ORIGINAL

COUR DE JUSTICE TRIBUNAL DE JUSTIÇA

COMESA

COURT OF JUSTICE

IN THE APPELLATE DIVISION OF THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA AT LUSAKA, ZAMBIA

APPEAL NO. 1 OF 2016

GOVERNMENT OF THE REPUBLIC OF MALAWI.....APPELLANT

VERSUS

MALAWI MOBILE LIMITED.....RESPONDENT

Coram:
Hon. Lombe P. Chibesakunda – Judge President}
Hon. Justice Abdalla E. El Bashir }
Hon. Justice Michael C. Mtambo }
Hon. Justice David Chan Kan Cheong } JJA
Hon. Justice Wael M. H. Y. Rady }

Registrar: Hon. Nyambura L. Mbatia
Assistant Registrar: Hon. Nemaduthsingh Juddoo

Counsel for the Appellant:
Hon. Mr. Kalekeni Kaphale, SC – Attorney General of Malawi
Ms. Apoche Itimu – State Attorney – for the Appellant

Counsel for the Respondent - Mr. David Kanyenda

COMESA COURT OF JUSTICE REGISTRAR 23 APR 2017 P.O. Box 12222 KHARTOUM, SUDAN

Certified true copy

JUDGMENT

23/04/17

I. BACKROUND

1. This is an appeal by the Government of the Republic of Malawi (the Appellant) against the decision of the First Instance Division (the FID) on a preliminary point that was filed in the FID under Rule 82 of this Court's Rules of Procedure (the Rules). The FID dismissed the appellant's preliminary application and held that it had jurisdiction to entertain the reference by Malawi Mobile Company Ltd (the Respondent) under Article 26 of the COMESA Treaty (the Treaty) in respect of an alleged violation of the municipal law of Malawi in the context of Article 6(f) and (g) of the Treaty.

2. The Respondent's case in the FID was that the Appellant's organ, the Malawi Communications Regulatory Authority (MACRA), committed an unlawful act and/or an infringement of a provision of the Treaty by violating Malawi's municipal law of contract in wrongfully terminating a licence agreement for the provision of cellular phone (cell phone) services by the Respondent to customers in Malawi. The Appellant also committed an unlawful act and/or infringement of a Treaty provision by committing a tort of inducing a breach of that contract through the Attorney General of the Republic of Malawi (the Attorney General) by unlawfully directing MACRA to revoke the Respondent's licence.

3. Apart from the issue of lack of jurisdiction, the Appellant contended before the FID that the Respondent had not exhausted local remedies as required by Article 26 of the Treaty as no Treaty issue was litigated in the courts of Malawi, *to wit* Article 6(f), be it expressly or in substance; that the word "unlawful" in Article 26 of the Treaty does not cover breaches of municipal law as alleged by the Respondent but community law; and that article 6(f) which was pleaded in the FID by the Respondent and Article 6(g) which was not pleaded but was relied on by the FID in its ruling, are high principles which do not confer to a legal or natural person an enforceable right

against Member States. They merely create Member State obligations *inter se*.

4. As indicated above, prior to the filing of the Reference in the FID, the Respondent brought an action for breach of contract and inducement to commit a breach of contract in the Commercial Division of the High Court of Malawi (the High Court) where it succeeded. It was awarded US$66,850,000.00 damages with respect to loss of profit arising from the alleged contractual and tortuous wrongs. The award was reversed by the Supreme Court of Appeal in Malawi (the Supreme Court), the apex court in Malawi, on the ground that although the appellant did not offer evidence in defence in the High Court, the burden of proof that the Respondent had a valid licence, that it was unlawfully revoked and that the damages claimed and awarded were suffered was on the Respondent. The Supreme Court found that the Respondent had failed to discharge that onus.

5. With respect to the subject matter of this appeal, the FID held:

   (a) At paragraph 47 of the ruling, agreeing with Counsel for the Respondent, that entertaining the term "unlawful" in section 26 of the Treaty as covering breaches of domestic law promotes the aims and objectives of the Treaty. A restrictive approach curtails access to the COMESA Court of Justice (CCJ) and in fact precludes the CCJ from examining a Member State's adherence to the aims and objectives, and it may promote Member State's impunity or trash democratic systems of governance;

   (b) At paragraph 49 of the ruling, agreeing with the East African Court of Justice (EACJ) in ***Samuel Mukira Mohochi v The Attorney General of The Republic of Uganda, Reference No. 5 of 2011***, that the fundamental principles in Article 6 of the Treaty are rules that must be followed or adhered to by Member States. They are foundational, core and indispensable to the success of the integration agenda and were intended to be strictly adhered to;

LPC

(c) At paragraphs 54 and 55 of the ruling, that a restrictive view of the jurisdiction of the Court is contrary to the very Treaty which allows the Court to go into municipal law to decide whether the Treaty has been breached, for example, whether the State has observed the Rule of Law;

(d) At paragraph 56 of the ruling, citing with approval an article by Peter Watson BA, LLB, SSC entitled ***"The Rule of Law and Economic Prosperity'*** sourced at ***www.lemac.co.uk/resources/publication files/speech rule of law.pdf***, that no one will disagree with the proposition that economic growth is a starting point for encouraging investment, whether internal or external, and for achieving wealth and prosperity of any nation state and the better provision for its population; and

(e) At paragraph 78 of the ruling, that the Respondent did exhaust the local remedies as the case was taken to the highest court of Malawi. It fulfilled the requirements of Article 26. More than what was required by the drafters of the Treaty should not be read in Article 26.

6. It should be noted that another issue relating to the dismissal of the Respondent's preliminary application in the FID was not appealed to this Division. This was in respect of an application to annul the decision of the Supreme Court on the ground that it was not quorate when it sat to deliver its judgment with Justice Mzikamanda who did not take part in the hearing and deliberations. According to the preliminary remarks of the Supreme Court judgment, it was stated that the Court was sitting with Justice Mzikamanda because the judge who participated in the hearing and deliberations, Justice Chinangwa, was out of the jurisdiction. The application was based on the provision of the Constitution of the Republic of Malawi which imposes the requirement that the Supreme Court sits with an odd number of judges. The FID reasoned that determining this issue at the preliminary stage would be contrary to Rule 82 of the Rules as it would require delving into the substance of the matter. Thus, at this point in time, that issue remains unresolved in the FID and as such, in the closing oral submissions, Counsel for the Respondent

has implored this Court that whichever way we decide in the appeal before us, the matter will need to be referred back to the FID to adjudicate on that outstanding issue.

II. PRELIMINARY POINT RAISED BY THE RESPONDENT

7. In response to the appeal, the Respondent raised a preliminary point to the effect that the present appeal is clearly inadmissible or clearly unfounded and therefore liable for dismissal under Rule 100 of the Rules for non-compliance with the provisions of Rule 93(1)(c) and (d) in that:-

   (a) the Notice of Appeal does not contain the pleas in law and legal arguments relied on contrary to Rule 93(1)(c); and

   (b) the Notice of Appeal does not contain the form of order sought by the Appellant contrary to Rule 93(1)(d) as read with Rule 94.

8. In an oral ruling, we held that we would admit this appeal and hear it on merit in the interests of justice mainly on the ground that the present situation was caused by an ambiguity in our own Rules. We now proceed to give the *full* reasons.

9. Part XIX of the Rules, which consist of Rules 91 to 103 inclusive, provides for the procedure governing appeals against decisions of the FID. It is appropriate and useful to set out the following extracts of the Rules for the purpose of determining this preliminary issue:

"Rule 92
Appeal and withdrawal thereof

1. A party wishing to appeal against a decision of the First Instance Division to the Appellate Division shall-

(a) within two months of the date of the judgment which he wishes to appeal against, file a notice of appeal in conformity with Form C with the Registrar together with sufficient copies for service to all the parties involved in that judgment; and

(b) Within two months of the date of the filing of the notice of appeal, lodge an application at the Court registry setting out the appeal together with sufficient copies for service to all the parties involved in the judgment appealed against.

2. (a) The time limits laid down in sub rule (1) may be extended by the President on a reasoned application by the Appellant; and

(c) The Registrar shall not accept any notice of appeal after the expiration of the time limits laid down in sub rule (1) unless the Appellant has obtained an extension of time from the President.

Rule 93
Contents of appeal and appeal record

1. An appeal shall contain-

(a) the name and address of the appellant;
(b) the names of the other parties to the proceedings before the First Instance Division;
(c) the pleas in law and legal arguments relied on; and
(d) the form of order sought by the appellant.

Rule 94
Relief sought on appeal

1. An appeal may seek-

(a) to set aside, in whole or in part, the decision of the First Instance Division;

(b) the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.

Rule 96
Response to appeal

1. Any party to the proceedings before the First Instance Division may lodge a response to an appeal within a month of the date of service on him of the notice of the appeal. The time-limit for lodging a response shall not be extended.

2. A response shall contain-

(a) the name and address of the party lodging it;
(b) the date on which the notice of appeal was served on him;
(c) the pleas in law and legal arguments relied on; and
(d) the form of order sought by the Respondent.

Rule 100
Inadmissible or unfounded appeals

Where the appeal is, in whole or in part, clearly inadmissible or clearly unfounded, the Appellate Division may, at any time, by reasoned order dismiss the appeal in whole or in part."

The Respondent's Submissions

10. The following submissions were made on behalf of the Respondent. Part XIX of the Rules must be read as a whole and considered in its entirety. The use of the word "*shall*" in Rules 92 and 93 denotes that they contain mandatory requirements. Rule 92(1)(a) should be read together with Rule 93(1) so that the Notice of Appeal filed by the Appellant on 13 January 2016 should have contained the appellant's pleas in law and legal arguments and the reliefs sought. This proposition is supported by the wording and tenor of Rule 96 which requires a party to lodge a **response** to an appeal within a month of the date of service on him of the **notice of the appeal**. Rule 96 further provides that the response shall contain the Respondent's pleas in law and legal arguments and the reliefs sought by him. A notice of appeal must therefore already contain the appellant's pleas in law and legal arguments and relief sought so that a Respondent is aware of them and is able to comply with the requirements of Rule 96 by replying to them.

11. In the present case, the Notice of Appeal failed to contain the appellant's pleas in law and legal arguments and the reliefs sought. The absence of these peremptory requirements is a fatal and incurable non-compliance with the requirements under the law. Rules of court are there to be observed and litigants who fail to comply do so at their own peril. The Notice of Appeal is fundamentally defective. It follows that this appeal is clearly inadmissible and clearly unfounded. There is in fact no valid or competent appeal before this Court. The purported appeal is not an appeal within the meaning of the Rules.

12. The Appellant also failed to lodge a valid appeal within the prescribed time frame of 2 months under Rule 92(1)(a). It was only on 10 March 2016 that the Appellant stealthily introduced its grounds of appeal in its response.

The Appellant's Submissions

13. It was contended on behalf of the Appellant that it has complied with the requirements of the law. Rule 92(1) sets out a two-stage process. Rule 92(1)(a) requires a prospective appellant to file a notice of appeal in conformity with Form C within 2 months of the date of the judgment of the FID. Rule 92(1)(b) then requires an appellant to lodge an application setting out **the appeal** within 2 months of the date of the filing of the notice of appeal. It is at this second stage that an appellant should file his pleas in law and legal arguments and the reliefs sought. These requirements have been complied with by the Appellant within the prescribed time limits.

14. Even assuming that the appeal is defective, the Respondent did not suffer any prejudice as it has been able to respond to all the appellant's pleas in law and legal arguments. In these circumstances, striking out the appeal would not be warranted.

Discussions and Conclusions

15. Counsel for the Respondent referred this Court to various domestic procedural rules and authorities from some Member States. We intend no disrespect to Counsel by our decision not to review the said rules and authorities. But the assistance to be derived from comparison with these rules and authorities is bound to be limited as we are not familiar with these rules. Each jurisdiction has its own rules of procedure and its own approach to this subject matter. Some jurisdictions strictly apply procedural rules and any defect in form is sanctioned as being fatal. Other jurisdictions will use their discretion, whether statutory or inherent, to decide whether to condone a breach of procedure or form. Since this Court has its own specific rules of procedure, we are of the view that the better approach is to turn to these Rules and interpret and apply them to the facts of the present case.

16. The ruling of the FID was delivered on 20 November 2015. The Appellant filed a notice of appeal on 13 January 2016. This was within the limit of 2 months provided by Rule 92(1)(a). It is also not disputed that the Notice of Appeal of the Appellant was in conformity with Form C as required under the same Rule. A perusal of Form C shows that nowhere therein is an appellant required to file at that stage his pleas in law and legal arguments and the reliefs sought.

17. The Appellant then filed its response on 10 March 2016 containing its grounds of appeal, its pleas in law and legal arguments and the reliefs sought. This was within 2 months of the date of the filing of the notice of appeal as provided for in Rule 92(1)(b). Interestingly, Rule 92(1)(b) provides that an appellant shall lodge, within 2 months of the date of filing of **the notice of appeal**, an application setting out **the appeal**. And Rule 93 provides that **an appeal** shall contain the pleas in law and legal arguments relied on and the form of order sought by an appellant.

18. It would, therefore, seem that the Appellant has complied with the requirements under Rules 92 and 93 so that there is a valid appeal before this Court.

19. The difficulty with the above resides in the wording and tenor of Rule 96.We agree with learned Counsel for the Respondent that a logical interpretation of this Rule would be that a notice of appeal should already contain the appellant's pleas in law and legal arguments and relief sought. This is so because Rule 96 requires a Respondent to lodge a response to an appeal within a month of the date of service on him of the **notice of the appeal**. And the response should contain the Respondent's pleas in law and legal arguments and the reliefs sought by him. A notice of appeal must therefore already contain the appellant's pleas in law and legal arguments and relief sought so that a Respondent is aware of them and is able to comply with

the requirements of Rule 96 by replying to them in the form of his own pleas in law and legal arguments.

20. We wish to point out that the rules under Part XIX have now been amended removing the ambiguity.

21. As can be seen, the confusion has been caused by an ambiguity in our own Rules. We must lay the blame at our own door for this unfortunate situation. The interpretations by both parties of these Rules are plausible and have merit. It stands to reason that a party should not be penalised by an ambiguity in our Rules. This is the main reason why we have allowed the present appeal to proceed on its merits.

22. Moreover, at the end of the day, as rightly pointed out by the Attorney General, no prejudice has been caused to the Respondent. The Respondent became eventually fully aware of the pleas in law and legal arguments relied upon, and the reliefs sought, by the Appellant. It had the opportunity to respond to them and it did seize the opportunity. It has been able to put forward its case in an unhindered manner and without being embarrassed. It was, therefore, in the interests of justice that this appeal was allowed to proceed. *We rule accordingly.*

III. THE ISSUES FOR DETERMINATION IN THIS APPEAL

23. **The issues to be determined are as follows :**

(a) Whether or not the CCJ has jurisdiction to entertain the Respondent's Reference under Article 26 of the Treaty;

(b) Whether or not, an action under Article 26 of the Treaty can be solely based on the Aims and Objectives and Fundamental Principles in the Treaty as set out in Articles 3 and 6 (f) and (g);

(c) Whether or not, the Respondent satisfied the requirement contained in the proviso to Article 26 of the Treaty by exhausting local remedies before the national courts of Malawi.

IV. ANALYSIS

(a) WHETHER OR NOT THE CCJ HAS JURISDICTION TO ENTERTAIN THE REFERENCE.

The Appellant's Submissions

24. The Appellant maintained that the FID erred in agreeing to assume jurisdiction when it failed to establish any link between the Treaty or community law and the matter before the national courts within the meaning of Article 26 of the Treaty. The CCJ only has jurisdiction to decide matters or questions relating to the Treaty and the community laws. A purposeful and contextual interpretation of the word "unlawful" in article 26 of the Treaty should lead to the result that that word cannot mean or relate to municipal law breaches that are not linked to the Treaty or related community laws.

25. According to article 34 of the Treaty, the CCJ is limited in its jurisdiction to issues around the interpretation and application of the Treaty or the validity of regulations, directions or decisions of the Common Market.

26. The inclusion of the word "unlawful" in Article 26 of the Treaty does not *per se* empower the CCJ to adjudicate on the legality of municipal law

unrelated to the Treaty. What is unlawful can only be unlawful within the context of the Treaty or the community law and not domestic laws that have no relation to the Treaty.

27. The word "unlawful" is not as clear as the Respondent argued and that it needed interpretation. Unlawfulness should be restricted to mean acts which violate community law. The Attorney General distinguished the EACJ decision of ***Mohochi*** (supra). That case being relied upon by the Respondent to illustrate unlawfulness did not in fact deal with unlawfulness. It dealt with infringement of a Treaty provision and a protocol made thereunder prohibiting discrimination with respect to citizens of Partner States which had direct effect in the East African Community, unlike Article 6 of the Treaty which does not have direct effect.

28. Further, the Attorney General made a distinction between the CCJ making reference to domestic law to resolve a Treaty issue, which was the case in ***Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius CCJ Ref.no.1 of 2012*** and making reference solely to domestic law to found an action such as breach of contract and inducing a breach of contract.

The Respondent's submissions

29. In response, it was submitted on behalf of the Respondent as follows: The subject matter or substance of a reference for determination by the CCJ must relate to the legality of any act, regulation, directive or decision of the Council or Member States on the ground that the same is unlawful or an infringement of the Treaty. The municipal law was envisaged by the framers of the Treaty as an applicable source of law, hence the proviso under Article 26 of the Treaty enjoins a litigant to exhaust domestic remedies.

30. Since the provisions of the Treaty are general, and because there are no Treaty provisions enumerating sources of law within the common market, municipal law is bound to play a leading role in the shaping of the COMESA law. If the common market evolves a jurisprudence that is essentially a synthesis of general principles of municipal law of the Member States, such regional law will receive the cooperation of Member States which will enhance its esteem and applicability.

31. Unlawfulness and breach of a Treaty provision are two distinct heads of claim under Article 26 of the Treaty and the Respondent is relying on them in the alternative. According to Article 31 of the Vienna Convention on the interpretation of treaties, words should be given their ordinary and natural meaning unless that would lead to an absurdity. This is what is known as the golden rule. Then there is the teleological approach whereby a word should be given a meaning according to the context. Further, there is the rule that a treaty should be given the meaning which promotes the achievement of the intention of the drafters of the treaty.

32. Black's Law Dictionary, 7th edition, defines unlawfulness as *"That which is contrary to Law"*. "Unlawful" and "illegal" are frequently used synonymously, but, in the proper sense of the word, "unlawful", as applied to promises, agreements, considerations, and the like, denotes that they are ineffectual in law because they involve acts which, although not illegal, i.e., not positively forbidden, are disapproved by law.

33. If the word "unlawful" is given its ordinary and natural meaning, breach of contract and inducing a breach of contract, the subject matter of the litigation in the courts of Malawi, qualifies to found a cause of action in the CCJ. Breach of contract and inducing a breach of contract also amount to an infringement of a Treaty provision, namely, Article 6(f). If the drafters of the Treaty had wanted to exclude domestic law infringements in the interpretation of the word "unlawful" in Article 26 of the Treaty, they could have stated so.

34. In support of the argument that unlawfulness includes violation of domestic law, Counsel for the Respondent asserted that this was the reason why the CCJ applied domestic law. Examples are ***Polytol*** (supra). In this case, the Limitation Act of Mauritius was applied. Another case is the recusal ruling of the Appellate Division in this reference where Malawi's Constitution was applied.

35. The Respondent alternatively relied on article 6 (f) of Treaty, arguing that municipal law is not designed to oust the CCJ's reliance on provisions of the Treaty.

Discussions and Conclusions

36. The determination of this issue entails the interpretation and application of the provisions in the Treaty relating to the jurisdiction of the CCJ. It is, therefore, appropriate to set out first the relevant provisions for the purposes of the present appeal.

37. The CCJ was established as an organ of the Common Market under Article 7 of the Treaty. It is common ground that Articles 19 and 23 of the Treaty spell out the jurisdiction of the CCJ :

Article 19
Establishment of the Court

1. *The Court of Justice established under Article 7 of this Treaty shall ensure the adherence to law in the interpretation and application of this Treaty.*
2. ....

Article 23
General Jurisdiction of the Court

1. *The Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty.*
2. *The First Instance Division of the Court shall have jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division under paragraph 2, any matter brought before the Court in accordance with this Treaty.*
3. ...

38. It is clear from the above that the jurisdiction of the CCJ is limited to the interpretation and the application of the Treaty and the adjudication upon matters referred to it pursuant to the Treaty.

39. Additionally, in the following provisions, the Common Market legislators took the opportunity to set out the various lawsuits that could be brought before the CCJ by the different entities and/or legal persons under the Treaty and the different conditions of application:

Article 24
Reference by Member States

1. *A Member State which considers that another Member State or the Council has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court.*
2. *A Member State may refer for determination by the Court, the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.*

Article 25
Reference by the Secretary-General

1. *Where the Secretary-General considers that a Member State has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, he shall submit his findings to the Member State concerned to enable that Member State to submit its observations on the findings.*
2. *If the Member State concerned does not submit its observations to the Secretary-General within two months, or if the observations submitted are unsatisfactory, the Secretary-General shall refer the matter to the Bureau of the Council which shall decide whether the matter shall be referred by the Secretary-General to the Court immediately or be referred to the Council.*
3. *Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the Court.*

Article 26
Reference by Legal and Natural Persons

Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty:

Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.

40. As regards to the interpretation and application of the above Articles, we endorse the clear findings of the **FID** in the case of ***Polytol Paints &***

Adhesives Manufacturers Co. Ltd v The Republic of Mauritius CCJ Ref.no.1 of 2012 where the Court stated:

> *"Thus, a legal or natural person is only permitted to bring to Court matters relating to conduct or measures that are unlawful or an infringement of the Treaty but not the non-fulfillment of a Treaty obligation by a Member State. The responsibility of bringing a matter relating to non-fulfillment of obligations under the Treaty is reserved for Member States and the Secretary General. This is clearly indicated in Articles 24 and 25.....*
>
> *In looking at Articles 24, 25 and 26, it is clear that the intention in the Treaty is to reserve matters relating to non-fulfillment of Treaty obligations to Member States and the Secretary General. The Applicant has no right to refer such matter to the Court for determination....*
>
> *The content of this rule* (Article 26) *shows the extent the signatories of the COMESA treaty have committed themselves to give some space in the COMESA Territory not only for the Member States but also for individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between the Member States. It also gives enforceable rights to citizens residing in the Member States".*

41. Certainly, these rights arise not only where they are expressly granted by the Treaty, but also where the Treaty imposes obligations on Member States to confer justiciable rights upon residents in Member States.

42. It must be observed that these rights of a resident of a Member States are mainly protected by Article 26 of the Treaty through a specific legal procedure before the CCJ.

43. Article 26 of the Treaty enables the Court to review the legality of the acts adopted by the Council or a Member State. However, this action may not be brought before the CCJ unless its subject is "*unlawful or an infringement of the provisions of this Treaty*".

44. A perusal of Article 3 of the Treaty as read with Articles 19, 23 and 26, shows that the CCJ is assigned the task of ensuring the respect of the law in the interpretation and application of the Treaty and deciding on disputes submitted to it under the Treaty. Therefore, it constitutes the judicial organ of COMESA, whose jurisdiction is to ensure the respect of law through the interpretation and application of the Treaty.

45. In ***Henry Kyarimpa v the Attorney General of Uganda, Appeal No. 6 of 2014,*** the Appellate Division of the EACJ held at paragraph 70 that:

> "*Why then, it may be asked, all this analysis of Uganda's internal law when the Court's jurisdiction is limited to the interpretation and application of the Treaty? To answer this question, we would adopt the exposition of the law and the reasoning of the Trial Court in paragraphs 45 and 46 of its judgment. The Trial Court delivered itself as follows:*
>
> *'45. It cannot be gainsaid that this Court's jurisdiction is limited to the application and interpretation of the Treaty. In so doing, there may be instances where the Court may have to look to Municipal Law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty. This was why for example, in Rugumba v Attorney General of Rwanda. EACJ Ref.*

No. 8 of 2010, this Court had to invoke the Penal Laws of the Republic of Rwanda to find that where a Partner State does not abide by its own Penal Laws and Procedures, then its conduct amounts to a violation of the rule of law and hence the Treaty.

46. Similarly, in Mohochi Vs The Attorney General of the Republic of Uganda, EACJ Ref No. 5 of 2011, the Court found that where a Partner State had declined to follow its immigration laws in declaring the Applicant a prohibited immigrant, then it was a breach of the Treaty and the Protocol on the Common Market which included the right of free movement of persons with EAC..."

46. In the light of the principles set out in ***Kyarimpa*** (supra), we agree with the submission of the Attorney General that the CCJ can use domestic law to resolve a Treaty issue but not to found a cause of action as propagated by the Respondent unless it has reference to a violation of the Treaty and the right to address such violation against Member States is vested under Article 26 of the Treaty in citizens and residents of Member States. We would, however, not venture to say whether these principles have been rightly applied in the case of ***Rugumba*** and ***Mohochi*** (supra).

47. Thus, this Court has no jurisdiction to entertain a reference by a resident person under Article 26 of the Treaty which is grounded solely on an infringement of a national law. This is not only because it has never been given such a status by the Treaty and the COMESA legal order, but also because, as already stated above, the main role of the CCJ, in the new legal order of COMESA, is to guarantee the respect of national law in accordance with the implementation of the Treaty. Therefore, the CCJ cannot be considered as a general supranational court with a task to control the legality of every national legal act unrelated to the Treaty.

48. However, we hasten to add that the CCJ has a supervisory role over national courts when it comes to the interpretation and application of the Treaty. This is borne out by the provisions of Articles 29 and 30 of the Treaty which read as follows :

"Article 29
Jurisdiction of National Courts

1. Except where the jurisdiction is conferred on the Court by or under the Treaty, disputes to which the Common Market is a party shall not, on that ground alone, be excluded from the jurisdiction of national courts.
2. Decisions of the Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts.

Article 30
National Courts and Preliminary Rulings

1. Where a question is raised before any court or tribunal of a Member State concerning the application or interpretation of this Treaty or the validity of regulations, directives and decisions of the Common Market, such court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give a judgment, request the Court give a preliminary ruling thereon.

2. Where any question as that referred to in paragraph 1 of this Article is raised in a case pending before a court or tribunal of a Member State against whose judgment there is no judicial remedy under the national law of that Member State, that court or tribunal shall refer the matter to the Court".

49. Consequently, while we agree with the FID that the Treaty allows this Court to go to the municipal law of the parties to determine whether the Treaty

has been breached, we, however, bearing in mind the provisions of Article 26 of the Treaty, hold that "unlawful" does not mean and does not include **any** breach of domestic law that is not Treaty related.

50. No relationship between the alleged breach of contract and tort of inducement, the subject matter of the Reference, and alleged unlawfulness under the Treaty has been established. The only mention by the Respondent of a violation of the Treaty was in the prayer in the Reference seeking a declaration that the acts, directives and decisions of the first and second Respondents in purporting to revoke the applicant's license were unlawful and amounted to violation of Article 6 (f) of the Treaty. There was absolutely no link between the facts averred in the Reference and the alleged violation of the above mentioned Article. It is to be noted that Counsel for the Respondent, in his submissions, did not clarify this issue. In fact, he contented himself with merely asserting that the alleged violation of Article 6(f) of the Treaty is unlawful within the meaning of Article 26 of the Treaty.

51. In view of the foregoing, we find that the Respondent has not demonstrated, either in the Reference before the FID, or in its oral or written submissions, what constitutes an alleged violation of the Treaty. We note that the Respondent's Reference was based on an alleged breach of contract and an alleged inducement to commit a breach of contract under Malawi national law.

52. In conclusion, we are unable to agree with the submission of Counsel for the Respondent that the word "unlawful" in Article 26 means **any** unlawful act. It would be an absurd interpretation because it would in effect mean that **any** alleged unlawful act of a Member State, even if it is unrelated to the Treaty, would be amenable to review by the CCJ on a reference by a resident in a Member State. This could not have been the intention of the Common Market legislators since the CCJ could not have been intended to be a supranational court sitting on appeal over all decisions of national courts

of Member States and applying domestic law on its own. The CCJ can only apply domestic law in the context of the Treaty.

(b) WHETHER OR NOT INDIVIDUALS WHO RESIDE IN MEMBER STATES CAN HAVE AN ENFORCEABLE RIGHT UNDER ARTICLE 6 (F) AND (G) OF THE TREATY.

The Appellant's Submissions

53. On the issue of whether or not an individual who resides in a Member State can have an enforceable right under Article 6 (f) and (g) of the Treaty, the following submissions were offered on behalf of the Appellant.

54. The FID erred in finding that any unlawful act by a Member State or any breach by it of any municipal law with no proven bearing on the aims and objectives of Treaty constitutes a breach of the principle of the rule of law and is therefore sufficient to found the jurisdiction of the Court.

55. It is not sufficient to ground a reference on elements of Articles 3 and 6 of the Treaty alone. This is because such a reading of the provisions fails to take the whole Treaty into context as required by article 31 of the Vienna Convention on the law of the treaties.

56. In any case, Article 6 (f) was never raised in the Malawi Courts and even Article 6 (g) was never canvassed before the Malawi Courts.

57. The FID decision is based on a vague similarity approach with the East African Community Treaty (EAC) or Southern Africa Development Community Treaty (SADC) without qualification, ignoring the special legal regime set up by the COMESA Treaty. Given the textual difference between the EAC Treaty and SADC Treaty and the COMESA Treaty, judgments by the EACJ or SADC Court are not *ipso facto* precedents for the CCJ.

The Respondent's Submissions

58. The mere invocation of Article 6 (f) in the Reference was enough to seize the jurisdiction of the CCJ. The FID was also right in finding that a cause of action arose under Article 6(g) even though it was not pleaded in the Reference. In any case this issue was one of substance and should not be dealt with at this stage.

Discussions and Conclusions

59. It is common ground that not all the provisions of a treaty could confer enforceable rights upon individuals. The formulation of a provision has to be sufficiently clear and complete. This characteristic in international law is usually referred to as 'self-sufficiency' which means in this context an applicability of the international rule (direct effect). To determine its correct meaning, the judge has to look for the intention of the State parties as expressed in the text of the provision invoked.

60. In the case of ***The Court of Danzin (3 mars 1928 P. C.I J. 1928, Series B, n° 15, 17-18)*** the Permanent Court of International Justice relied also on the intention of the parties, which is to be ascertained from the contents of the agreement as follows :

> *"It may be readily admitted that, according to a well established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the Beamtenabkomen. The fact that the various provisions were put in*

the form of an Abkomen is corroborative, but not conclusive evidence as to the character and legal effects of the instrument. The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive. This principle of interpretation should be applied by the Court in the present case."

61. The concept of direct effect, mainly endorsed by the European Union Court of Justice, comprises criteria that have to be fulfilled before a court can give effect to international law. Generally, what counts is, first, whether a provision is clear enough and, secondly, whether or not it grants a right to private parties.

62. In ***Van Gend & Loos v Netherlands Inland Revenue Administration - Case 26-62,*** the European Union Court of Justice held that for a particular provision among European law norms to be directly applicable, the provision concerned must be clear, precise, unconditional and capable of producing rights for individuals. The Court clearly embraced the idea that not all treaty provisions had such effect: only under certain conditions, it indicated, can treaty provisions be invoked by individuals in national courts, in order to claim subjective rights.

63. It should be stressed that the COMESA Treaty, as most other treaties, does not explicitly provide for the direct effect of its provisions. It may be assumed however that, independently of the legislation of Member States, the Common Market law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also where the Treaty imposes obligations on Member States to confer justiciable rights upon residents in Member States.

64. It should be recalled that, according to these principles, the FID in the case of ***Polytol*** (supra) stated that residents of COMESA Member States

likewise have an enforceable right before the CCJ whenever they establish that they have been prejudiced by an act of the Council or of a Member State that contravenes the Treaty. Accordingly, Article 46 of the Treaty was declared clear and unambiguous about the obligation it imposed upon Member States and the possible exemptions. The Court concluded as follows:

> *"The Court observes that the Applicant had the right to import products from Egypt, a Member State, under zero duty. The Court also finds that this right was breached by the Respondent as a result of the imposition of the duty. The Applicant has paid duties which it should not have. This constitutes a prejudice which is a direct consequence of the Respondent's breach"*

65. In this context, the difference between the direct effect of a provision of a treaty and its direct applicability must be pointed out. Direct effect does not mean that the provision becomes part of national law, whereas direct applicability does. Direct effect means that the rights created by a provision are capable of being relied upon in the national court as well as this Court. It must be pointed out that the Court has noted this difference in ***Polytol*** (supra). In spite of recognising the difference in legal systems regarding their position towards the domestication of international law, it held, on the basis of Article 27 of the Vienna Convention on the Law of Treaties 1969, that :

> *"In some Member States, Treaties become directly applicable; in others they require another domestic legal instrument for their incorporation. Notwithstanding the differences in domestic legal systems the Treaty objectives can be achieved when all Member States fulfill their obligations under the Treaty. Any Member State that acts contrary to the Treaty cannot, therefore, plead the nature of its legal system as a defence when citizens or residents of that state are prejudiced by its acts".*

66. In these circumstances, we find that, on a literal interpretation of Article 6, as read with Article 3 of the Treaty, the language of the Treaty in Article 6 (f) and (g) is not sufficiently definite and mandatory for the CCJ to rely upon it as founding, *per se,* a cause of action **by a person who is resident in a Member State**. The wording of Article 6 (f) and (g) does not contain a clear and unconditional obligation, whether positive or negative, in the legal relationship between Member States and their subjects.

67. It is apparent that the formulation of Article 6 clearly indicates the intention of the drafters of the Treaty to define the parameters of the actions of Member States in the pursuit of the aims and objectives of the Common market as it has been stipulated in the beginning of that Article as follows :

> *"The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991, agree to adhere to the following principles."*

68. It is also crystal clear that most of the principles set out in Article 6 are, by their nature, inter-State and are not intended to confer on individuals any clear justiciable right before the CCJ. This is borne out by the express wording of Article 6 (a), (b), (c) , (d) , (i) and (j) which states as follows :

«(a) equality and inter-dependence of the Member States;
(b) solidarity and collective self-reliance among the Member States;
(c)inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;
(d) non-aggression between the Member States;...
(i)the maintenance of regional peace and stability through the promotion and strengthening of good neighbourliness; and
(j)the peaceful settlement of disputes among the Member States, the active co-operation between neighbouring countries and the promotion of a peaceful environment as a pre-requisite for their economic development."

69. Consequently, we are not convinced that an action based solely on Article 6 (f) and (g), even though it is not expressly described as being inter-State, could be brought before the CCJ by a resident in a Member State under Article 26 of the Treaty. It must be emphasised that Article 6 (f) and (g) does not include any mandatory provision to give enforceable rights to residents in Member States.

70. Since Article 6 defines the parameters of the actions of Member States in the pursuit of the aims and objectives of the Common Market under Article 3, the application of Article 6 must be interpreted in the light of the meaning that must be given to the provisions of Article 3 of the Treaty.

71. Article 3 sets out the aims and objectives of the Common Market on an inter-State dialogue basis. These are to promote joint development, cooperation and contributions of Member States towards the realisation of the objective of the Common Market. They do not impose precise or unconditional obligations on Member States to confer justiciable rights upon residents in Member States.

72. We also understand that economic justice is a concept in which the economic policies must result in distribution of benefits equally to all. This vague principle, set out in Article 6 (f), mainly encompasses the moral principles which guide Member States in designing their economic institutions. Article 6 (f) does not create a direct right in favour of a resident of a Member State under Article 26 of the Treaty, and nor does Article 6 (g) which recognises the rule of law. This provision enshrines the idea that the Common Market is a community based on the rule of law.

73. The respondent relied on the case of ***Mike Campbell v The Republic of Zimbabwe SADC (T) Case No. 2/2007,*** and ***Mohochi*** (supra). So did the FID in order to hold that the fundamental principles stipulated in Article 6 of the Treaty were capable of being breached and was therefore justiciable.

74. We respectfully beg to disagree. We are of the view that these cases are not relevant for our present purposes in as much as, as we have already stated above, we find that Article 6 does not **per se** confer any enforceable right upon a resident of a Member State in order to found an action under Article 26 of the Treaty. Moreover, in these cases, the Member States signed a protocol in furtherance of the Treaty obligations, the subject matter of the references which was held to be enforceable, unlike in the case before us.

75. For the reasons we have given, a legal or natural person is not permitted to bring to the CCJ matters solely under Article 6 (f) and (g) of the Treaty. In this context, the responsibility of bringing a matter relating to the non-fulfillment of obligations of Member States under the Treaty, as the FID said in the case **of *Polytol*** (supra), is reserved for Member States and the Secretary General as indicated in Articles 24 and 25 of the Treaty .

76. In conclusion, since the Respondent's case is grounded on purely contractual and tortuous domestic law of Malawi, we hold that we have no jurisdiction to entertain the present matter and we have found nothing else in the Reference which would justify us assuming jurisdiction. A mere reference solely to Article 6(f) and (g) of the Treaty by a resident of a Member State is not enough for the CCJ to proceed with the present case.

(c) WHETHER OR NOT THE RESPONDENT SATISFIED THE REQUIREMENT CONTAINED IN THE PROVISO TO ARTICLE 26 OF THE TREATY BY EXHAUSTING LOCAL REMEDIES BEFORE THE NATIONAL COURTS OF MALAWI.

77. Under this ground of appeal, it is the Appellant's contention that the FID '*erred in holding that the Respondent had exhausted local or domestic remedies within the meaning of the proviso to Article 26 of the COMESA Treaty when the issue of whether there was a breach of the Treaty or of any of its aims, objectives or principles was not the subject of litigation before the national courts*'. There is strictly speaking no need for us to consider this

ground of appeal in view of our above finding that the CCJ has no jurisdiction to entertain the present Reference. We shall, however, do so for the sake of completeness.

78. The proviso to Article 26 reads as follows :

"Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State."

The Appellant's Submissions

79. The following submissions were offered on behalf of the Appellant. The FID did not consider whether there was an exhaustion of local remedies in the present case. To exhaust local remedies, the Respondent would have had to raise the alleged unlawfulness of a local act or decision against Treaty provision and adjudicate it before the national courts of Malawi without success. It was up to the Respondent, as a resident person, to file a case with the High Court of Malawi to assert a breach of the Treaty. The Respondent chose to rely on tort under Malawi municipal law against the Appellant and raised no issues regarding violation of Malawi's obligations under the Treaty.

80. In so far as the issue of violation of the Treaty or Treaty law or community law obligations was never raised before the national courts of Malawi, the FID could not entertain the Reference. In particular, no issue of an alleged breach of Article 6(g) of the Treaty was ever brought before the national courts of Malawi whether in the pleadings or at the trial or the appeal. As a matter of fact, the whole Reference makes no mention of Article 6(g) of the Treaty.

81. The provisions of Article 29 of the Treaty support the position that unless there is an issue concerning the violation of Treaty law or the Treaty, the CCJ has no interpretive role. Its role is based on testing municipal laws and acts against specific provisions of the Treaty or Treaty law. The true issue was that the Respondent had not raised the violation of any Treaty provision or litigated any Treaty issue before the national courts of Malawi.

82. The intention could not have been to create the CCJ as an appellate court for all cases that entail a breach of municipal law even if that law has nothing to do with the Member States' Treaty obligations. The requirement of exhaustion will be satisfied only if the issue before the domestic courts is the same as the one that escalates to the CCJ. The Treaty issue should be ventilated at national level, at least in substance. It would be absurd and unreasonable if a resident person could litigate before the local courts on issues which have nothing to do with the Treaty and, after exhausting the local remedies, thereafter sue a Member State for breach of Treaty law before the CCJ.

83. On another note, the purported admission by the Appellant that the Respondent has exhausted all domestic remedies only pertains to domestic law issues which were litigated upon, namely an alleged breach of contract and alleged tort of inducement under Malawi law, and not treaty violation.

The Respondent's Submissions

84. It was submitted on behalf of the Respondent as follows. The question of exhaustion of local remedies is in reality a non-issue. The Appellant is bound by its pleadings. In its defence to the Reference, it has expressly admitted that the Respondent has exhausted domestic remedies in respect of the issues it litigated upon in the municipal courts of Malawi. The Appellant should, therefore, be estopped from asserting otherwise and from raising the present issue.

85. The onus was on the Appellant to prove that the Respondent has not used a remedy that was both effective and available at the material time. The Appellant has failed to do so. Even if it had done so, the Respondent has already demonstrated that it fully utilised the domestic remedies in connection with the question of the alleged tort of inducement and the breach of contract. Furthermore, there was no effective and available remedy in the municipal courts in respect of the issue of quorum of the Supreme Court of Malawi.

86. The Respondent was required to raise at least in substance in the domestic proceedings the complaints referred to the CCJ. The FID rightly found that the very same issues were before the municipal courts and the CCJ, the sole new issue being the quorum of the Supreme Court of Malawi.

Discussions and Conclusions

87. The issue to be determined is whether the FID was right in holding that the Respondent had exhausted local remedies in the national courts of Malawi within the meaning of the proviso to Article 26 of the Treaty so as to be able to proceed with the present Reference.

88. The requirement contained in the proviso to Article 26 of the Treaty that a resident person should exhaust local remedies prior to referring a case to the CCJ has been upheld in **The Republic of Kenya and the Commissioner of Lands v Coastal Aquaculture, COMESA Court of Justice Ref. No. 3 of 2001**, where it was held as follows:

"Much as this Court may sympathize with the Respondent regarding the frustration of his projects on the said parcels of land by the Applicants, and the resultant shyness of the investor funding the projects, the

Respondent may refer a matter to this Court, and this Court can exercise jurisdiction over such reference, only if the Respondent has exhausted all its remedies in the municipal courts of the particular Member State."

89. This requirement is based on generally recognised rules of international law. Article 35 (1) of the European Convention on Human Rights ("the European Convention") contains a similar provision to the above proviso to Article 26. Article 35(1) provides as follows:

"*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law...*".

90. With regard to the interpretation and application of Article 35(1), the Appellant referred to two cases of the European Court of Human Rights, namely ***Vukovi v Serbia (2014) 59 E.H.R.R. 19*** and ***Azinas v Cyprus (2005) 40 E.H.R.R. 8***.

91. In ***Vukovi*** (supra), the applicants, who were reservists drafted by the Yugoslav Army, unsuccessfully sued the Respondent State before domestic courts for payment of per diem as per regulations. The Government had reached an agreement with other reservists with regard to the payment of per diem. The applicants did not rely on any anti-discrimination provision, whether domestic or international, before the domestic courts. They made a complaint before the European Court of Human Rights ("the European Court") of discrimination stemming from the agreement relying on Article 14 of the Convention. The European Court laid down the following general principles:

"*69. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level...*

70. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system...

71. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they lack the requisite accessibility and effectiveness.

72. Article 35(1) also requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies.

73. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective..."

92. Applying the above principles, the European Court upheld the preliminary objection of Serbia concerning the applicants' failure to exhaust domestic remedies as regards their discrimination complaint.

93. In ***Azinas v Cyprus (2005) 40 E.H.R.R. 8,*** the Applicant, who was a Governor and a public officer, was sentenced for theft, breach of trust and abuse of authority. Disciplinary proceedings ensued and the applicant was dismissed and lost his pension. He challenged unsuccessfully before the national court the disciplinary sanction on ground of excess or abuse of power due to the disproportionality of penalty. He lodged an application before the European Court complaining of unjustified interference with his right of property in breach of Article 1 of Protocol No.1.

94. The European Court found that the application was inadmissible as the relevant effective domestic remedy had not been exhausted. It held as follows:

> *"38. While in the context of machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been ventilated before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law.*
>
> *The object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address the allegation made of violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court. In so far as there exists at national level a remedy enabling the*

national courts to address, at least in substance, the argument of violation of the Convention right, it is that remedy which should be exhausted. If the complaint presented before the Court...has not been put, either explicitly or in substance, to the national courts when it could have been put in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on the exhaustion of domestic remedies is intended to give it. It is not sufficient that the applicant may have, unsuccessfully, exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of the "effective remedy". It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument."

95. Counsel for the Respondent, for his part, referred us to the **Practical Guide on Admissibility Criteria** of the **Council of Europe/European Court of Human Rights 2014**, more particularly the chapter dealing with the non-exhaustion of domestic remedies under Article 35(1). We find it appropriate and useful to quote the following extracts:

> *"60. As the text of Article 35 itself indicates, this requirement is based on the generally recognised rules of international law. The obligation to exhaust domestic remedies forms part of customary international law...*
>
> *61. The (European) Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the*

Convention...If an application is nonetheless subsequently brought to Strasbourg, the Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the vital forces of their countries...

63. The rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the Convention. It is based on the assumption...that the domestic legal order will provide for an effective remedy for violations of Convention rights...

67. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised 'at least in substance'...This means that if the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place...

76. Where the government claims non-exhaustion of domestic remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available..."

96. In the light of the above, we hold that, where a resident person wishes to lodge a Reference before the CCJ under Article 26 of the Treaty, the following principles are applicable beforehand in view of the proviso to that Article:

(a) the national courts or tribunals should initially be afforded the opportunity to prevent or put right any alleged violation of the Treaty or to determine any Treaty related issue;

(b) it follows that any remedy existing at national level, which enables the national courts to address, at least in substance, the alleged violation of the Treaty or Treaty related issue, should first be exhausted;

(c) it is not necessary for the alleged Treaty violation or Treaty related issue to be expressly raised in domestic proceedings before the national courts provided that the complaint or issue is raised at least in substance; this means that if an applicant has not relied on the Treaty, he must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged violation or determine the issue in the first place;

(d) it is not sufficient that an applicant may have, unsuccessfully, exercised another remedy on other grounds not connected with the alleged Treaty violation or Treaty related issue; it is the Treaty complaint which must have been aired at national level for there to have been exhaustion of the remedy before the national courts;

(e) an applicant is only obliged to exhaust before the national courts remedies which are available and effective; and

(f) where the government claims non-exhaustion of domestic remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available.

97. We have duly considered the submissions of both parties. In its ruling, the FID found, rightly in our view, that the issues before the Malawi national courts were an alleged breach of contract by MACRA and an alleged tort of inducement to commit a breach of contract by the Appellant. The FID then went on to state that these issues have relevance to the Treaty but it failed to elaborate in what manner.

98. As regards the present specific issue of exhaustion of local remedies, the FID reiterated that it was endowed with jurisdiction to entertain the matter. The FID held that, in its opinion, the Respondent did exhaust the local remedies. The FID noted that the Respondent's case had been taken to the highest court of Malawi thus fulfilling the requirements of Article 26 and more than what was intended by the drafters of the Treaty should not be read in Article 26. We wish to point out that it would seem that the FID was not

favoured with all the authorities and arguments put before us on the present issue.

99. We would have first dealt with the Respondent's contention that the Appellant should be estopped from raising the question of exhaustion of local remedies in view of the latter's express admission but we shall deal with this issue later for reasons which will become obvious.

100. As already stated above, the CCJ is a regional court established as an organ of COMESA and given jurisdiction by the Treaty. It follows that any complaint or issue to be determined by the CCJ must be Treaty based.

101. In the present case, it is common ground that the issues before the Malawi national courts were an alleged tort of inducement to commit a breach of contract by the Appellant and an alleged breach of contract by MACRA under Malawi domestic law.

102. The Respondent has submitted that it has already demonstrated that it fully utilised the domestic remedies in connection with the question of the alleged tort of inducement and the alleged breach of contract. It has further submitted that the very same issues which were before the national courts of Malawi are now before the CCJ, except for the issue of the quorum of the Supreme Court of Malawi.

103. This is precisely the point. Only issues of breach of contract and tort of inducement to commit a breach of contract under Malawi domestic law were pleaded and adjudicated upon before the national courts of Malawi. This is not disputed and is borne out by a perusal of the Reference.

104. It is clear that no violation of the Treaty or Treaty related issue was pleaded and adjudicated upon before the national courts of Malawi. The Malawi courts dealt with purely domestic remedies under Malawi domestic

law of contract and tort, which had nothing to do with the Treaty. They were never called upon to consider or adjudicate any violation of the Treaty or any Treaty related issue. In other words, the case of the Respondent before the national courts was not Treaty based.

105. In these circumstances, applying the principles laid down above, we find that the Respondent failed to exhaust local remedies in the national courts of Malawi within the meaning of the proviso to Article 26 of the Treaty. The national courts of Malawi were never afforded the opportunity to prevent or put right any alleged violation of the Treaty or to determine any Treaty related issue. The proviso to Article 26 relates to the exhaustion of Treaty based remedies and not purely domestic remedies which have nothing to do with the Treaty. The case of ***Polytol*** (supra) is a good example of how a violation of the Treaty was first pleaded and adjudicated upon in the national court before it came to the CCJ.

106. True it is that there was no need for the Respondent to have expressly raised before the national courts any Treaty issue which it would then seek to raise before the CCJ. It should, however, have ventilated the Treaty issue at least in substance before the national courts. It failed to do so.

107. Counsel for the Respondent himself submitted that the Treaty issue must be raised at least in substance before the national courts. But when he was asked to elaborate on the Treaty issues raised in substance before the national courts of Malawi, he was unable to give a precise answer. This was unsurprising since it is clear that no Treaty violation or Treaty related issue was raised before the national courts of Malawi, be it expressly or in substance. As has already been stated, the case for the Respondent against the Appellant before the national courts was an alleged tort of inducement under Malawi domestic law and had nothing to do with the Treaty.

108. As can be seen in the cases of ***Vukovi*** and ***Azinas*** (supra), the European Court declined to entertain the applications for alleged breaches of the

European Convention rights given that these Convention issues had not been aired, even in substance, before the national courts. The applicants, therefore, failed to satisfy the requirement of exhaustion of local remedies under Article 35(1) of the European Convention.

109. Although it is true that the Respondent's case in the national courts and in the Reference is based on the same facts and events, the issues to be resolved before the national Courts pertained to purely contractual and tortuous matters governed by Malawi domestic law bearing no relationship to the Treaty. The Respondent did not raise any Treaty complaint before the national courts either expressly or in substance.

110. As rightly pointed out by the Appellant, Article 6(f) and (g) of the Treaty, on which the Respondent is now seeking to rely before the CCJ, was never raised before the national courts of Malawi whether in the pleadings or in the trial or the appeal.

111. Moreover, as was held in ***Azinas*** (supra), it is not sufficient that an applicant may have, unsuccessfully, exercised another remedy on other grounds not connected with the complaint of violation of a Convention right. Likewise, in the present case, the Respondent relied before the national courts solely on remedies under the Malawi domestic law. This was not sufficient to comply with the proviso to Article 26 and to enable the Respondent to found an action on the said Article.

112. As a matter of fact, a perusal of the Reference reveals that the Respondent has failed to establish any link between the matter determined before the national courts and the Treaty. On the contrary, the Reference indicates that there are no Treaty issues even before the CCJ. Paragraph 5 of the Reference lists the issues to be determined by the FID and reads as follows:

"5. ISSUES FOR DETERMINATION BY THE FIRST INSTANCE DIVISION

The issues for the determination of the First Instance Division are as follows:

5.1 Whether the (then) 1st Respondent induced the breach of the Irrevocable Agreement?

5.2 Whether the 1st Respondent interfered with the management, constitution and control of the (then) 2nd Respondent board and the contractual relationship between the Applicant and MACRA?

5.3 Whether the 1st Respondent was in breach of contract by revoking the contract?

5.4 Whether the Applicant has failed to roll out their services and thereby was in breach of the terms of the licence?

5.5 Whether there was any agreement between the Applicant and the 2nd Respondent to extend the roll out period?

5.6 Whether the Respondents are liable to compensate the Applicant?

5.7 Whether the High Court of Malawi (Commercial Division) erred in awarding the sum of US$66,850,000.00 rather than US$133,700,000.00 as damages."

113. As is obvious from the above, the FID is not being asked to determine any Treaty issue. It is in effect being asked to sit as a court of appeal on the findings of national courts under Malawi domestic law having nothing to do with the Treaty. The CCJ, however, is not a supranational court sitting on appeal on decisions of national courts under domestic law, which are not Treaty related.

114. Counsel also submitted that the Appellant has failed to discharge the onus of proving that the Respondent has not used a remedy that was both effective and available at the material time and that there was in fact no effective and available remedy in the municipal courts in respect of the issue of quorum of the Supreme Court of Malawi. The short answer is that this is putting the cart before the ox. The Respondent failed in the first place to demonstrate that the issue of quorum of the Supreme Court of Malawi is actionable and can be remedied under the Treaty. Moreover, as we have found above, there was no Treaty issue which was raised before the domestic courts, either expressly or in substance.

115. We shall now deal with the Respondent's contention that the Appellant should be estopped from raising the question of exhaustion of local remedies inasmuch as the latter has already expressly admitted that the Respondent has complied with this requirement of exhaustion of domestic remedies.

116. The purported Appellant's admission is contained at paragraph 2.3 of its defence to the Reference and reads as follows:

> "*It is admitted that Malawi Mobile Limited is a juridical person resident in the Republic of Malawi and that it has exhausted all remedies in Malawi's courts in respect of the issues that it litigated upon.*"

117. We find no merit in the Respondent's contention. An examination of the above purported admission shows that it related solely to exhaustion of

domestic remedies in Malawi courts **in respect of issues that the Respondent litigated upon**. The fact of the matter is that, as we have found above, the Respondent never litigated any Treaty issue before the Malawi Courts. It stands to reason that the Respondent could not have exhausted before the national courts remedies which it never sought in the first place. Only domestic law issues having no connection with the Treaty were litigated in the national courts.

118. For the reasons given above, we find that the FID was wrong in holding that the Respondent had exhausted local remedies in the national courts of Malawi within the meaning of the proviso to Article 26 of the Treaty. In fact, the Respondent has failed to do so, and thereby failed to comply with the proviso to Article 26. The FID should accordingly have upheld the preliminary objection raised by the Appellant and ruled that the Reference was inadmissible for want of jurisdiction. We, therefore, quash the ruling of the FID on this issue.

V. FINAL CONCLUSIONS

119. In the light of the above considerations and findings, we hold as follows:

(a) the CCJ has no jurisdiction to entertain the Respondent's Reference under Article 26 of the Treaty inasmuch as:

(i) the alleged breach of contract by MACRA and alleged tort of inducement committed by the Appellant, being based solely on Malawi domestic law and not being Treaty related, are not "unlawful" within the meaning of Article 26 of the Treaty;

(ii) Articles 3 and 6(f) and (g) of the Treaty, as read together, do not confer, **per se**, a justiciable right before the CCJ upon a resident of a Member State against that Member State under Article 26;

(b) the Respondent has failed to satisfy the requirement contained in the proviso to Article 26 of the Treaty which provides that it should have first exhausted local remedies in the national courts or tribunals of the Member State so that it cannot proceed with the Reference.

120. We, therefore, allow the appeal and quash the decision of the FID. We, accordingly, dismiss the Respondent's Reference.

121. It follows that there is no need to refer back the issue regarding the quorum of the Supreme Court to the FID.

122. In view of the importance of the points raised in the present case, we order that each party bears its own costs.

DONE at **LUSAKA, ZAMBIA** this 23rd day of April, 2017.

DELIVERED this 23rd day of April, 2017.

Hon. Lady Lombe P. Chibesakunda - Judge President
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Hon. Mr. Justice Abdalla E. El Bashir - Lord Justice
.....

Hon. Dr. Michael C. Mtambo - Lord Justice
.....

Hon. Mr. David Chan Kan Cheong - Lord Justice
.....

Hon. Dr. Justice Wael M. H. Y. Rady - Lord Justice
.....

COMESA COURT OF JUSTICE
REGISTRAR
23 APR 2017
P.O. Box 12222 KHARTOUM, SUDAN

23/4/17