sometimes the common law did not provide adequate remedies to solve all problems hence the creation of the courts of equity by the monarch.
150. However, in modern days, separate courts of equity have largely been abolished and the same courts that may award a legal remedy have the power to prescribe an equitable one. With time, certain aspects of equity were imported into the law and one such import is the doctrine of Clean Hands.
151. It is notable also that it is quite a controversial doctrine particularly in the sphere of public law where the formulation is that the responsibility of the state is not engaged when the complainant has acted in breach of the law of the state. However, as an equitable rule extended to the domain of law, it is necessary to be cautious when applying it particularly in cases where fundamental legal/human rights are involved.
152. In the present Communication, the relief sought by the Complainants before the Supreme Court was a determination by the Court whether an Act of Parliament, enacted by the Respondent State, violated or was likely to

violate their fundamental rights guaranteed under the Constitution, and other international human rights instruments, including the African Charter. According to the Supreme Court, the petition could not be entertained because the Complainants approached the Court with *dirty hands*. They (the Complainants) had refused to comply with the very law they approached the Court to challenge. The Court thus invoked the equitable doctrine of 'he who comes to equity must come with clean hands', and refuse to entertain the Complainants' request for the Court to determine the constitutionality of the Act they were challenging.

153. The question before the Commission is whether the Supreme Court, by invoking the clean hands doctrine, and refusing to entertain the merits of the petition of the Complainants, violated the rights of the Complainants and in effect, the African Charter.

### ***Alleged violation of Article 3***

154. The Complainants allege the violation of Article 3 of the African Charter. This Article provides that: 'Every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law'. According to the Complainants, by applying the unclean hands doctrine and refusing to hear the merits of their case, the Supreme Court of Zimbabwe violated the right to equal protection of the law guaranteed under Article 3 of the African Charter. The State did not address itself to this allegation.
155. Article 3 guarantees fair and just treatment of individuals within the legal system of a given country. The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.
156. The most fundamental meaning of equality before the law provided for under Article 3(1) of the Charter *is the right by all to have the same procedures and principles applied under the same conditions*.
157. The right to equality before the law means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. With respect to Article 3(2) on the right of equal protection of the law, the African Commission in its decision in Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development /Republic Of Zimbabwe<sup>7</sup>, relied on the Supreme Court decision in *Brown v.*

<sup>7</sup>

Communication 293/2004.

Board of Education of Topeka,<sup>8</sup> in which Chief Justice Earl Warren of the United State of America argued that ‘equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.’<sup>9</sup>

158. In order for a party to establish a successful claim under Article 3 of the Charter, it should show that, the Respondent State has not given the Complainant the same treatment it accorded to the others in a similar situation. Or that, the Respondent State had accorded favourable treatment to others in the same position as the Complainant.
159. In the present Communication, the Commission notes that the Complainants have not demonstrated the extent to which the Courts treated them differently from the Respondent State or from any other party in a similar situation. This seems to be the first instance where the Supreme Court is approached to deal with the kind of matter raised by the Complainants and there is no evidence to indicate that the Complainants were treated differently. The African Commission can therefore not find the Respondent State to have violated the Complainants’ rights under Article 3 of the African Charter.

#### ***Alleged violation of Article 7***

160. With respect to the alleged violation of Article 7 of the African Charter, the Complainants submit that the right to have their cause heard, in particular, the right to an appeal to competent national organs against acts violating their fundamental rights... guaranteed under Article 7 (1) (a) of the African Charter have been violated. The Respondent State on its part argues that their right to be heard has not been violated, noting that Complainants’ have disregarded the law.
161. The Respondent State operates a legal system where the Constitution reigns supreme. Article 3 of the Constitution of Zimbabwe provides that “this Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void”. This means any law that violates the Constitution, or any conduct that conflicts with it, can be challenged and struck down by the courts.

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<sup>8</sup> 347 U.S 483 (1954).

<sup>9</sup> [www.legal-explanations.com](http://www.legal-explanations.com).

162. The fundamental rights of Zimbabweans are enshrined in Chapter 3 of the Constitution of Zimbabwe entitled *the Declaration of Rights* (Bill of Rights). All legislation passed by Parliament must conform to the Bill of Rights provisions of the Constitution. If a legislative provision is inconsistent with the Bill of Rights, the courts, in particular, the Supreme Court, have been given the power to declare it to be void and of no force and effect.
163. This function to determine constitutionality or compatibility or otherwise of laws with the Constitution rests with the Supreme Court of the Respondent State. Thus, when there are doubts about the constitutionality of a new legislation, persons affected are entitled to obtain a ruling from the Supreme Court as to whether or not the legislation is constitutional.
164. The Supreme Court has also been given extensive powers to provide appropriate remedies to persons whose fundamental rights have been violated. In terms of Section 24 (1) of the Constitution, if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, *without prejudice to any other action with respect to the same matter which is lawfully available*, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.
165. In view of the importance attached to fundamental rights, Article 24 (4) provides that the Supreme Court shall have original jurisdiction –
- to hear and determine any application made by any person pursuant to subsection (1) *or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious*; and... may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

166. In terms of the Constitution, there are at least two instances in which the Supreme Court can decline to entertain an application to determine the constitutionality of a law. The first is when in its view, the application is *vexatious* or *frivolous*; and the second is when the Supreme Court is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law. In the present Communication, neither of the two grounds could apply. The Court did not find the application vexatious or frivolous and there was no other adequate means of redress of the issue as the Supreme Court in the Respondent State has original and final jurisdiction with respect to matters dealing with fundamental rights.
167. Article 24 of the Constitution does not provide any time bar or an indication on when one should approach the Supreme Court to seek redress for any alleged violation of their rights. The Constitution simply provides that anyone who believes his rights *have been, are being or are likely to be* violated can approach the Court. This means that a law can be challenged at any time, depending on the circumstances, and on how the alleged victim perceives the law as interfering with the enjoyment of their rights, that is, whether the law has already violated the person's rights, whether the law is violating the person's rights or whether the law is likely to violate the person's rights.
168. In the case under consideration, the Complainants argue that the law enacted by Parliament *is likely to* violate their rights guaranteed under the Constitution of the Respondent State and under international human rights instruments. For this reason, they approached the Supreme Court to declare those sections of the law they believed would *likely* violate their rights, unconstitutional. In the Supreme Court, the Respondent State raised the point *in limine* that the Applicant (Complainants before the Commission), ought not to be heard on the merits as it had not sought registration. The Supreme Court upheld the Respondent State's contention, and in its ruling advised the applicant to seek registration with the Respondent State before approaching it (the Supreme Court) for the relief on the merits of the constitutional challenge.
169. Can it be said that the Complainants were refused to be heard by the Supreme Court? In other words, by not hearing the Complainants' petition on the merits, could it be argued that their right to have their cause heard has been violated?
170. To answer this question, the Commission will have to determine the meaning of having 'one's cause heard' under Article 7(1)(a) of the Charter.

171. Article 7(1) of the African Charter provides that “every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.
172. The right to have one’s cause heard requires that the matter has been brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law.
173. In the present Communication, the Complainants argue that the Supreme Court failed to hear their ‘cause’ on the merits. The Supreme Court instead pronounced itself on a preliminary objection raised by the Respondent State that the Complainants were before the Court with dirty hands. In its ruling, the Supreme Court directed the Complainants to go and do that which they were challenging (to register in accordance with the Respondent State’s Law they were challenging before the Court), and it is only then that their ‘cause’ could be heard on the merits.
174. In the opinion of the Commission, a ‘cause’ before a tribunal must be construed in broader terms to include everything related to the matter, including preliminary issues raised on the matter. The Court need not pronounce itself on the merits of the substantive matter. It simply needs to hear the parties. Thus, by pronouncing on the preliminary issue raised by the Respondent State on the question brought by the Complainants, the Supreme Court in effect heard the ‘cause’ of the Complainants. Besides, the Supreme Court did not close its doors on the Complainants, it simply asked the latter to go and register and come back to it for the matter to be heard on the merits. It can therefore not be said that the Respondent State has violated the Complainants’ rights under Article 7.

***Alleged violation of Article 9, 14 and 15***

175. It is alleged that the State moved into action to seize the premises and close the offices of the Complainants after the Court’s decision.
176. Can it be said that the State was enforcing a Court decision or trying to prevent a breach of the law? The African Commission is of the view that even if the State was in the process of ensuring respect for the rule of law, it ought to have responded proportionally. In law, the principle of proportionality or proportional justice is used to describe the idea that the punishment of a certain crime should be in proportion to the severity of the crime itself. The principle of proportionality seeks to determine whether, by

the action of the State, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole. In determining whether an action is *proportionate*, the Commission will have to answer the following questions:

- Was there sufficient reasons supporting the action?
- Was there a less restrictive alternative?
- Was the decision-making process procedurally fair?
- Were there any safeguards against abuse?
- Does the action destroy the very essence of the Charter rights in issue?

177. In its decision, on Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme*/Islamic Republic of Mauritania, the African Commission held in respect of the allegations made against the State that “the dissolution of *UFD/Ere nouvelle* political party by the Respondent State was not proportionate to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter”.

178. In the present Communication, when put against the above criteria, it is clear that the action of the State to stop the Complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons. In a civilized and democratic society, respect for the rule of law is an obligation not only for the citizens but for the State and its agents as well. If the State considered the Complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them. The State did not do that but decided to use force and in the process infringed on the rights of the Complainants.

179. The action of the Respondent State to stop the Complainants from publishing their newspapers, close their business premises and seize their equipment resulted in them and their employees not being able to express themselves through their regular medium; and to disseminate information. The confiscation of the Complainants’ equipment and depriving them of a source of income and livelihood is also a violation of their right to property guaranteed under Article 14. By closing their business premises and preventing the Complainants’ and their employees to work, the Respondent State also violated Article 15 of the Charter. Thus, whether motivated by the Supreme Court’s decision or through its own initiative, the action of the Respondent State resulted to an infringement of the rights of the Complainants. The Commission thus finds the State in violation of Articles 9 (2), 14 and 15 of the African Charter.

180. The African Commission thus finds the Respondent State has not violated Articles 3 and 7 of the African Charter as alleged by the Complainants.

181. The African Commission however finds the Respondent State in violation of Articles 9 (2), 14 and 15 of the African Charter.

182. Since a violation of any provision of the Charter necessarily connotes the State Party's obligation under Article 1, the African Commission also finds the Respondent State in violation of Article 1 of the African Charter.

The African Commission thus recommends that the Respondent State provides adequate compensation to the Complainants for the loss they have incurred as a result of this violation.

**Adopted at the 6<sup>th</sup> Extra Ordinary Session of the African Commission on Human and Peoples' Rights, 30<sup>th</sup> March – 3<sup>rd</sup> April, 2009, Banjul, The Gambia.**