

REFERENCE NUMBER 1 OF 2012



**IN THE COMESA COURT OF JUSTICE
FIRST INSTANCE DIVISION
LUSAKA, ZAMBIA**

Coram: S. Rugege, Lord Principal Judge; A. Nyankiye J. M. Ogoola, M.
Tadesse, L. Malaba, S. B. Maphalala and H. Rakotomena, LLJ

Registrar: (Acting) Nkonkesha, Esq.

**POLYTOL PAINTS & ADHESIVES
MANUFACTURERS CO. LTD**

APPLICANT

VERSUS

THE REPUBLIC OF MAURITIUS

RESPONDENT

For the Applicants:

Razi Daureeawo, S.C

For the Respondents:

Mr. B. Madhub, with Mrs. F. Malidarbocus
Moolna

JUDGMENT OF THE COURT

Lord Principal Judge Samuel Rugege delivered the judgment of the Court.

Background

The present Reference was filed by the Applicant, Polytol Paints and Adhesives Manufacturers Co. Ltd. a company incorporated in Mauritius, against the Republic of Mauritius the Reference seeks various remedies from this Court as detailed below:

Jul. de DM
SB
me *h*

"(a) A declaration that the Respondent has infringed the Treaty, in particular by

- (i) Failing to give the Treaty force of law and the necessary legal effect within its territory;
- (ii) Failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the treaty;
- (iii) Levying customs duty on the Kapci products for the duration of the relevant period; and
- (iv) Imposing a discriminatory measure or legislation in the relevant period in levying customs duty on products including Kapci products imported from Egypt but not from other member states manufacturing same or like products.

(b) An order directing the Respondent to take all necessary steps and measures to properly implement the Treaty within its domestic legislation within such time frame as the Court deems just, fit and proper in the circumstances and in particular by:

- (i) giving the Treaty the force of law and the necessary legal effect within its territory; and
- (ii) Giving its national courts jurisdiction to deal with the matters concerning the application and interpretation of the Treaty;

Jul. 2 DM
SB

- (c) An order directing the Respondent to grant appropriate relief or remedy to the Applicant, including:
 - (i) the refund of the principal sum together with associated interest from the date of encashment of the principal sum by the Respondent to the date of refund to the Applicant; and
 - (ii) such other damages and compensation
- (d) An order awarding the Applicant's costs of and incidental to this reference
- (e) Such other orders as the Court deems just, fit and proper in the circumstances."

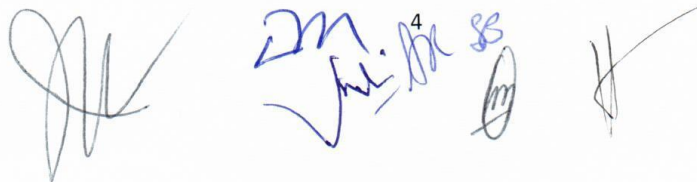
On 5 November 1993, the Republic of Mauritius signed the treaty establishing the Common Market for Eastern and Southern Africa (hereinafter COMESA). The Treaty was ratified on 8 December 1994. Under Article 46 of the Treaty, by the year 2000, Member States of COMESA were required to eliminate customs duties and other charges of equivalent effect imposed on goods eligible for Common Market treatment. Further, on 29 October 2000, the COMESA Council of Ministers issued a legal notice requiring Member States to issue legal or statutory instruments by 31 October 2000 to put into effect the elimination of customs duties and other charges required by Article 46.

In compliance with Article 46 of the Treaty, on 1 November 2000 the Republic of Mauritius eliminated customs duties on products originating in

Member States of COMESA. However, on 16 November 2001 the Republic of Mauritius amended the Customs Tariff Regulation of 2000 to introduce a 40% customs duty on specific products imported from the Republic of Egypt, including Kapci paint products. The Applicant claimed that same or like products from Member States other than Egypt were not subject to customs duties by the Republic of Mauritius.

The Applicant challenged the reintroduction of the levy of customs duty principally on the basis that imposition of duty on Kapci products was in violation of the provisions of the Treaty. In its letter dated 25 August 2005 to the Ministry of Finance, Polytol urged the authorities to remove the duty in order to comply with Article 46 of the COMESA Treaty. Similar letters were addressed to the Ministry of Finance on 2 February and 13 February 2006. A reminder was sent to the Ministry on 26 May 2006. (See Annexes 15-17 in Applicant's bundle of documents). However, no response was forthcoming.

In April 2008 Polytol sought a remedy before the national courts for alleged infringement of the Treaty and brought an action before the Supreme Court of Mauritius for leave to apply for judicial review of the Respondent's decision to levy the duty on Kapci products in the relevant period. On 15 April 2009, the Supreme Court delivered its decision, dismissing Polytol's application for leave to seek judicial review on two grounds. First, the Court found that the application made in May 2008 for leave to apply for judicial review was well outside the required time limit as the duty had been re-introduced in 2001. Secondly, the Court found that it could only take cognizance of the provisions of the COMESA Treaty to the extent that they have been incorporated into the municipal law which at the time was the

The bottom of the page features several handwritten signatures and initials in blue ink. From left to right, there is a large, stylized signature, followed by a cluster of initials including 'DM', 'Jui', and 'SS', and a final, more fluid signature on the right.

This Court can only consider the validity of the regulations against the backdrop of the Customs Tariff Act and our Constitution. In the absence of any such legislation to that effect, non-fulfillment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts.

Mauritius reduced the rate of duty on the Kapci products from 40% to 30% in 2006, and to 15% in mid-2008. On 20 November, 2010 the duty on Kapci products in issue was finally removed altogether by the Customs Tariff (Amendment Schedule (No.2) Regulations, 2010 (see Annexes 7 and 11 of Applicant's bundle.) However, Polytol was not satisfied with the mere removal of duties but sought to recover a refund of the duties which it claimed had been unfairly and unlawfully levied. On 10 August 2011, Polytol submitted a claim to the Mauritius Revenue Authority ("MRA") for the refund of the principal sum. By letter dated 8 September 2011 the MRA informed the Applicant that the claim for refund could not be entertained. An appeal to the Assessment Review Committee made on 29 September 2011 did not yield the desired result.

5

✓ Jack: Adam (20) 11

SB

of the Treaty and seeking remedies from this Court as earlier indicated in this judgment.

On 13 June 2012, the Respondent filed a preliminary application (No.1 of 2012) seeking to set aside the Reference on the grounds that (a) the Applicant had no *locus standi* to file the Reference in matters relating to the implementation of Treaty obligations, (b) that the Applicant had not established a valid basis upon which was invoking the jurisdiction of the COMESA Court of Justice and (c) that the Applicant was not an aggrieved party as there was no regulation in violation of the Treaty at the date of the Reference.

The Court delivered its judgment on the preliminary application on 6 December 2012, finding that the Applicant had *locus standi* and that the Court had jurisdiction to hear the Reference in terms of Articles 23 and 26 of the Treaty. It further held that the determination as to whether the Applicant was an aggrieved party, could not be based on the circumstances pertaining at the date of filing the Reference as the claim was based on a period dating back to before the removal of customs duties on Kapci. The Court accordingly dismissed the preliminary objections. The Reference was subsequently heard on 26 April 2013, and the Court reserved its judgment.

Issues arising in the Reference

1. Whether there was a breach of the Treaty

The Applicant's main argument is that the Respondent breached the Treaty by imposing customs duties on imports from the Republic of Egypt after the date of elimination of the same, in accordance with the Treaty. This

6
Jul: H M @
SS

raises the question of the nature of the obligations of Member States under the Treaty.

Article 45 provides for the progressive establishment of a Customs Union among the Member States over a ten year transitional period commencing from the date of coming into force of the Treaty (that is, from December 1994). However, with respect to of establishment of a Free Trade Area within COMESA, the Treaty is more specific. Article 46 states

The Member States shall reduce and ultimately eliminate by the year 2000, in accordance with the program adopted by the PTA Authority, customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods which are eligible for Common Market tariff treatment.

It is on the basis of the above that the Applicant contends that by reinstating the customs duty on certain products originating from a Member State (Egypt), including Kapci paint products, from November 2001 to November 2010 the Respondent was in breach of the Treaty.

The Respondent in reply argues that Mauritius did not breach the Treaty, because the Customs Union is not fully established and that the Council extended the establishment of the Customs Union to 2014. [Refer to Council decision at its Meeting of 19-20 November 2012 para 129 (d) CS/CM/XXXI/4]. Counsel for Respondent argued that Member States have flexibility in the determination of when to implement certain aspects of the Treaty that would be most advantageous to a successful establishment of a

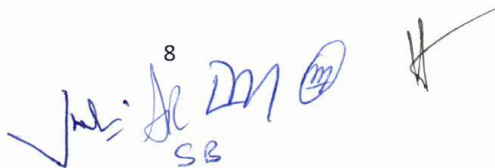
7
Jul. 2011 DM @
SB

Customs Union. He submitted that the requirement to eliminate duties by the year 2000 is "not cast in stone".

The position of the Respondent is thus that if the Treaty is taken as a whole then an extension of the implementation of the whole would necessarily extend the implementation period for all parts of the Treaty. On the other hand the position of the Applicant is that Article 46 of the Treaty, which has a definitive time period attached to its implementation and has not been specifically extended by the Council, ought to be taken as an individual stand-alone provision the implementation of which must comply with the time limit under the Treaty.

Applicant makes a number of allegations of breach of the Treaty by Mauritius. The questions raised by Applicant for consideration by the Court are summarized in paragraph 34 of Applicant's bundle (pages 11 & 12). These questions may be grouped into two categories: those which relate to purported failure to fulfill obligations under the Treaty in general contained in paragraph 34 (a) and those which are based on actions of a Member State that affect the rights of Applicant outlined in paragraph 34 (b) – (d). The questions relating to failure to fulfill obligations are the following:

- (a) Whether the Respondent has failed to fulfill its obligations under the Treaty, thereby infringing the Treaty, in particular Articles 5 and 29, by:
 - (i) Failing to take steps to implement or properly implement the Treaty within its domestic legislation;

8
The page number 8 is centered above a series of handwritten marks. These include a large checkmark-like signature, the initials 'SB', and a circled 'M'. To the right of these is a single, sharp, upward-pointing stroke.

- (ii) Failing to give the Treaty the force of Law and the necessary legal effect within its territory; and
- (iii) Failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty.

The issue that arises in examining the first set of questions relating to the failure of Mauritius to take certain measures to fulfill its obligations under the Treaty is whether these questions are properly before the Court. Article 26 under which the Applicant based its Reference states that

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...

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. Article 24 (1) states:

"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."

9
Julian DM
SB

In paragraph 2 of the same Article, the Treaty gives a similar right to a Member State as that given to a legal or natural person in Article 26.

“A Member State may refer for determination by the Court, the legality of any act, 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.”

With relation to the Secretary General, Article 25 of the Treaty confers on him an obligation to take measures to deal with a matter where he considers that a Member State has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty. These measures involve engaging the Member State concerned if that fails to remedy the situation, refer the matter to the Bureau of the Council which may decide that the matter be referred to the Court immediately or be referred to Council and if it is not resolved, the Council must direct the Secretary General to refer it to the Court.

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. It follows from the above analysis that the Court need not decide on the questions raised by the Applicant relating to the alleged failure by Mauritius to implement the Treaty within its domestic legislation, failing to give the Treaty force of law

and failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty.

This brings the Court to the alleged breaches of the Treaty which involve acts or measures that affect Applicant and which fall under Article 26. The first question raised by Applicant in this respect is whether Respondent has infringed the Treaty by imposing customs duty on the import of products including Kapci for Egypt. As stated above, Article 46 of the Treaty requires Member States to have eliminated duties on goods from other Member State by the year 2000. Although Mauritius complied by the due date, it reimposed the duty with respect to certain products from Egypt in November 2001. The reason for this change is stated in the Defence filed by the Respondent and signed by the Chief State Attorney and Respondent's Attorney, Mrs F.M Moolna S.A, as follows:

"4. Respondent admits paragraph 9 of the Reference and avers that the said tariff Regulations were implemented following an import surge from the Republic of Egypt between 1997 and 2000. In view of representation from local industries, the state of Mauritius engaged in negotiations with the Republic of Egypt with a view to reach a compromise in lieu of application of safeguard measures under Article 6 of the Treaty."

Thus, Mauritius was clearly alive to its obligations under Article 46 and aware of possible exemption under the Safeguard provision in Article 61 but chose not to take that route. In the view of the Court, Mauritius infringed Article 46 by reintroducing duties on Egyptian products including Kapci paints even if it was for the protection of its industries.

The Respondent argues that there was no breach of the Treaty since this measure was based on a mutual agreement between two countries which agreed to have duties applicable only between themselves. However, the question then arises as to whether parties to a multi-lateral Treaty can have bilateral arrangements the effect of which are contrary to the purpose and objectives of the multi-lateral Treaty. This issue is examined later in this judgment.

The main argument of Respondent in response to the Applicant is that the provisions of the Treaty regarding establishment of the Customs Union are flexible, intended to facilitate a process rather than rigid rules "cast in stone". Counsel for the Respondent invited the Court to look at the objectives of COMESA –and to infer from them a process that is progressive irrespective of the Treaty timeframe. In support of this, he cites a number of decisions of the COMESA Council of Ministers which allowed certain countries to postpone joining the FTA and urged others to comply with Article 46. In particular, he refers to the meeting of the Council of Ministers of November 1999 whereby it was decided in paragraph 164 that:

"164. Council noted that the study has indicated that there was a possibility that not all the Member States should publish the 100% tariff reduction by the due date for the COMESA Free Trade Area and recommended that only Member States that would fulfill the conditions of a free trade area, form the Free Trade Area to the exclusion of those that would not have published the 100% reduction rate."

Contrary to the Respondent's argument, this Court finds that this statement emphasizes that Member States must comply with the deadline in order to benefit from FTA otherwise they will be left out. This is not

flexibility for Member States to join whenever they choose too. The same can be inferred from the Council statements urging Member States to comply with the deadline.

On the other hand, once Mauritius had taken steps to join the FTA in November 2000, it could not selectively apply the obligations under Article 46 by imposing duties for products from some Member States in the FTA and not others. What Mauritius could have safely done was to take advantage of the Safeguard clause in Article 61 of the Treaty which permits a Member State to take necessary safeguard measure in the event of serious disturbances occurring in the economy, subject to informing the Secretary General and other Member States. As earlier indicated, Mauritius chose not to use this method probably because the safeguard would be only for one year with possibility of renewal upon approval by Council.

It is further argued by Respondent that the whole process leading to the Customs Union was extended by Council to 2014. This is in reference to the Meeting of October 2012 where Council took the decision at paragraph 55 (d) "That the transition period for the Customs Union be extended to June 2014". It should be noted that this "transition period for the Customs Union" is that referred to in Article 45 and does not affect the specific time limit of the FTA in Article 46. It would cover for instance matters relating to the Common External Tariff and non-tariff barriers, which are different aspects of the Customs Union referred to in Article 45.

One other thing that may be said about the flexibility argument is that in interpreting the Treaty, an attempt should be made to keep the ordinary meaning of the text of the Treaty where it is not vague or ambiguous. As it is

expressed in Article 31 of the Vienna Convention on the Law of Treaties of 1969:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."

In the view of this Court Article 46 is clear and unambiguous and its terms must be interpreted with their ordinary meaning in the context of the purpose and objective of the treaty to achieve free trade within the COMESA area.

2. Whether there was breach on the basis of discrimination

Another question raised by the Applicant is whether there was a breach of the treaty by Mauritius in particular, Article 57, by imposing discriminatory legislation or measures in levying duty on products from Egypt but not from other Member States manufacturing the same or like products.

In the view of the Court, the allegation of infringement of the Treaty in this respect is misconceived. Article 57 states that

"A Member State shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of the Member States."

This provision is intended to protect products from Member States against protectionist measures such as duties, quantitative limitations and other non-

Jul *Al* *DM* *Q* *H*
SB

tariff barriers. The Applicants did not produce evidence to show that like or same products were discriminated against. The Court therefore, finds that there was no infringement of Article 57 of the Treaty by Mauritius on grounds of discrimination.

3. Whether or not individuals who reside in the Member States can have an enforceable right under the COMESA Treaty.

The next point which this Court examined is whether Articles 45 and 46 of the Treaty give individuals or legal persons who reside in Members States an enforceable right. The Respondent's lawyer argued at length that in spite of Article 26 of the Treaty which gives individuals the right to bring an action to the Court in some cases, this does not necessarily mean that the Treaty gives them an enforceable right. He argued that 'the fact that the national legislation does not comply with the undertakings taken by the State cannot de facto give a right to an individual or legal entity as contrasted to an obligation imposed on the State to comply with its obligations'. Given the differences in the legal systems of Member States on their position with regard to the status of Treaties vis-a-vis the domestic laws, he thinks that giving citizens of the Members States an enforceable right results in a disparate effect to the Treaty. To convince the Court that this has been the jurisprudence in international courts the Respondent's Counsel made a lengthy citation from the opinion of Advocate General Karl Roamer which was submitted to the European Commission before the ECJ in the case of *Van Gend en Loos vs Nederlandse Administratie Der Belastingen* 26/62 (1963(ECJ). The relevant parts are recited here

'Anyone familiar with Community law knows that in fact it does not just consist of contractual relations between a number of States considered as subjects of the law of nations. The Community has its

own institutions, independent of the Member States, endowed with powers to make administrative measures and to make rules of law which directly imposes duties on Member States as well their authorities and citizens....It must be not be forgotten that many of the Treaty's provisions expressly refer to the obligations of Member States. It can surely be inferred from the carefully phrased wording of the Treaty and also from its material content and its context that these provisions in fact only lay down an obligation on the part of Member States.

The first conclusion we can draw from this analysis is that large parts of the Treaty clearly contain only obligations of Member States, and do not contain rules having a direct internal effect."

In his opinion the following three elements must be fulfilled before an individual claims an enforceable right emanating from the provisions of a Treaty

- a) That it has a right
- b) That the right has been breached
- c) That the breach has resulted in prejudice, and
- d) That the casual link between the prejudice and the breach is established

The Applicant on the other hand argues that the Treaty is clear on this point and any resident of the Member States can have provisions of the Treaty directly enforced.

As stated in the previous parts of this judgment, the Treaty makes a clear distinction between matters that involve failure of a Member State to fulfill obligations under the Treaty and matters that involve an act by a Member

State that is in breach of the Treaty. The former, much as they are relevant to the COMESA territory can only be pleaded by the Member States or the Secretary General. The argument on behalf of the Respondent that a Treaty does not give an enforceable right to legal or natural persons is acceptable in as far as the provisions enforceable by a Member State or Secretary General are concerned. . The content of Article of 26 of the Treaty is however, different. Article 26 of the Treaty provides that

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 of the Member State.

The content of this rule 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 Members States. It also gives enforceable rights to citizens residing in the Member States.

17
Jul: H DM @
SB

In the case at hand, the Respondent has imposed a customs tariff that is in breach of the Treaty. If the Respondent's Customs Tariff Regulations were consistent with the rules of the Treaty, the Applicant would have paid no customs duty on the Kapci products imported from Egypt during the relevant time. The Applicant was therefore clearly prejudiced because of the Regulations of the Respondent that was in breach of the Treaty. The argument of the Respondent's Counsel that the Treaty is not directly enforceable in some jurisdictions, including Mauritius, and therefore the individuals cannot have rights emanating from the Treaty is misconceived. It is indeed true that there are differences in legal systems regarding their position towards the domestication of international law. 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. This is clearly stipulated in Article 27 of the Vienna Convention on the Law of Treaties, 1969 which provides that ' [a] party may not invoke the provision of its internal law as justification for its failure to perform a treaty'.

As stated earlier, the Respondent's Counsel quoted in his speaking notes the arguments that were submitted to the European Commission by Advocate General Karl Roamer to support his arguments. The European Court of Justice rejected the opinion of the Advocate General and held that individuals have enforceable rights under the Treaty. The contention was

18
JL: SL DM @ J
SB

that Article 12 of the EEC Treaty did not confer direct rights to legal or natural persons. The Court held that

The ... Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore 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 by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.....

The Court went on to say that

...according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect”.

This Court holds that residents of COMESA Members States likewise have an enforceable right before this Court whenever they establish that they have been prejudiced by an act of the Council or of a Member State that contravenes the Treaty. The Applicant had to pay customs duties when it should have paid none according to the Treaty. 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.

Jul: Hl DM (m) X
SB

4. Whether or not the bilateral agreement between Mauritius and Egypt saves Respondent from being in breach

The Respondent argued that the imposition of the duty on imports from Egypt cannot constitute a breach of the Treaty as Egypt had expressed its agreement to the imposition of the duty. The Respondent averred that the said Regulations were implemented following an import surge from the Republic of Egypt between 1997 and 2000. The Respondent further argued that the State of Mauritius had engaged Egypt in negotiations with a view to reaching a compromise in lieu of opting for the safeguard measures under Article 61 of the Treaty. The Applicant on the other hand argues that such an agreement even if it exists cannot relieve the Member States of their obligation to comply with the mandatory provisions of the Treaty.

This Court has indeed observed that there was communication between the Egyptian and Mauritian authorities regarding the imposition of duty on some of the products imported to Mauritius from Egypt. The question, however, is whether the agreement of two Member States for imposition of duties on some products originating from one Member State is consistent with the binding rules of the COMESA Treaty. The Treaty allows Member States to enter into bilateral agreements with each other or with third states. This should not however, be construed as giving the Member States a right to enter into agreements that defeat the main purpose of the Treaty which they have undertaken to respect.

In this connection Article 56(3) states that

Nothing in this Treaty shall prevent two Member States from entering into new preferential agreements among themselves

which aim at achieving the objectives of the Common Market, provided that any preferential treatment accorded under such agreements is extended to the other Member States on a reciprocal and non-discriminatory basis.

Article 56(3) of the Treaty allows Member States to enter into agreements among themselves only if some basic requirements are met. First, whatever agreement the Member States enter into must contribute towards the achievement of the objectives of the Common Market. Second, the agreement should relate to a preferential treatment. Third, such preferential treatment should be extended to all the other Member States provided that the other Member States reciprocate. That there was communication between the States of Mauritius and Egypt on this matter is admitted by the Applicant's Counsel. The argument is that even if there was such an agreement it was contrary to the requirements of the Treaty.

The Court has examined the nature of the communication preceding the imposition of the duties and the impact of the Regulations in light of Article 56(3) of the Treaty. The Regulation that was issued in 2001 by Mauritius imposed a 40% duty on Kapci products imported from Egypt. The purpose of the negotiations was not therefore to give preferential treatment to the products from Egypt, as envisaged by Article 56 but to levy additional duty on the same products. What Article 56(3) envisages is a situation where Member States give additional benefits to products apart from the minimum protection given to them under the Treaty. The agreement between Egypt and Mauritius had in effect raised the duty from zero, which is the rule under the Treaty, to 40%. This bilateral act was clearly against the basic objectives of the Treaty which include the

elimination of customs duty and other non tariff barriers within the time limit provided by the Treaty.

Under Article 55 of the Treaty any practice which negates the objective of free and liberalized trade shall be prohibited. The agreement between Egypt and Mauritius hampered the process of liberalization of trade within the COMESA territory and could not relieve the Respondent from its obligations to uphold the principles of the Treaty.

Article 18 of the Vienna Convention likewise imposes similar obligations. It states that

a State is obliged to refrain from acts which would defeat the object and purpose of a Treaty when it has signed the Treaty or exchanged instruments of ratification.

Article 41 of the Convention further states that

Two or more parties to a multi-lateral Treaty may conclude an agreement to modify the Treaty as between themselves alone if ((b) the modification in question is not prohibited by the Treaty and (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the Treaty as a whole.

The Mauritius/Egypt agreement was a derogation from the provision on elimination of customs duties and incompatible with the object and purpose of the Free Trade Area. The Court c therefore holds that the

agreement cannot save the Respondent from the consequences of its breach of Article 46 of the Treaty.

5. Whether the Statute of Limitations applies.

In its defence, during oral argument, the Respondent contended that as per the law of Mauritius, an Applicant only has three years to bring a claim for reimbursement of any taxes that have been unduly imposed. This means that because the Applicant did not bring a claim for relief until 2011, the Respondent contends that it cannot be reimbursed for any undue taxes imposed prior to 2008, and that is only if Mauritius is found in breach of Treaty.

The Applicant, on the other hand, submitted that because it immediately objected to the imposition of a customs duty on its products imported from Egypt when the imposition occurred in 2001, and only waited to bring suit after it had exhausted all negotiations and diplomatic remedies such as writing to the government, that the period of the statute of limitations should be suspended to commence from the time when the Government's decision regarding reimbursement became final and a suit was unavoidable. The Applicant contends that the period of limitations began running on the date of the last letter from the Mauritius Revenue Authority (MRA) dated 8 September 2011, in which the MRA rejected the Applicant's claim for refund of the principal um.

In the view of this Court, the Applicant was not fully diligent in pursuing its rights under Article 46 of the Treaty. The Applicant only first complained to

23
JL: *[Signature]* 88

the Respondent in 2005 when it requested for a review of the re-introduction of customs duties on Kapci products imposed in 2001. This infringement of the Treaty was not a one off event, but a continuing breach which persisted until 2010. In the circumstances, the Applicant was entitled to bring an action for reparation at any time, for as long as the breach continued. The Court, therefore, holds that from the time the Applicant woke up to its rights in 2005 and did not get a remedy, it is entitled to that remedy from 2005. In this case considering the Mauritian limitation period, where it is stated that no claim for refund can be made more than three years after the payment of the duty and considering that Polytol needed to challenge the re-imposition of the duty before it could claim refund of the duty based on the 2001 Regulations, the Court finds that the proper date to calculate the running of the 3 year limitation period is April 2005, three years prior to filing the action in the Supreme Court to have the law reviewed. The Court does not accept the contention of the Respondent that the recovery should be from 2008, that is to say three years prior to the claim for refund submitted to the Mauritius Revenue Authority.

6. Whether Moral Damages are payable for Breach of Treaty

The Applicant contends it is entitled to moral damages because of the Respondent's failure to implement a mechanism for enforcement of the Treaty in their national law. The Applicant further argues that the suit would have been settled expediently and without undue delay if the national courts had been given jurisdiction to try the case and therefore the Applicant argues it is entitled to moral damages as well as reimbursement.

The Respondent contends that the Applicant suffered no real injury from the lack of implementation of the Treaty into national law and therefore should not be given damages.

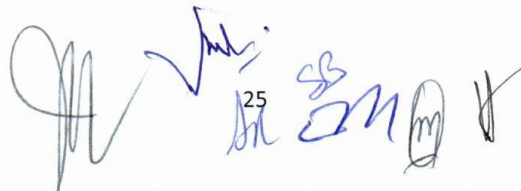
This Court has already decided that the Applicant has enforceable rights under the Treaty. However, it is the view of this Court that the basis of a claim for moral damages has not been established. The Court, therefore, rejects this claim.

7. Summary of Findings

After having examined the prayers of both parties, the Court has made the following findings:

1. Regarding the alleged breach of the Treaty by the Respondent through failure
 - (i) to take steps to implement or properly implement the Treaty within its domestic legislation;
 - (ii) to give the Treaty the force of Law and the necessary legal effect within its territory; and
 - (iii) to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty,

The Court finds that the Applicant cannot plead these matters in this Court as they are reserved by the Treaty to the Member States and the Secretary General.


25

2. Regarding the alleged breach of Article 46, this Court finds that the Respondent has breached the Treaty by imposing duties after the expiry of the time limit prescribed by the Treaty
3. Regarding the argument by the Respondent that there was a bilateral agreement between Egypt and Mauritius to impose customs duties on Kapci products, the Court finds that such agreements are against the objectives of the Treaty and cannot save the Respondent from breach of the Treaty.
4. Regarding the alleged discrimination against products from Egypt, the Court finds that there was no discrimination
5. Regarding the issue of whether individuals have an enforceable right under the Treaty, the Court has found that individuals have an enforceable right under Article 26 of the Treaty
6. The Court finds that the period of limitation should be calculated starting from 1 April 2005.
7. The Court has also found that the Applicant is entitled to a partial refund of the tariff duties paid in breach of the Treaty.

8. The Order of the Court

In view of the above findings:

1. The prayer for a declaration that Respondent infringed the Treaty on the grounds of :
 - (i) Failing to take steps to implement or properly implement the Treaty within its domestic legislation;
 - (ii) Failing to give the Treaty the force of Law and the necessary legal effect within its territory; and
 - (iii) Failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty is hereby dismissed.
2. The prayer for an order directing the Respondent to take all the necessary steps to implement the Treaty as above is hereby dismissed
3. The prayer for an order declaring that Respondent breached Article 46 of the Treaty by re-imposing customs duties on products originating from Egypt is hereby granted.

Accordingly the Respondent is hereby ordered:

- a) to refund the customs duties paid by the Applicant for the period from 1 April 2005 to 20 November 2010 when the duties were removed.

27
Jul: [Signature] DM [Signature] [Signature]
SS

- b) to pay interest on the above sum at the prescribed rate applied by the courts in Mauritius from 1 April 2005 until full payment of the refund.
- c) to pay 70% of the Applicant's costs in this Reference.

It is so ordered.

Done at Lusaka this 31st day of August, 2013


.....
Hon. Samuel Rugege - Lord Principal Judge


.....
Hon. Adrien Nyankiye - Lord Justice


.....
Hon. James Ogoola - Lord Justice

.....
Hon. Menberetsehai Tadesse - Lord Justice


.....
Hon. Luke Malaba - Lord Justice


.....
Hon. Stanley B. Maphalala - Lord Justice


.....
Hon. Hortense Rakotomena - Lady Justice