

## **Access to COVID-19 Vaccines: A Continued Cry for the Poor, Marginalized, Vulnerable and Unheard**

### **Litigation on Access to COVID-19 Vaccines in Southern Africa Virtual Workshop (15<sup>th</sup> July 2021)**

#### **Keynote Speech Justice Zione Ntaba**

Let me first bring you greetings from the Warm Heart of Africa, Malawi. It is a country rich with beautiful people, amazing food, breathtaking mountains and a lake which is fondly called the Lake of Stars or the Calendar Lake. It is a country steeped in diversity in terms of culture, its people and an abundance of natural resources.

It is an immense honour to address you at this *COVID-19 Litigation on Access to Vaccines Workshop* being held virtually. It is important to note that the theme is highly appropriate right now on the African continent as every country is continuing to grapple with COVID-19 and its impact on the population as well as its economic prosperity and development for its people. Therefore, my keynote address is suitably placed in this discussion that Africa needs to have at this point.

Before, I proceed into my address, it would be remiss of me if I did not tell you how much of an honour it is that I am here addressing such an esteemed gathering of people. I chose law as a career and I choose public service as my call. I am hoping that my passion for law and its ability to change context for a person, group, community or nation is a call which I think African nations need to hear, more so especially during these times.

In beginning today's conversation, it is fundamental that it is rooted in the rule of law. Undeniably, everything in this world and our interactions in it are based on a normative framework whether written or unwritten including economics, societal issues as well as culture. Therefore, I choose to begin with Eleanor Roosevelt's words which add a lot of value to the debate:

*"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighbourhood he lives in; the school or college he attended; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world".<sup>1</sup>*

Arguably, many parts of the world are returning back to some semblance of pre-pandemic normalcy, with large parts of their populations having been vaccinated. At the same time, the majority of countries in

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<sup>1</sup> Eleanor Roosevelt, Excerpt from a speech by Eleanor Roosevelt at the presentation of "IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights." Thursday, March 27, 1958. United Nations, New York. <https://ironline.american.edu/blog/our-basic-human-rights/> (accessed: 20th September, 2019).

Southern Africa are witnessing the most devastating wave of COVID-19 yet, with the majority of countries only having fully vaccinated less than 4% of their populations.<sup>2</sup> With the Delta variant of COVID-19 spreading at an increasing speed, the WHO recorded the highest number of new COVID-19 cases seen on the continent in the first week of July 2021.<sup>3</sup> Increasing transmission rates have forced many Southern African countries into lockdowns again, with some countries experiencing the harshest government measures yet.

Recognizably, and not denying the responsibility of the international community as a whole to facilitate and ensure speedy and equitable access to COVID-19 vaccines and health products, we must also not ignore the failure of national governments to take all necessary measures to ensure access to COVID-19 vaccine for their people and Southern Africa is not an exception. It has also been argued that the conduct of pharmaceutical companies putting profits over life as well as the reluctance of States, particularly those in the Global North, to waive intellectual property rights, have worsened the situation especially for Southern Africa.

Despite this being the position, the deplorable conduct of international actors cannot be said to be the sole cause of the predicament of inadequate vaccine access in Southern Africa. The wind-ranging reasons for this situation are well documented in recent research reports of organizations such as Amnesty International<sup>4</sup> and the International Commission of Jurists.<sup>5</sup> The reasons are, in large part, in connection with our own government's failures to respect, protect and promote human rights relating to COVID-19 vaccine access. It is precisely this situation which creates the potential role that Courts should address and be at the forefront of providing redress for.

African courts both historically and in the context of COVID-19 have often led the way in championing the protection of economic, social and cultural rights including the right to health. African courts have gone far, for instance, in ensuring access to lifesaving medicines. As an example, the famous judgment of the South African Constitutional Court in *Minister of Health v Treatment Action Campaign*,<sup>6</sup> ruled on a constitutional challenge against government's shortcomings in its response to the HIV/AIDS epidemic in South Africa. The Constitutional Court found that government had failed to take reasonable measures to address the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that government had acted unreasonably in: (a) refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated; and (b) not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV. According to the South African Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights including the right to health.<sup>7</sup> The Court ruled that because the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and

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<sup>2</sup> Overview of COVID-19 vaccine administration in SADC member states. Available at: <https://ourworldindata.org/covid-vaccinations> (accessed 14 July 2021)

<sup>3</sup> Mwai P, "Coronavirus in Africa: Concern grows over third wave of infections" (9 July 2021), available at: <https://www.bbc.com/news/world-africa-53181555>

<sup>4</sup> Amnesty International "Southern Africa Needs Assistance An Open Call To The Regional And International Community" (19 June 2021): <https://www.amnesty.org/download/Documents/AFR0343432021ENGLISH.PDF>.

<sup>5</sup> International Commission of Jurists "The Unvaccinated Equality not Charity in Southern Africa" (6 May 2021): <https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf>.

<sup>6</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) <http://www.saflii.org/za/cases/ZACC/2002/15.html>

<sup>7</sup> Constitution of South Africa, sections 7(2) and 27.

all organs of state, the state was obliged to ensure that everyone has to have access to public health services, including medication to prevent mother to child transmission of HIV.

It is imperative that courts must, especially, in times of emergency, act as a bulwark for the protection of human rights and the rule of law in the same manner as the South African Constitutional Court did in *Treatment Action Campaign*.<sup>8</sup> It is therefore without any doubt that during in these COVID-19 times that African courts can and should be a guiding light in government's efforts to ensure equitable COVID-19 vaccine access. After all, what possible meaning could the right to health have to ordinary inhabitants of SADC countries, if it cannot shield them from a rampaging global pandemic which continues to take lives and devastate livelihoods?

Courts through cases brought before them, can play a vital role by insisting governments and private companies comply with their constitutional obligations. Courts can ensure vindication of these rights as well as the guarding of the very legitimacy of human rights and the rule of law in Southern Africa.

Most SADC countries bear, at very least, international law obligations to, at a very minimum, take steps to protect the rights to health, life and equal benefit from scientific progress. Furthermore, they bear international law obligations to, both individually and through international cooperation, seek the full realization of these rights.<sup>9</sup> Arguably, it is an immediate, minimum core obligation of all States to ensure provision of COVID-19 vaccines to all people without discrimination of any kind.<sup>10</sup> A range of UN Treaty Body Mechanisms and Special Procedures, as well as the World Health Organization have therefore rightly recognized COVID-19 vaccines as "global public good".<sup>11</sup>

It will be incumbent upon judges to assess and consider cases before them relating to COVID-19 vaccine access in terms of these strong human rights protections in international law – often mirrored in domestic constitutions – with these obligations at front of mind. Indeed, as Judge Moses Chinhengo, citing

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<sup>8</sup> International Commission of Jurists, "ICJ Guidance on the Courts and COVID-19" (7 April 2020), available at: <https://www.ici.org/ici-guidance-on-the-courts-and-covid-19/>

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights ("ICESCR"), 16 December 1966, United Nations, Treaty Series, vol. 993, available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, Art. 12, 15.; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html>, UN General Assembly, International Covenant on Civil and Political Rights, (16 December 1966), available at: <https://www.refworld.org/docid/3ae6b3aa0.html>, Art. 6.

<sup>10</sup> International Commission of Jurists "The Unvaccinated Equality not Charity in Southern Africa" (6 May 2021): <https://www.ici.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf>; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/2000/4 (11 August 2000) ("General Comment 14"), para 12.

<sup>11</sup> United Nations Committee on Economic, Social and Cultural Rights Statement on universal and equitable access to vaccines for the coronavirus disease (COVID-19), E/C.12/2020/2, (15 Dec 2020), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/2020/2&Lang=en); "The central role of the State in responding to pandemics and other health emergencies, and the socioeconomic consequences thereof in advancing sustainable development and the realization of all human rights" A/HRC/44/L.23/Rev.1, available: <https://undocs.org/A/HRC/44/L.23/Rev.1>; WHO SAGE values framework for the allocation and prioritization of COVID-19 vaccination (14 September 2020), available at: [https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE-Framework-Allocation\\_and\\_prioritization-2020.1-eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/334299/WHO-2019-nCoV-SAGE-Framework-Allocation_and_prioritization-2020.1-eng.pdf?sequence=1&isAllowed=y); United Nations Committee on Economic, Social and Cultural Rights Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, E/C.12/2021/1, (23 April 2021), available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2021%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2021%2f1&Lang=en); United Nations, "Statement by UN Human Rights Experts Universal access to vaccines is essential for prevention and containment of COVID-19 around the world\*" (9 November 2021), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E/>

interventions of Courts in Malawi,<sup>12</sup> South Africa, Namibia<sup>13</sup> and Lesotho<sup>14</sup> noted in reference to human rights restrictions in the face of the pandemic more broadly, judges should not be overly deferent or engage “jurislimitation”<sup>15</sup> if and when they are faced with tough decisions on COVID-19 vaccine access.

The growing jurisprudence on COVID-19 vaccine access, including on the African continent, gives us some examples of precedents weighing in on human rights issues surrounding COVID-19 vaccines. As examples, the Supreme Court of India has engaged in a dialogic process with the government of India, encouraging it to reconsider its vaccine rollout plan because of concerns it raised regarding the plan’s constitutionality.<sup>16</sup> In coming to its decision, the Court said the following in terms of the rights to health, life and equality:

*“Our Constitution does not envisage courts to be silent spectators when constitutional rights of citizens are infringed by executive policies. Judicial review and soliciting constitutional justification for policies formulated by the executive is an essential function, which the courts are entrusted to perform.”*

Turning to Colombia, an Administrative Tribunal issued an order compelling the government to reveal the details of government contracts with pharmaceutical companies in order to give effect to the principle of “maximum” disclosure, in line with the right to information<sup>17</sup>. Closer to home, in Zimbabwe, a civil society organization has approached the High Court seeking the publication of a comprehensive COVID-19 vaccine rollout plan relying in part on the rights to health and life.<sup>18</sup>

Coming home to my own country, decisions of the courts in Malawi, for instance, struck down lockdown measures in the absence of appropriate social assistance and support, finding that they were a “real threat to [the] life and livelihoods” of a significant proportion of people in Malawi.<sup>19</sup> This constitutional case held that the executive had powers to make subsidiary legislation but can only do so without departing from the specification and purposes of applicable legislation. The COVID-19 regulations under which the initial lockdowns in Malawi were implemented were therefore set aside as *ultra vires* and in violation of the doctrine of separation of powers and human rights entrenched in the Malawian Constitution. Although this was not a decision relating to COVID-19 vaccine access, this judgment shows the Court’s appreciation

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<sup>12</sup> Fish Hodgson T, “COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 1)” (8 December 2021), available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-1/>

<sup>13</sup> Mutandwa V, “COVID-19 and Africa Symposium: Lockdowns, the Right to Work and the Rule of Law in Namibia” (8 December 2021), available at: <http://opiniojuris.org/2020/12/08/lockdowns-the-right-to-work-and-the-rule-of-law-in-namibia/>

<sup>14</sup> Farise K, “COVID-19 and Africa Symposium: The State’s Duty to Provide PPE to Health Workers in Lesotho” (8 December 2021), available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-states-response-to-covid-19-in-africa/>

<sup>15</sup> Chinhengo M, “COVID-19 and Africa Symposium: “Jurislimitation” In Litigation In the Context of COVID-19, the New Normal?” (7 December 2021), available at: <http://opiniojuris.org/2020/12/07/covid-19-and-africa-symposium-jurislimitation-in-litigation-in-the-context-of-covid-19-the-new-normal/>

<sup>16</sup> The Supreme Court of India, *Suo Motu Writ Petition (Civil) No.3 of 2021*, in re: Distribution of Essential Supplies and Services During Pandemic (31 May 2021), available at:

[https://main.sci.gov.in/supremecourt/2021/11001/11001\\_2021\\_35\\_301\\_28040\\_Judgement\\_31-May-2021.pdf](https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf)

<sup>17</sup> Unidad de Salud, “¿Por qué Colombia tendrá que revelar los contratos de las vacunas?” (21 Mayo 2021), available at: <https://www.eltiempo.com/salud/colombia-tendra-que-revelar-contratos-de-compra-de-vacunas-anticovid-590193>

<sup>18</sup> International Commission of Jurists, Zimbabwe Human Rights Association, Appeal for urgent intervention for the protection of the rights to health and life in Zimbabwe: COVID-19 vaccination procurement and distribution plan (17 February 2021), available at: <https://www.ici.org/wp-content/uploads/2021/02/ZimRights-ICI-Letter-to-ACHPR-1.pdf>

<sup>19</sup> *The State on application of Kathumba and others v President of Malawi and others* (Constitutional Reference Number 1 of 2020) [2020] MWHC 29 (03 September 2020), available at: <https://malawilii.org/mw/judgment/high-court-general-division/2020/29/>; T Hodgson COVID-19 and Africa Symposium: Lockdowns, Separation of Powers and the Right to Social Security in Malawi (Part 2) (8 December 2020), available at: <http://opiniojuris.org/2020/12/08/covid-19-and-africa-symposium-lockdowns-separation-of-powers-and-the-right-to-social-security-in-malawi-part-2/>

of the critical need for judicial intervention to protect human rights even in the context of government's COVID-19 response measures.

Understandably, these examples highlight the magnitude of the human rights issues brought on by the COVID-19 pandemic and illustrate that there are many potentially litigious issues relating to COVID-19 vaccine access that may surface in courts in Southern Africa in the coming days, weeks and months. What must be stressed however is that the rule of law must be upheld. Therefore, the words of Mulenga SCJ in *Charles Onyango-Obbo and Another v Attorney General*, writing for the Ugandan Supreme Court, bear repetition:<sup>20</sup>

*“Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau’s version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the raison d’etre of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual’s self-fulfillment and advancement, recognising the individual’s rights and freedoms as inherent in humanity....”* (Emphasis Added).

Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Accordingly, it is critical that you meet here today as human rights defenders and lawyers to contemplate the possibility of strategic legal action in Southern Africa, which, where it is required, can play a vital role in ensuring the protection of human rights and the rule of law. Indeed, as the examples cited above show, litigation has sometimes proven to be an effective and necessary tool for the protection of economic, social and cultural rights in particular.

Recognizing this, the workshop today provides a unique opportunity to discuss a plethora of legal issues that have arisen from pandemic response measures and find opportunities to join forces and support each other, in efforts to collectively ensure state authorities are held effectively accountable for the execution of their constitutional and broader human rights obligations relating to COVID-19 vaccine access. With the support of experienced regional litigators, the Southern African Litigation Centre, and experts in international human rights law, the International Commission of Jurists, I have no doubt these efforts will bear fruit and you will all be giving judges from Southern Africa, like myself, difficult questions to answer about COVID-19 vaccine access and human rights.

As thousands continue to die and many millions more continue feel the dire consequences of the pandemic, we must not overlook the injustices that have occurred and continue to force many Southern

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<sup>20</sup> *Charles Onyango Obbo and Anor v Attorney General* (Constitutional Appeal-2002/2) [2004] UGSC 81 (10 February 2004) <https://ulii.org/ug/judgment/supreme-court-uganda/2004/81>.

African countries to remain among the “unvaccinated”.<sup>21</sup> Both courts and civil society have a vital role to play if we are to ensure equitable COVID-19 vaccine access for all our people.

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<sup>21</sup> International Commission of Jurists “The Unvaccinated Equality not Charity in Southern Africa” (6 May 2021): <https://www.icj.org/wp-content/uploads/2021/05/Africa-The-Unvaccinated-Publications-Reports-2021-ENG.pdf>.