



COMMUNITY COURT OF JUSTICE, ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTE, CEDEAO
TRIBUNAL DE JUSTICA DA COMUNIDADE, CEDEAO

THE COMMUNITY COURT OF JUSTICE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the Matter of

**THE INCORPORATED TRUSTEES OF EXPRESSION NOW HUMAN
RIGHTS INITIATIVE V FEDERAL REPUBLIC OF NIGERIA**

Application No: ECW/CCJ/APP/35/40 Judgment NO. ECW/CCJ/JUD/37/23

JUDGMENT

ABUJA

DATE: 23rd October, 2023

JUDGMENT NO. ECW/CCJ/JUD/37/23

**THE INCORPORATED TRUSTEES OF EXPRESSION NOW HUMAN
RIGHTS INITIATIVE** **-APPLICANT**

V.

FEDERAL REPUBLIC OF NIGERIA **-RESPONDENT**

COMPOSITION OF THE COURT

| | |
|--|----------------------|
| Hon. Justice Dupe ATOKI | - Presiding |
| Hon. Justice Sengu Mohamed KOROMA | - Member/ Rapporteur |
| Hon. Justice Ricardo Claudio Monteiro GONCALVES | - Member |

ASSISTED BY:

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| Dr. Yaouza OURO-SAMA | - Chief Registrar |
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REPRESENTATION OF PARTIES:

Solomon **OKEDARA**

- Counsel for the **APPLICANT**

Maimuna Lami **SHIRU** (Mrs.)

- Counsel for the **RESPONDENT**



I. JUDGMENT

1. This is the judgment of the Community Court of Justice, ECOWAS (hereinafter referred to as the Court) delivered virtually in open Court pursuant to Article 8 (1) of the Practice Direction on Electronic Case Management and Virtual Court Sessions, 2020.

II. DESCRIPTION OF THE PARTIES


2. The Applicant is a Non-Governmental Organization registered under the Companies and Allied Matters Act, Laws of the Federation of Nigeria, 2004 domiciled in the Federal Republic of Nigeria.
3. The Respondent is the Federal Republic of the Nigeria and a Member State of ECOWAS.

III. INTRODUCTION

4. The subject matter of the proceedings borders on the Applicant's allegations that the Respondent has violated its international obligations by violating various human rights enshrined in the fundamental human rights treaties, particularly the freedom of expression.

IV. PROCEDURE BEFORE THE COURT

5. The Applicant filed an Initiating Application on 4th September 2020, in the Registry of the Court.
6. The Respondent filed its Statement of Defense, and a Notice of Motion for Extension of Time to file the same on 28th October 2020.




7. The Applicant filed its Reply to the Respondent's Statement of Defense on 10th February 2021.
8. On 27th September 2021, the Court held a Virtual Session in which both parties were represented by Counsel and the Motion for the Extension of Time was moved and granted by the Court. The case was heard on the merits and adjourned for judgment.
9. The Court held a Virtual Session on 2nd May 2023, in which the parties were represented by Counsel. The Court notified the parties of the change of panel and that the matter commence *de novo*. The Respondent at this point sought an adjournment to enable the substantive Counsel to appear in Court. This was granted.
10. A final hearing was held virtually by the Court on 8th May 2023, in which the parties were also represented by Counsel. The Counsel were again informed about the change in composition of the Panel after which they adopted their earlier briefs. The matter was thereafter adjourned for judgment.

V. APPLICANT'S CASE

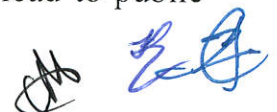
a) *Summary of facts*

11. The Applicant describes itself as a Non-Governmental Organisation (NGO) incorporated to protect and promote the human rights of Nigerian citizens especially freedom of expression, both offline and online. It also advocates for a free media space devoid of undue interference by collaborating with bloggers and journalists and their respective associations all over Nigeria.
12. The Applicant claims that the Nigerian Broadcasting Code, which was promulgated pursuant to the Nigerian Broadcasting Commission Act of 2004, a Federal Law, contains provisions that infringe on freedom of expression. It submits that the 2004 Act empowers the National Broadcasting Commission to



establish and disseminate a national broadcasting code and set standards with regard to the contents and quality of materials for broadcast. The crux of its claim is that the provisions of the Code particularly Articles 3 (1) (1) and 3 (1) (2) expressly declares hate speech an offence and imposes a fine for violation even though the definition of hate speech therein is vague and imprecise. The Applicant claims that the implication of this piece of legislation is that its members, associates, and collaborators who are journalists and media platform owners can have their broadcast services on radio or television stations suspended, or their licence suspended or revoked as provided in Article 15 (2) (1) of the Amendment to the Code.

13. The Applicant's claim also raises concerns of a fine of N5, 000, 000 (Five Million Naira) pursuant to Article 15 (5) (1) (c) of the Amendment to the Code for any speech that is considered to be an attack on a person or group based on their political leanings, or by making offensive reference to any person or organization (Article 3 (1) (2) Code), alive or dead (Article 3 (1) (1) Code).
14. The Applicant claims that for the same reason its members and associates are currently having their freedom of expression interfered with as the right of the public to receive information is being infringed upon.
15. In its particulars of the Respondent's arbitrary use and continuous use of the provisions of the Code, the Applicant narrated that on 4th August 2020, the Respondent's Minister of Information in an ad hoc manner, announced an increment of the fine for hate speech to N5,000,000.00 (Five Million Naira) as contained in the 6th Edition of the Code. Hence, on the 13th August 2020, the Respondent through the National Broadcasting Commission imposed a fine of N5,000,000 (Five Million Naira) on a radio station, Nigeria Info, for a comment made by a former Deputy Governor of the Central Bank of Nigeria, Dr. Obadiah Mailafiya, alleging that such comment could incite to crime or lead to public



disorder. The Applicant submits that the Respondent's agents later invited the said Dr. Obadiah for questioning and later released him.

16. The Applicant reports that other instances of violation include fines imposed on several FM/Radio stations. All these have led to the members and associates having to make their positions on issues known before they are disseminated. In sum, the Applicant claims that the Respondent has consistently certain provisions of the NBC Code and the Amendments to intimidate and harass the Applicant's officers, members, associates and collaborators, thereby gagging their freedom of expression.

Pleas in law

17. The Applicant relies on the following pleas in law in support of its claim:

- Article 1 and Article 9 (1) and (2) of the African Charter on Human and Peoples Rights relating to the right to receive information and to express and disseminate opinions within the law.
- Article 19 of the International Covenant on Civil and Political Rights as it relates to the right to hold opinions and to freedom of expression.
- Article 66 (2) (c) of the ECOWAS Revised Treaty.

Reliefs sought

18. The Applicant in consequence, is seeking the following reliefs from the Court:

- a. A declaration that the provisions of Articles 3(1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) violate Article 9(1) and (2) of the African

Charter on Human and Peoples Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 66 (2) (c) of the revised ECOWAS treaty.

- b. A declaration that the Defendant's actions in giving effect to the provisions of Articles 3(1) (1), and 3(1) (2) of the Nigeria Broadcasting Code (6th Edition) and Article 15(5) (1) to penalize and fine the Applicant's officers, members, associates, collaborators and indeed several other Nigerians, violates the Applicant's rights under Article 9(1) and (2) of the African Charter on Human and Peoples Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 66 (2) (c) of the revised ECOWAS treaty.
- c. A declaration that by the continued enforcement of Articles 3(1) (1), 3(1) (2), 15 (2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition), the Defendant is in breach of its obligation under the Revised ECOWAS Treaty and the African Charter on Human and Peoples Rights and International Covenant on Civil and Political Rights.
- d. A declaration that the defendant's agency, the National Broadcasting Commission not being an independent judicial body and not empowered by Section 2 (h) of the National Broadcasting Commission Act lacks the power to enforce the provisions of Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) and indeed any other penal provisions in the Code.



- e. An order directing the Defendant to repeal or amend Articles 3(1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15.5.1 of the Amendments to the Nigeria Broadcasting Code (6th Edition) in line with its obligations under the Revised ECOWAS Treaty, the African Charter on Human and Peoples Rights and the International Covenant on Civil and Political Rights.
- f. Perpetual injunction restraining the Defendant and its agencies from further giving effect to the provisions of Articles 3 (1) (1), 3 (1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition).
- g. Other consequential order(s) as this Honourable Court may deem fit to grant in the circumstance.

VI. RESPONDENT'S CASE

a) Summary of facts

19. The Respondent denies any violation of the Applicant's rights to freedom of expression or to hold opinions and avers that it is its duty and obligation to promote and protect the rights of its citizens or nationals against human rights violation by any community, institution or an official of the community in the exercise of its official functions. It submits that the National Broadcasting Commission is its agent charged with the responsibility of regulating and controlling the broadcast industry in Nigeria and is also entrusted with the power to establish and disseminate a National Broadcasting Code (6th Edition) (the Code) to set standards about the content and quality of materials for broadcast.



20. The Respondent avers that '*the Code*' seeks to promote local content in the Nigerian broadcast industry, proscribe monopolistic and anti-competition practices, and provide for increased advertising revenue for local broadcast stations and content producers. It is against this background that the Broadcasting Code was promulgated and was not intended to scuttle freedom of expression.
21. It is the Respondent's contention that the Applicant has not adduced any evidence to show how it has violated the rights of its members, associates, or collaborators by its amendment of the National Broadcasting Code, 6th Edition. The Respondent avers that the National Broadcasting Commission has the power to sanction defaulters or any licensed stations who is in serious breach or violates the National Broadcasting Commission Act Cap, N11 Laws of the Federation of Nigeria 2004 or the National Broadcasting Code 6th Edition, as a result of promoting unverified and inciting views that could encourage or incite to crime and lead to public disorder or hate.
22. The Respondent submits that the Code is not being used by it or its agency to gag the freedom of expression and the press as alleged by the Applicant nor to harass the Applicants, its agents, or members.

b) Pleas in law

23. The Respondent submits the following pleas in law in support of its defense:
- i. Article 1 and Article 9 (1) and (2) of the African Charter on Human and Peoples Rights relating to the right to receive information and to express and disseminate opinions within the law.



- ii. Article 19 of the International Covenant on Civil and Political Rights as it relates to the right to hold opinions and to freedom of expression.

c) Reliefs sought

24. The Respondent is urging the Court to refuse the Applicants reliefs and make the following declarations and order on its behalf:

- a. A declaration that the National Broadcasting Code 6th Edition (“*The Code*”) as amended, is not in breach of Articles 1, 9(1), and (2) of the African Charter on Human and Peoples’ Rights (Ratification & Enforcement) Act CAP. 10 LFN 1990 and Article 19 of the International Convention on Civil and Political Rights.
- b. A declaration that the Respondent did not violate the Fundamental Rights of freedom of expression and the press of the Applicant or any of its citizens.
- c. A declaration that the Applicant's application is inadmissible.
- d. An order dismissing the Plaintiff’s suit for lacking in merit.

VII. APPLICANT’S REPLY

25. The Applicant, in its reply to the Respondent’s defense, alleges that it has proved its claim and has done so by attaching documentary evidence, annexures 3 and 4 (newspaper publication of the imposition of fines on some radio stations). It claims that the the fines imposed on the FM Station is a violation of the right to freedom of expression.

26. It further states that Articles 3 (1) (1), 3(1) (2), 15(2) (1) of the Code, and Article 15 (5) (1) of the Amendments to the Code (6th Edition) are not laws reasonably justifiable in a democratic society as they did not clearly define the term ‘hate



speech’ nor broadcast that is *‘an offensive reference to any person or organization, alive or dead.’*

VIII. JURISDICTON

27.The Court notes that the claim before it borders on allegation of human rights violations. It is an established practice rooted in Article 4 of the Supplementary Protocol (A/SP.1/01/05) and aligned with its jurisprudence that the Court assumes competence for all allegations of human rights committed in the Member States. This is regardless of the strength or weakness of the claim as has been held severally but more recently in HASANE ABDOU NOUHOU V REPUBLIC OF NIGER JUDGMENT NO: ECW/CCJ/JUD/30/23 (UNREPORTED) at page 12 where the Court held that it had jurisdiction based on Article 9 (4) of the Supplementary Protocol (supra).

28.Consequently, having regard to the expressed provision of Article 4 of the Supplementary Protocol (supra) to wit *‘The Court has jurisdiction to hear materially, cases relating to human rights violation that occurs in any Member State of the Community’* and the claims before it, this Court declares that it has jurisdiction to hear and determine.

IX. ADMISSIBILITY

29.It is trite law that jurisdiction to hear and determine a claim is not the same as the admissibility of the claim. Admissibility in this sense is establishing whether the application will be accepted for consideration on its merits and progress to a final determination of the issues in dispute. It should be added however, that a body of opinion has developed in international human rights courts that rules of admissibility must be treated with some “...*degree of flexibility and without excessive formalism.*” Human rights treaties must be interpreted and applied so

as to make its safeguards practical and effective. (YASA V TURKEY – 1998 – VI; 28 EHRR 408).

30. Without more, access to the Court for determination of all claims is granted if the requirements pursuant to Article 10 (d) of the Supplementary Protocol (supra) are met. In the instant claim, which is for the alleged violation of human rights brought by an individual, the provision (Article 10 (d) mandates that:

“Individuals on application for relief for violation of their human rights; the submission of application for which shall: i. Not be anonymous; nor ii. Be made whilst the same matter has been instituted before another International Court for adjudication;”

31. The Court is mindful that the Applicant in this suit is on record as a corporate body who gives its scope of work as an advocate for a free media space devoid of undue interference at all times. Hence it is necessary that the Court determines whether this entity can be admitted as an applicant before it based on its criteria aforesaid.

32. In the first instance, the Court notes that the Applicant has duly identified and submitted itself as a victim. Furthermore, the Court has no evidence before it that the claim is pending before another international Court. The question then is whether not being an individual/natural person denies it access before this Court. In answering this question, the Court relies on its decision in DEXTER OIL LTD v. REPUBLIC OF LIBERIA (UNREPORTED) JUDGMENT NO: ECW/CCJ/JUD/03/19 at page 21 where it had this to say:

“The Court has decided that Article 10 (d) anticipates only natural person, it is nonetheless not unmindful of its jurisprudence and that of other International Courts creating exception and granting corporate bodies’ access to ground action of violation of their fundamental Rights against a member state. Human rights imply the rights that belong to



all human beings irrespective of their nationality, race, caste, creed, and gender amongst others; like right to life, right to health and right against torture, inhuman and degrading treatment which are specific to a human being. On the other hand right of a corporate body are rights that are fundamental and necessary for the existence of a corporate body which a legal entity can enjoy and be deprived of; for example right to freedom of speech as the corporation is entitled to speak about its product; right to property as the corporation generates profit in shares and, or cash and is entitled to the quiet enjoyment of same. The established exceptions under which corporate bodies can ground an action are: rights that are fundamental rights not dependant on human rights and they include right to fair hearing, right to property and right to freedom of expression.”

33. Consequently, the Court answers the question in the affirmative: that corporate entities can bring an action for the violation of human rights, particularly the right to freedom of expression. In light of this conclusion, the Court holds that the application is admissible.

X. MERITS

34. This Court having considered the facts, evidence and arguments before it, will determine the same under a single rubric, that is:

- *Whether there is a violation of Articles 9 ACHPR and 19 of the ICCPR by the Respondent via the enactment and enforcement of the National Broadcasting Code (6th Edition) made under the Nigerian Broadcasting*



Commission Act, 2004 and its Amendments. If a contravention is established what is the effect on the responsibility of the state.

On the violation of Articles 9 of the ACHPR and Article 19 of the ICCPR by the Respondent via the enactment and enforcement of the National Broadcasting Code made under the Nigerian Broadcasting Commission Act, 2004.

Applicant's case

35. The Applicant claims that the enactment of Article 3 (1) (1) of the Nigeria Broadcasting Code (6th Edition) which provides that “*No broadcast shall encourage or incite to crime, lead to public disorder or hate, or be repugnant to public feelings or contain offensive reference to any person or organization, alive or dead or generally be disrespectful to human dignity,*” is abhorrent and constitutes a violation of the right to freedom of expression. Furthermore, that Article 3 (1) (2) of the Code which provides that “*Broadcasting shall promote human dignity therefore, hate speech is prohibited,*” is an ambiguous provision in that it fails to define the term ‘*hate speech.*’ The Applicant submits that any failure to adhere to these provisions attracts various penalties under Article 15 (2)(1) of the Code and Article 15 (5) (1) of the Amendment of the Code.

36. The Respondent having enforced this legislation which interferes with the freedom of expression of Nigerians, the Applicant particularly claims that the same has been used to gag the press and create a chilling or stifling effect on freedom of expression. The Applicant then went further to state, in paragraph 4.8 of its application, that “*from the above provisions of the Code, it is hereby clear that Members, Associates, Collaborators of the Applicant who are journalists and media platform owners can have their broadcast services on*



radio or television stations suspended immediately, or their licence suspended or revoked as provided...” and concluded that “*for the same reasons, members, associates, collaborators of the Applicant and indeed most Nigerians are currently having their freedom of expression interfered with as the right of the public to receive information is being infringed upon.*”

37. The Applicant gave instances of the Respondent's alleged arbitrary use of the Code firstly, at the unveiling of the said Code by the Respondent's Minister of Information in which he announced that the fine was increased to N5,000,000 (Five Million Naira). Secondly, a fine was imposed on a radio station (Nigeria Info) for a comment made on air by a guest. Thirdly, the invitation by the Respondent's agent, issued to one Dr. Mailafiya for allegedly making unverifiable and inciting views on air which it alleges contravenes the said Code. Fourthly, that some news agencies (both print and electronic) have attracted various fines as a result of the ambiguous Code and its ambiguous definition of ‘*hate speech*’.

38. The Applicant claims that it and collaborators, associates, and members are being censored and denied the opportunity to air their views freely on media platforms and Television. It also claims that many citizens have expressed fear and reservations on the enactment and retention of the Code. The Applicant therefore prays the Court to make several declarations and orders as listed in paragraph V (15) above.

Respondent's case

39. The Respondent denies all the claims brought by the Applicant and states in its defence that it is the responsibility of the State to protect the rights of its citizens against any violation and that the National Broadcasting Commission is the body charged with the responsibility of regulating the broadcast industry. The



Broadcasting Code (6th Edition) seeks to promote local content in the Nigerian Broadcast Industry and to proscribe monopolistic and anti-competition practices.

40. It is the Respondent's contention that the Applicant has not shown how the amendment to the Nigerian Broadcasting Code has violated its rights and that the Commission has the power to sanction defaulters of its Code. It further avers that the Broadcasting Code is not used by the Respondent in any way to gag the freedom of expression and the press as alleged by the Applicant. It concludes that it has in no way violated the said Articles 1 and 9 of the ACHPR as well as Article 19 of the ICCPR as it relates to the Applicant or its associates and members.

Analysis of the Court

41. The Court is seised with the claims for the violation of the right to freedom of expression in contravention of Article 9 (1) & (2) of the ACHPR and Article 19 of the ICCPR as submitted by the Applicant. It is also seised of the defence raised by the Respondent that it has not in any way contravened the said provisions as claimed and submission that the Applicant has failed to prove how it has suffered from the enactment of the said NBC Code (6th Edition). The issue for determination before this Court therefore is whether the enactment of the National Broadcasting Code made under the Nigerian Broadcasting Commission Act, 2004, contravenes the guarantees under Article 9 (1) & (2) of the ACHPR and Article 19 of the ICCPR.

42. Article 9 ACHPR provides that:

- i. *Every individual shall have the right to receive information.*



- ii. *Every individual shall have the right to express and disseminate his opinions within the law.*

43. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides thus:

- i. *Everyone shall have the right to hold opinions without interference.*
- ii. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.*
- iii. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - a. *For respect of the rights or reputations of others.*
 - b. *For the protection of national security or of public order (ordre public), or of public health or morals.*

A combined reading of the denoted provisions above establishes that the freedom to hold opinions and to express oneself is a guaranteed human right the violation of which shall attract sanctions. However, these provisions have made room for claw-back clauses which allows for derogation from the right at the instance of the law. In the instance where a claim for the violation of rights guaranteed under Article 9 (1) of the ACHPR is made, the Applicant must show that such a violation occurred outside the safeguard of Article 9 (2) of the



ACHPR. In other words, the claim must contain the evidence that his right to freedom of expression has been curtailed arbitrarily outside the remit of the law. The Court will rely on its jurisprudence in DEYDA HYDARA JR & 2 ORS V. REPUBLIC OF THE GAMBIA (2014) page 275 to articulate this position better, as it was held that “*Article 66 of the ECOWAS Revised Treaty imposes an obligation on Member States to ensure a safe and conducive atmosphere in the practice of journalism and in the situation where attacks by State operatives against journalists are not investigated, let alone to prosecute the suspects, the State will be in breach of its obligation under the Treaty and also the ACHPR, as such impunity has the effect of denying the journalists the rights to function and thus stifling freedom of expression.*” Similarly, in LOHÉ ISSA KONATÉ V REPUBLIC OF BURKINA FASO, the African Court cited the decision KEUN-TAE-KIM V REPUBLIC OF KOREA (UNCHR Comm.; Comm. No. 574/1994 (1999) where it was argued that “*...freedom of expression may be legitimately limited only for the purpose of protecting the rights and reputation of others, or for the protection of national security, public order, public health, or public morality.*”

44. The Court therefore, considers that not only is the Respondent bound by its obligations under Article 1 of the ACHPR which the *ratio descendi* in the above case captured in light of Article 9 of the ACHPR; but it has the duty where a claim of contravention of an obligation is established to identify the victim or victims (natural or unnatural) and assess the evidence in support of the claim on balance of probabilities. This duty cannot be departed from in any instance as it does not only impede the promotion and protection of the rights guaranteed in the fundamental human rights instruments, but it will enable injustice.

45. In light of the Applicant’s claims, the Court will reproduce the contentious provisions of the legislation it claims violates its rights to determine: whether



the legislation contravenes the ACHPR and ICCPR as claimed and determine whether the Applicant has sufficiently proved that any resulting contravention has violated his right to freedom of expression.

46. The said contentious provisions are:

- Articles 3(1) (1) of the Code provides that *“No broadcast shall encourage or incite to crime, lead to public disorder or hate, be repugnant to public feelings or contain an offensive reference to any person or organization, alive or dead or generally be disrespectful to human dignity.”*
- Article 3(1) (2) of Code provides that *“Broadcasting shall promote human dignity, therefore, hate speech is prohibited”* and in the ‘Definition of Terms’ contained in the Code, ‘Hate Speech’ is defined as *“A Speech which attacks a person or group based on attributes such as disability, ethnicity, gender, political leaning, race or religion”*.
- Article 15(2) (1) of the Code provides that *“immediate order of suspension of broadcast services, suspension of license and immediate shutdown/seal up of transmitter, revocation of licence, seizure, and forfeiture of transmitting equipment.”*
- Article 15(2) (1) (1) provides that *“In the case of suspension of a broadcast licence, the appropriate recommencement fee as stipulated in 15.5.1 c shall apply.”*
- Article 15(5) (1) of the Amendments to the Code provides for the following: (b) Amendment to Sanctions, Light sanction N50,000.00 - N200,000.00, Heavy-N500,000 -N4,999,000.00, Severe.....N5,000,000 and above.



47. Before delving into the determination of issues, the Court finds it necessary to reason out a particular question, which though not raised by the parties is central to the claim i.e. whether the Court can examine the domestic laws of Member States. The Court notes that the claim concerns several provisions of the domestic legislation and it must therefore, examine its competence to determine same. In so doing, the Court considers the ratio in FEDERATION OF AFRICAN JOURNALISTS & 4 ORS V. REPUBLIC OF THE GAMBIA (UNREPORTED) JUDGMENT NO: ECW/CCJ/JUD/04/18 page 31 where it was held that “*The powers conferred on the Court, in the 2005 Supplementary Protocol are clear and should not be misconstrued as the jurisdiction to exercise or control over the constitutionality of laws of Member States which is the preserve of domestic constitutional Courts.*” Therefore, it is trite law that the Court has no power to examine the laws of Member States however, if these laws are at variance with international law and obligations ratified by the Member State, the international law takes precedence. Hence in FEDERATION OF AFRICAN JOURNALISTS & 4 ORS. V REPUBLIC OF THE GAMBIA (supra) the Court also held referring to the legislation of a Member State that “*The restrictions and vagueness with which these laws have been framed and the ambiguity of the mens rea (seditious intention), makes it difficult to discern with any certainty what constitutes seditious offence.*” This decision was premised on an earlier one in HADIJATOU MANI KORAOU V. REPUBLIC OF NIGER (2008) CCJELR at page 217 where it was held that “*The Court has no mandate to examine the laws of Member states in abstracto, but rather to ensure the protection of the rights of individuals whenever such individuals are victims of the violation of those rights which are recognized as theirs, and the Court does so by examining concrete cases brought before it.*”



48. In the present case, the Court re-emphasises that whilst it has no power to determine the legality of the laws of Member States, its jurisdiction includes claims that concern domestic laws and their conformity with international law. Particularly, the Court has the power to determine whether the application of said laws is compliant with the international obligation of the Member State. In ARTICLE 19 V ERITREA (2007) AHRLR 73, the African Court held that allowing national laws to restrict the right to freedom of expression would render the right an illusion. Hence, international standards and maxims of law must be accorded hierarchy over domestic legal frameworks. Based on this, the Court holds that it has a right to review the effect of the above extant provisions to determine whether they have procured the violation of the right to freedom of expression of the Applicant herein.

49. In determining the first contentious issue, that is whether the extant laws aforementioned in paragraph 45 above contravenes Article 9 (1) & (2) of the ACHPR and Article 19 of the ICCPR, the Court relies on the directive of the African Commission in CONSTITUTIONAL RIGHTS PROJECT V NIGERIA (Communication No. 153/96) [1999] ACHPR 9; (15 November 1999), that *“competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.”* Hence, in the enactment of extant laws, Member States must give due consideration to its alignment with international guarantees and obligations like those under the ACHPR.

50. In the present case, the question before this Court is whether Articles 3 (1) (1), 3 (1) (2) of the Code and 15 (5) (1) of the Amendment can pass the standard set in the Declaration of the Principles of Freedom of Expression and Access to Information in Africa (Adopted in 2019 at the 65th Ordinary Session of the



African Commission on Human Rights) and in turn be deemed compliant with Article 9 of the ACHPR. The rules found in the Declaration posit the parameters within which the exercise of freedom of expression and access to information can be curtailed. Therefore, where an act does not conform to Principle 9 of the Declaration guidelines, it will be found to be incompatible with Article 9 (2) of the ACHPR. Principle 9 of the Declaration outlines the limitations that are acceptable or derogations that are legally accepted by law as:

“Justifiable limitations 1. States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation: a. is prescribed by law; b. serves a legitimate aim; and c. is a necessary and proportionate means to achieve the stated aim in a democratic society...”

51. The Court in THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC & ACCOUNTABILITY PROJECT (SERAP) V. FEDERAL REPUBLIC OF NIGERIA JUDGMENT NO: ECW/CCJ/JUD/23/22 (UNREPORTED) this Court held that it *“views the ... requirements in the Declaration cumulatively therefore, it is not enough that it is established by law but that it also has a legitimate aim and is a necessary and proportionate with ‘...a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim.’ It is no gainsaying that a law which fails to define its purpose or objective cannot pass a test of legality and can therefore be classified as ambiguous... where the application of the law is infinite in scope because of ambiguous clauses it renders it to Principle 9 of the Declaration and breaches the obligation in Article 9 (1) and (2) of the ACHPR.”* In view of the erudite reasoning in the abovementioned jurisprudence i.e. that a law which fails to define its purpose or objective cannot pass the test



for legality within the meaning of the Declaration, the Court has carefully perused the contentious provisions and the facts alleged with the application. From this exercise, the Court determines that Article 3 (1) (1) of the NBC Code is vague as the wording denotes a scope of application which is infinite and poses a challenge to the enjoyment of freedom of expression. Furthermore, Article 3(1) (2) of the NBC Code is viewed by the Court as denoting an equally ambiguous wording and bestows a vague scope of application which can lead to the curtailment of the right to freedom of expression. Article 3(1) (1) of the Code provides that *“No broadcast shall encourage or incite to crime, lead to public disorder or hate, be repugnant to public feelings or contain an offensive reference to any person or organization, alive or dead or generally be disrespectful to human dignity.”* A simple reading of the provision by the Court makes evident the infinite class of acts that may be deemed to either be a broadcast that may result in an infringement. Principle 9 of the Declaration was adopted to aid Member States in preventing a situation such as that created with the enactment of Articles 3(1) (1) of the Code. Article 3 (1) (2) which is reproduced above, has an equally ambiguous wording which falls outside the parameters set by Principle 9 of the Declaration.

52. The Court finds that these two provisions need to be properly aligned to evince clarity and a defined scope of application to protect the rights of citizens at all times. As a consequence of the ambiguity and vagueness of Articles 3 (1) (1), 3(1) (2), 15 (2) (1) of the Code, Article 15 (2) (1) of the NBC Code (which are sanctions imposed in furtherance of the provisions) cannot be seen to have been enacted in the spirit of the promotion or the protection of the right to freedom of expression, reason being that the sanctions resulting will be arbitrary and the scope will be infinite. Based on the foregoing the Court maintains that Articles 3 (1) (1), 3(1) (2), 15 (2) (1) and 15 (2) (1) (1) of the Code 6th Edition and Article

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15 (5) (1) of the Amendment do not comply with Principle 9 of the Declaration and therefore contravenes Article 9 of the ACHPR.

53. The second issue for determination by the Court is whether the Applicant has proved that a contravention of Article 9 (1) and (2) of the ACHPR and Article 19 of the ICCPR by the extant laws has resulted in the violation of its right to freedom of expression. In *CONGRÈS POUR LA DÉMOCRATIE ET LE PROGRÈS (CDP) & ORS. v. REPUBLIC OF BURKINA FASO* (2015) CCJELR 295 the Court emphasised that “...it only makes rulings, in principle, on cases of human rights violation which are concrete, real, and proven, and not on violations claimed to be possible, contingent, or potential.” Therefore, whilst the right to freedom of expression is guaranteed, any claim of violation must establish a direct link between the claimant and the act of violation or injury. It is not enough to make a general statement indicating that a particular law tends to violate a right, the violation must be proved. The Court recalls the Applicant’s claim that the rights of its associates, collaborators, and members have been violated. However, the Court finds the submissions of the Applicant bereft of any evidence corroborating the facts alleged and it will explain its reasoning.

54. The Court reiterates that it is imperative that the Applicant discharges the burden of proof by way of uncontroverted evidence. It is settled law that even as an unnatural person, the Applicant can be a victim of the violation of the right to freedom of expression. However, it is imperative that the Applicant shows how it has suffered harm as a result of the contravention on the part of the Respondent. The Court relies on the *locus classicus* on the principle of proof that “... the onus of proof is on the party who asserts a fact and who will fail if that fact failed to attain the standard of proof that would persuade the Court to believe the statement of claim. Furthermore even as in this case where the



Defendants rested their respective positions on the evidence of the Plaintiffs, the Plaintiff is required to still prove his claim. It must be mentioned that a party is free to choose whether to adduce evidence in support of his pleadings or not and the Court has no power to interfere with the exercise of that right:" FEMI FALANA & 1 OR v. THE REPUBLIC OF BENIN & 2ORS (2012) CCJELR at page 15.

55. The Court, in the present case, notes that the evidence the Applicant has submitted are newspaper reports of the fines imposed on certain persons/media houses. This Court is prompted in this wise to instruct that evidence in the form of press reportage does not effectively discharge the burden of proof. *"Proof is what allows one to establish the value of truth or falsity, regarding a statement or fact that is judicially relevant. To this end it is submitted that mere averments in pleadings does not amount to proof:" OUSAINOE DARBOE & 31 ORS v. THE REPUBLIC OF GAMBIA JUDGMENT NO: ECW/CCJ/JUD/01/20 (UNREPORTED) at page 23.* Therefore, in the present case, the Court considers that affidavit evidence or testimony on oath, from the said collaborators, agents etc. of the Applicant, in addition to the press reportage of the effect of the application of the contentious law and the fines paid would have established probative value. However, merely submitting the reportage does not persuade the Court as to the veracity of the claim. A successful claim for the violation of human rights is one in which proof of the act has been adduced which is sufficiently compelling to sway the Court on a balance of probabilities.

56. The Court notes that whilst the contentious extant provisions contravenes the provisions of Article 9 (1) & (2) of the ACHPR, the Applicant has failed to establish how the same occasioned harm/injury to it. Thus, the Court finds that whilst the provisions have been held to be in contravention of the obligation of the Respondent, it cannot grant relief 'b' of the reliefs sought by the Applicant



as it has not proved a violation as claimed. The Court grants reliefs ‘a, c and e’ of the reliefs sought by the Applicant declaring that the said laws are in contravention and ordering the Respondent to align its laws i.e. Articles 3(1) (1), 3(1) (2), 15 (2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) with its obligations under Article 9 (1) & (2) of the ACHPR.

57. With regards to the relief ‘d’ sought by the Applicant, which is that the Court declares that the NBC not being an independent judicial body but that it enforces Article 15 (5) (1) (c) of the NBC Code Amendment even though it lacks the power to do so. The Court considers that this relief lies outside its competence as the facts and evidence before it are insufficient to prove the allegation in this instance. Whilst the Court can determine issues of human rights violations occasioned by enactment of extant laws, it cannot determine that the enforcement of the same is in contravention of human rights guarantees without uncontroverted evidence. The Court therefore dismisses relief ‘d.’

58. Lastly, the Court having considered relief ‘f’ sought by the Applicant, that is granting a perpetual injunction restraining the Respondent and its agencies from further giving effect to the contentious provisions, dismisses the same. This is on the basis that it has made orders and declarations which, based on the principle of comity, and pursuant to Article 62 of the Rules of Procedure of the Court are binding from the date of delivery. Consequently, the Court instead orders that the Respondent ceases to give effect to Articles 3 (1) (1), 3(1) (2), 15 (2) (1) and 15 (2) (1) (1) of the Code 6th Edition and Article 11 (5) (1) of the Amendment until it has aligned the same using the guidelines laid down in Principle 9 of the Declaration that gives effect to Article 9 (1) & (2) of the ACHPR. This is pursuant to its obligation under Article 1 of the ACHPR.



On the responsibility of the state in aligning its domestic legislation with its international obligations

59. At this juncture the Court is hard pressed to determine a follow on question which is that regarding “*the responsibility of the state in aligning its domestic legislation with its international obligations.*” This is crucial given the decision reached by the Court above.

Applicant’s case

60. The Applicant prays that the Court grants the following reliefs:

- *A declaration that by the continued enforcement of Articles 3(1) (1), 3(1) (2), 15 (2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition), the Defendant is in breach of its obligation under the Revised ECOWAS Treaty and the African Charter on Human and Peoples Rights and International Covenant on Civil and Political Rights.*
- *A declaration that the defendant’s agency, the National Broadcasting Commission not being an independent judicial body and not empowered by Section 2 (h) of the National Broadcasting Commission Act lacks the power to enforce the provisions of Article 15(5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) and indeed any other penal provisions in the Code.*
- *An order directing the Defendant to repeal or amend Articles 3(1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15 (5) (1) of the Amendments to the*



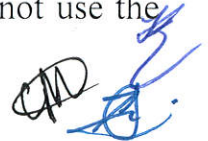
Nigeria Broadcasting Code (6th Edition) in line with its obligations under the Revised ECOWAS Treaty, the African Charter on Human and Peoples Rights and the International Covenant on Civil and Political Rights.

61. The reliefs above are tied to the Applicant's claim that the right of the public to receive information is being infringed upon. In view of this, the Applicant is asking the Court to determine the following questions and grant it its prayers:

- *Whether the impugned provisions as provided in the Respondent's Code violate the right to freedom of expression of the Applicant's members, associates and collaborators under the African Charter on Human and People's Rights which enshrines the right to freedom of expression including the right to seek, receive and impart information or ideas. (Paragraph 5.10 of the Applicant's Initiating Application.)*
- *Whether the imposition of fines based on the Code violates the right to freedom of expression of the Applicant's members, associates and collaborators.*

Respondent's Case

62. The Respondent avers that the Code and its amendment is not in breach of Articles 1, 9 (1) & (2) of the ACHPR (Ratification and Enforcement) Cap 10 LFN 1990 and Article 19 of the ICCPR. The Respondent submits that the Code and its amendment seek to promote local content in the Nigerian broadcast industry, proscribe and provide for increased advertising revenue for local broadcast stations and content producers. It maintains that it does not use the



Code or agency to gag the freedom of expression and the press of the Applicant or any of its citizens.

Analysis of the Court

63. The Court is mindful to reproduce Article 1 of the ACHPR which states that “*The Member States...parties to the present Charter shall recognise the rights, duties and freedoms enshrined...and shall undertake to adopt legislative or other measures to give effect to them.*” The Court must state that it is imperative that the state party ensures that it does not derogate from its obligations as it has a responsibility of not only promoting human rights but protecting them. In so doing, the Court directs the Respondent to adhere to the guidelines in Principle 9 of the Declaration which were implemented as a soft law that guides the proper application of Article 9 of the ACHPR. The Court recognises that even though Article 9 (1) of the ACHPR has a clawback clause in Article 9 (2) of the ACHPR, the intention was for the freedom of expression to be enjoyed and the clawback is only imperative within the law which must have been promulgated using the guidelines in the Declaration. The Court therefore instructs the Respondent that it is its responsibility to ensure that there is compliance with this intention.

64. However, in response to the questions raised from the reliefs sought by the Applicant, the Court in the first instance answers in the affirmative and aligns itself with its decision in paragraph 56 above. On the second question, the Court also answers in the affirmative and re-emphasises that the fines imposed under Article 15 (5) (1) of the Amendments to the NBC (6th Edition), in furtherance of the implementation of Articles 3 (1) (1), 3 (1) (2) of the NBC are in violation of Article 9 of the ACHPR. This is based on the Court’s earlier determination



that the wording is vague and ambiguous, and the scope if infinite in application contrary to the guidelines in the Declaration.

65. Based on the foregoing, the Court finds that the Respondent has failed in its responsibility to align its domestic legislation with its international obligations.

XI. REPARATIONS

66. The Court notes that the Applicant is seeking that the Respondent repeal or amend Articles 3 (1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15 (5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) in line with its obligations under the Revised Treaty of ECOWAS and the ACHPR. It is also seeking a perpetual injunction restraining the Respondent from giving effect the said provisions, and any other consequential orders.

67. The Respondent on the other hand maintains the said provisions do not contravene its international obligations and states that it did not violate the Applicant's right thereunder.

68. The Court realigns itself with its decision above that the said provisions contravenes the Respondent's international obligations but restates that the Applicant failed to prove that the same had violated its rights. In this wise, the Court holds that the Respondent should adhere to its duty under Article 1 of the ACHPR and ensure that its laws give effect to its obligations thereunder particularly, Article 9 (1) & (2) in this instance. The Court so holds.

XII. COSTS

Article 66 (1) of the Rules of the Court provides that "[A] decision as to costs shall be given in the final judgment or in the order which closes the



proceedings.” The Court recalls that Applicant has prayed further consequential orders whilst the Respondent has not. In view of the fact that provisions that have been brought before this Court present a potential harm to the enjoyment of the right under Article 9(1) & (2) of the ACHPR, and the Court has found the Respondent wanting in its obligations and awards costs in favour of the Applicant to be calculated by the Chief Registrar.

XIII. OPERATIVE CLAUSE

For the reasons stated above the Court sitting in public after hearing both parties:

As to jurisdiction:

- i. Declares that it has jurisdiction.

As to admissibility:

- ii. Declares the application admissible.

As to merits of the case:

- iii. **Declares** that Articles 3 (1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15 (5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) contravenes Article 9 (1) & (2) of the ACHPR.

As to reparation:

- iv. **Orders** the Respondent to align the Articles 3 (1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15 (5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) in line with its obligations under Article 1 of the ACHPR.



- v. **Orders** that the Respondent ceases to give effect to Articles 3 (1) (1), 3(1) (2), 15(2) (1) of the Nigeria Broadcasting Code (6th Edition) and Article 15 (5) (1) of the Amendments to the Nigeria Broadcasting Code (6th Edition) until it has aligned same as ordered.
- vi. **Orders** the Respondent to submit to the Court within six (6) months of the date of the notification of this judgment a report on the measures taken to implement the orders set-forth herein.
- vii. **Dismisses** all other claims.

COSTS:

- viii. Awards costs against the Respondent to be calculated by the Chief Registrar.

Hon. Justice Dupe **ATOKI**

Hon, Justice Sengu Mohamed **KOROMA**/Rapporteur

Hon. Justice Ricardo Claudio Monteiro **GONCALVES**

Dr. Yaouza **OURO-SAMA** - Chief Registrar

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Done in Abuja, this 23rd day of October, 2023 in English and translated into French and Portuguese.

