COMMON MARKET FOR EASTERN AND

SOUTHERN AFRICA

MARCHE COMMUN DE
L'AFRIQUE ORIENTALE ET
AUSTRALE

COUR DE JUSTICE

COMESA

السوق المشتركة للشرق والجنوب الأفريقى

محكمة العدل

COURT OF JUSTICE

IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA – APPELLATE DIVISION (SITTING VIRTUALLY)

APPLICATION NO. 1 OF 2022
Arising from Appeal No. 2 OF 2022

IN THE MATTER OF

AGILISS LIMITED .....CLAIMANT

VERSUS

THE REPUBLIC OF MAURITIUS.....RESPONDENT

THE MINISTER OF FINANCE, ECONOMIC PLANNING AND DEVELOPMENT OF THE REPUBLIC OF MAURITIUS .....CO-RESPONDENT NO. 1

THE MINISTER OF COMMERCE AND CONSUMER PROTECTION OF THE REPUBLIC OF MAURITIUS .....CO-RESPONDENT NO. 2

THE STATE TRADING CORPORATION.....CO-RESPONDENT NO. 3

CORAM
Hon. Lady Justice Lombe P. Chibesakunda – Judge President
Hon. Dr. Justice Michael Mtambo – Judge
Hon. Dr. Justice Wael Rady – Judge

REGISTRY
Hon. Nyambura Mbatia – Registrar
Hon. Philippe H. Ruboneza – Assistant Registrar
Mr. Asiimwe Anthony – Clerk of Court

COUNSEL
Razi Daureeawo and Ashwina Pittea – Counsel for the Applicant
Yvan C. Jean-Louis – Counsel for the Respondent & Co-Respondents 1, 2 & 3

RULING

I - BACKGROUND

1. The Applicant is a private company duly incorporated under the laws of the Republic of Mauritius and resident of that Republic within the meaning of Article 26 of the Treaty for the Establishment of the Common Market for Eastern and Southern Africa (COMESA) (hereinafter referred to as the Treaty). It is principally in the business of importing and distributing staple foods including edible oils originating from the Republic of Egypt. Both countries are members of COMESA.

2. The Respondent, the Republic of Mauritius, is a Member State of COMESA as specified under Articles 1(2) and 26 of the Treaty.

3. Co-Respondents 1 and 2 are respectively the Minister of Finance, Economic Planning and Development, and the Minister of Commerce and Consumer Protection of the Republic of Mauritius, both appointed under the Constitution of the Republic of Mauritius.

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4. The Co-Respondent 3, the State Trading Corporation (the STC), is a statutory body corporate established under the Mauritius State Trading Corporation Act 1982 with the objectives to:

(a) negotiate the purchase of goods;
(b) engage in the manufacture or processing of goods and to ensure their marketing;
(c) import goods, with a view to their marketing, distribution or supply by wholesale or retail;
(d) engage in the storage of petroleum products and promotion;
(e) development of bunkering and petroleum related activities; and
(f) engage in such other activities as may be authorised by the Minister of Commerce and Consumer Protection.

5. On 7 June 2022 the Government of the Republic of Mauritius decided to grant a subsidy to the STC to the tune of MUR 500 Million. The subsidy related to the importation of edible oils into Mauritius to ensure the manufacture and sale of cooking oils to the public at affordable prices.

6. It is the Applicant's assertion that it has been importing the oils under favourable tariffs in terms of the Treaty since 2012. That its share in the local edible oil market is about 25%. On 7 June 2022, in the budgetary speech, Co-Respondent No. 1 announced the intention to provide the STC with a subsidy on edible oils among other commodities. The announcement was an abandonment of the previous policy where subsidies were available to all operators in the market.

7. On 28 June 2022, the Applicant wrote to Co-Respondent No. 1 expressing its concerns at the prospect of the subsidy being extended solely to its competitor as this had the effect of distorting the market to its loss and prejudice. There was no response to the Applicant's letter prompting the Applicant to write a follow up letter dated 15 July 2022 urging a return to the original position where subsidies were available to all players in the market.

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8. Despite the Applicant's objections, senior government officials comprising the Attorney-General, the Minister of Agro-Industry and Food Security, and Co-Respondents No. 2 and the STC, made pronouncements to the effect that the STC would be selling oil at the subsidised price of MUR90 down from the previous average price of MUR110. Subsequently, Co-Respondent No. 2 wrote a letter dated 22 July 2022 stating that the STC would be selling edible oil at a much lower price of MUR75. The Respondent, acting through its Cabinet, agreed to the STC commercialising its own branded one-litre edible oil, as announced in Budget 2022-2023. It would be sold at a subsidised price of MUR75 per one litre.

9. This subsidy propelled the Applicant to bring a Reference in the First Instance Division (the FID) of the COMEA Court of Justice (the CCJ) seeking a declaration that the act to grant the subsidy solely to Co-Respondent No. 3 was unfair, illegal and distorts competition among entrepreneurs in the market to the Applicant's continuing financial prejudice.

10. In addition to the Reference, the Applicant lodged an Application for injunction seeking the FID, inter alia, to suspend the measure by the Respondent granting the subsidy to Co- Respondent No.3.

11. By Order of the Honourable Principal Judge, an order of injunction suspending the subsidy to Co- Respondent no. 3 was granted. However, in a subsequent *inter parte* hearing, upholding the Respondent's preliminary objection on jurisdiction, the said order was lifted by a full bench of the FID on 21 October 2022 on the ground that the Court lacked jurisdiction to hear the Reference and as such, there was no cause of action warranting the continuation of the injunction.

12. In the *inter parte* hearing before the FID, more particularly, it was held that:

i. the Applicant erred to argue that the Respondents had the burden to prove that it, the Applicant, had not exhausted local remedies. This is because the Applicant having pleaded in its Reference that it had exhausted local remedies, or that it was exempted from

seeking local remedies, it bore the legal burden to prove what it pleaded. The undoubted legal principle is that, "**He who alleges must prove**". The Applicant having made the allegation of exhaustion of local remedies had the burden to prove the same. Further the primary obligation to exhaust domestic remedies is imposed on the Applicant by Article 26 of the Treaty.

ii. The submissions made by the Applicant that the FID judgment in Reference No. 1 of 2019 placing the burden of proof on the Applicant in relation to exhaustion of local remedies was based on wrong law was erroneous. That decision is the judgment of the Court, and it remains extant and binding until it is set aside by the Appellate Division.

iii. The Applicant failed to exhaust local remedies. It failed to produce to the Court clear evidence of the steps it took, if any, in pursuit of local remedies in the Republic of Mauritius. Having so failed, the proviso to Article 26 of the Treaty was not fulfilled by the Applicant and on that basis, the Respondents succeeded in the preliminary objection that the Court had no jurisdiction. Consequently, the Respondents proved on a balance of probabilities that the FID has no jurisdiction to hear and determine the motion.

iv. As such, the Applicant failed to prove at the relevant stage the existence of a *prima facie* case, a pre-requisite for the grant of an interlocutory injunction, as provided under Rule 46 (3) of the COMESA Court of Justice Rules of Procedure 2016 (the Rules)

13. On 15 November 2022, the Applicant filed a Notice of Appeal (Appeal No. 2 of 2022) in the Appellate Division (AD) and on 6 December 2022 lodged an Application (*ex parte*) seeking the stay of the Reference No 2 of 2022 and the enlarging of the interim measures granted by the FID on 28 September 2022 pending the determination of Appeal No 2 of 2022. The Judge President granted the Order on 16

December 2022. The *ex parte* application for interlocutory relief on appeal was made under Rules 41, 44 and 90(2) of the Rules.

14. In the *inter parte* application now under consideration by this Court, the Applicant seeks the following orders:

i. The Ruling dated 21 October 2022 delivered by the FID in Reference Number 2 of 2022 be stayed pending the determination of the appeal made by the Applicant to the AD being appeal Number 2 of 2022;

ii. The interim order granted on 28 September 2022 by the FID be enlarged up until the determination of Appeal No. 2 of 2022;

iii. The costs of and incidental to the application abide by the result of the application;

iv. Such orders as this Honourable Court deems just in the circumstances.

II. THE DISPUTE

i. APPLICANT'S CASE

15. The Applicant submits that the general principles governing applications for stay pending appeal have been articulated in the Mauritian case of **Ex Parte: S.M. Rashad Maudarbocus & Anor (2019 SCJ 118)** at pp 4-5 of the judgment as follows:

> *"in an application for stay of execution, there are competing interests which have to be weighed. On the one hand the winning party should not, without good reason, be prevented from benefiting from the fruits of judgment pronounced by the Judge after due process of law…On the other hand, the losing party should not as far as possible be deprived, in the exercise of his legitimate right to appeal against the judgment, of*

any possible outcome in his favour, on appeal. An order for stay of execution is within the court's discretion and the Judge has to try as far as possible, to adopt the course that will enable the appellate court to do justice between the parties whatever the outcome of the appeal".

16. Reliance is also placed by the Applicant on the United Kingdom case of **AssetCo plc v Grant Thornton UK LLP [2019] EWHC 592 (Comm)** at para 56 of the judgment where it was held:

i. "The first question is whether solid grounds are put forward requiring a stay; see Aikens LJ in Mahtani v Sippy [2013] EWCA Civ. 1820 [13]-[17]. This will usually require some irretrievable harm to be shown on the evidence if no stay is granted: Mahtani at [15].

ii. If there are solid grounds, the court proceeds to consider all the circumstances of the case and weighs up the risks in granting a stay and the risks inherent in refusing a stay: Mahtani at [13].

iii. In this respect, the court will consider the risk of an appeal being stifled if no stay is granted and the risk of the paying party being unable to recover in the event that an appeal is successful.

iv. Ultimately, the approach is to make the order which best accords with the interests of justice. Where the balance of prejudice is in doubt, the answer may well depend on the perceived strength of the appeal (**see Leicester Circuits Limited v Coates Brothers Plc [2002] Civ. 474 [13]).**

17. In support of the assertion that the appeal has reasonable prospects of success, the Applicant admits that it is not disputed that exhaustion of local remedies is an admissible criterion under the Treaty. However, the rule on exhaustion of local remedies is not absolute. The courts in Mauritius do not have jurisdiction to determine the Reference due to the holding in the **Polytol Paints & Adhesive Manufacturers Co. Ltd. v The Minister of Finance (2009 SCJ 106).** This is evident from the case of **Pierce v Pierce (1998 SCJ 397)** where the Mauritius Supreme

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Court held that the **Convention on the Civil Aspect of International Child Abduction**, not being part of the law of the land, the court was not bound to give effect to its provisions.

18. It is also submitted by the Applicant that by virtue of the holding in the Republic of Mauritius Supreme Court case of **Polytol** *(supra)*, it had exhausted the local remedies of the Republic of Mauritius. This case held that to the extent that it has not been domesticated in the local law, the Treaty is not enforceable in the domestic Courts of the Republic of Mauritius. The Applicant therefore concludes that it has no local remedy before the national Courts or Tribunals of the Republic of Mauritius, hence the need to exhaust local remedies as required under the proviso to Article 26 is dispensed with.

19. The Applicant further relies on the case of the COMESA Court, Appellate Division, in **Government of the Republic of Malawi v Malawi Mobile Limited (Appeal No. 1 of 2016)** at paragraph 96] where it was held:

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

20. However, the FID equally relied on **The Government of Malawi case** to hold that the Applicant failed to ventilate the Treaty issue of anti-competitive conduct using the local laws of Mauritius before resorting to the CCJ. Emphasis was placed on paragraph 106 where the AD stated thus:

> *"106. True it is that there was no need for the Respondent to have expressly raised before the national courts any Treaty issues 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."*

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21. The Applicant in its appeal takes issue with this interpretation of the **Government of the Republic of Malawi case** by the FID. It argues that the FID quoted the AD out of context and that the AD judgment must be read as a whole.

22. It is the Applicant's case that the FID also held that the Applicant relied on foreign authorities whereas in the judgment in Reference No. 1 of 2019, the Court cited several cases of the COMESA Court of Justice where the proviso to Article 26 of the Treaty has received interpretation. One such case is **COMESA Court of Justice Ref. No. 1 of 2009 Intelsolmac v Rwanda Civil Aviation Authority** where the importance of exhausting local remedies under the proviso to Article 26 of the Treaty was emphasized.

23. Yet again, the Applicant takes issue with the approach of the FID in the treatment of international law and jurisprudence vis a vis COMESA cases. The Applicant argues that it is legitimate to rely on international jurisprudence as the AD just did that in **the Government of Malawi appeal** by relying on the cases of **Vukovi v Serbia (2014) 59 E.H.R.R. 19** and **Azinas v Cyprus (2005) 40 E.H.R.R. 8** on **the Practical Guide on Admissibility Criteria of the Council of Europe/European Court of Human Rights 2014**.

24. The Applicant reiterates its reliance on the **African Commission of African Charter on Human and People's Rights** on the interpretation of the compliance with the exhaustion of local remedies in that an aggrieved need only exhaust remedies that are available effective and sufficient and further that where the remedies fail to meet the standard set out above, they need not be exhausted (see **Sir Dawda K Jawara v The Gambia [Communication No. 147/95, 149/96]).**

25. In support of the assertion that it would suffer irreparable harm as a result of the MUR 500 million subsidy granted to the STC which has enabled the STC to commercialise the edible oil at a lower price of MUR 75 per 1 litre, the Applicant produced the following table of the loss of its market share due to the subsidy which made its products uncompetitive on the market.

Month	Oil Volume (Litters)		% Variance
	2022	2021	
July	170,622	575,371	- 237%
Aug	203,829	570,741	- 180%
Sep	360,757	657,366	- 82%
Oct	381,882	631,093	- 65%
Nov	201,836	457,415	- 113%

26. The Applicant submitted that the subsidy has adversely affected its business financially in that it has started losing the market share which it had secured over the years. It is struggling to meet its financial commitments, as far as it has invested heavily in supporting infrastructure in its business of importing and distributing edible oil. It has entered into irrevocable forward contracts with a supplier in the Republic of Egypt and has financial commitments towards banking institutions for the edible oil segment. The non-payment of its oil segment loans will impact its overall import line with its banking institutions and working capital for the other segments of the business, thus jeopardising the entirety of the business which it had built over 70 years as a consequence of which it may be forced to close down its edible oil business or its business as a whole, leading to loss of employment for over 350 employees.

27. In support of the assertion that the balance of convenience tilts in ~~his~~ favour, it is the Applicant's submission that since the Respondents did not file any affidavits showing any detriment to be suffered by them in the event that the injunction pending appeal is granted whereas it filed an affidavit showing that it would be ruined to the extent of closure of business if an injunction is not granted, the balance of convenience leans in favour of the granting the injunction.

III. RESPONDENT'S CASE

28. The Respondent did not file any affidavits in the entire proceedings, being content to rely on questions of law in submissions.

29. It is the Respondent's submission following the Judge President's *ex parte* orders of stay and injunction dated 16 December 2022 subsequent to the Application for the same dated 6 December 2022 that the orders be discharged as:

i. There is no reason in law for staying the Ruling given that the Applicant has no real prospect of success;

ii. The Applicant has bypassed an essential requirement of Article 26 of the Treaty by not exhausting local remedies in the national courts or tribunals;

iii. The Applicant is relying on the decision of the Supreme Court of Mauritius in the **Polytol case** *(Supra)* to claim it had no effective and available remedy before the courts and tribunals of Mauritius to the extent that the COMESA Treaty had not been domesticated into the laws of Mauritius and that the Treaty was thus not justiciable by these courts and tribunals;

iv. The Supreme Court Polytol case has long been superceded by the FID decision in **Polytol Paints and Adhesive Manufacturing Co Ltd. v The Republic of Mauritius (Reference No. 1 of 2012)** which held that:

> "*The argument of the Respondent 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. […] 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 internal law as justification for its failure to perform a treaty";* and

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v. There is settled law that it is not the function of an appellate court in an injunction case to substitute its own discretion for that of a first instance court unless that court has misdirected itself on law.

IV. MAIN ISSUES

30. We have considered the application, supporting documents, the response, and submissions by both Counsel and in our opinion, the issues for our determination can be summarised into two:

(i) Whether there are sufficient grounds to order a stay of execution pending the determination of the appeal; and

(ii) Whether there are sufficient grounds to order an injunction pending the determination of the appeal.

V. APPLICABLE LAW

31. Before we tackle the issues at hand in detail, we will briefly look at the applicable law. Rule 41, 46 and 90(2) of the CCJ Rules of Court (2016) (the Rules), provide as follows:

Rule 41

"Interlocutory applications

1. 'Subject to Rule (4) of this Rule, all applications shall be by motion, supported by an affidavit which shall state the grounds of the application.
2. ...
3. Upon making an ex parte order the Court shall set down the application for *inter partes* hearing within sixty (60) days of the *ex parte* order.

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Rule 46

"Application for Suspension or for Interim Measures

1. An application to suspend the operation of any Measure adopted by a Member State or an Institution, made pursuant to the Treaty, shall be admissible only if the Applicant is challenging that measure in proceedings before the Court.

2. An application to compel a Member State or an Institution to adopt an Interim Measure shall be admissible only if it is made by a party to a case before the Court and relates to that case.

3. An application under sub rule (1) shall state the subject matter of the proceedings, the circumstances giving rise to urgency and the points of law establishing a *prima facie* case for the interim measure applied for".

Rule 90(2)

"Appeal

1. ...
2. An appeal shall not operate as a stay of execution of the judgment appealed against unless, on application, the President expeditiously so orders.

VI. DISCUSSION AND ANALYSIS

32. As is evident, this application is for interlocutory relief in terms of Rule 41 as read with Rules 46 and 90(2)] of the Rules. By the application, the following reliefs are sought:

1. The Ruling dated 21 October 2022 delivered by the COMESA Court of Justice in Reference No.2 of 2022 be stayed pending the determination of Appeal No. 2 of 2022;

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2. The Interim Order granted on 28 September 2022 be enlarged up until the determination of Appeal No. 2 of 2022.

33. Thus, the Applicant seeks the interlocutory orders of injunction and stay pending the determination of the appeal.

Issue 1: Whether there are sufficient grounds to order a stay of execution pending the determination of the appeal.

34. The principles governing stay have been laid down in Rule 90(2) of the Rules. The Mauritian case of **Ex Parte: S.M. Rashad Maudarbocus & Anor (2019)SCJ 118)** and the United Kingdom case of **Asset Co plc v Grant Thornton UK LLP [2019] EWHC 592 (Comm)** relied on by the Applicant in its submissions are case authorities for applications for stay pending appeal. The case authorities are to the effect that the appellate court must balance competing interests of a winning and losing party and do justice between the parties whatever the outcome of the appeal.

35. This cardinal principle on the exercise of discretion by an appeal Court on an application for stay was underscored by Dr. Justice Mtambo of this Court in **Malawi Mobile Limited v The Common Market For Eastern and Southern Africa, Application. No. 1 of 2019** at para 38 where it was stated that:

> "*The grant or refusal of a stay indeed lies in the discretion of the Court. However, it is not a wanton or capricious exercise of discretion but a judicious process taking into account established principles of law. (…). The Court is enjoined to look at the respondent's right to the enjoyment of the fruits of litigation more favorably than the applicant's right to block that enjoyment because of the appeal it has taken up. The scales are always more weighed in favour of a successful party*".

36. It is common ground that, where an appeal will be rendered nugatory if a stay is not granted, that is a compelling reason for granting a stay particularly for the preservation of the subject matter of the action in the appeal. It was held by Cotton L.J. in **Wilson v. Church (No. 2) (1879) 12 Ch D 454** that:

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"But then there comes the question whether, or not that part of the order which directs payment to the bondholders should be stayed. I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory and, acting on that principle, when there was an appeal to this court from the judgment of Fry J. dismissing the plaintiff's action altogether, and it was urged therefore that this court had no jurisdiction to stay the execution of the order, we were of opinion that we ought to stay the execution of a judgment in another action made by Fry J. ordering the fund to be dealt with - that is to say - by granting an injunction against the trustees to restrain them from parting with any portion of the fund in their hands till the appeal was disposed of. That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the appeal, if successful, from being nugatory. Acting on the same principle, I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognize that it may be reversed), the appeal ought not to be rendered nugatory."

37. A judgment of the court can be either declaratory or executory. The difference between declaratory and executory judgments becomes relevant when a court considers whether to grant a stay or not. Where the judgment is merely declaratory, there is nothing to execute and nothing to stay. However, a declaratory judgment could be stayed when there are tangible rights of the parties that must be sustained and protected so as not to render the entire exercise of appeal, where one has been filed, a futile and useless exercise.

38. With reference to Nigerian law, the principles in the paragraph above were discussed by Kunle Aina, Senior Lecturer at the University of Ibadan in a paper titled Challenges to grant of injunction pending appeal in Nigeria appearing in the Civil Procedure Review AB Omnibus Pro Omnibus (unpublished). In **Government of Gongola State v Turkur (1989) All N.L.R. 647 at 653**, Obeseki JSC held that where

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the judgment is a declaratory one or where a court merely rules that it has no jurisdiction, there is nothing to be executed and the court order of stay of execution is not appropriate in the circumstances. This position was also taken in **Mobil Oil Ltd. V Agadaigha [1988] NWLR 383 of 405-406.**

39. Applying the law to the case at hand, we find that to the extent that the FID Ruling dated 21 October 2022 in Reference Number 2 of 2022 merely declined jurisdiction to hear the motion and set aside the interim order issued on 28 September 2002, it cannot be a subject of stay as long as there is nothing to be executed and there are no tangible rights of the parties that arise and need to be protected to preserve the status quo. Moreso, the interim remedies where granted only until the determination of the matter by the FID, and they automatically ended when the FID declined jurisdiction. Thus, the aforementioned FID ruling was merely declaring of this effect.

40. In the premises, the application for stay has no merit and we accordingly dismiss it.

Issue 2 : Whether there are sufficient grounds to order an injunction pending the determination of the appeal.

41. The Grant of Interim Measures and Orders of Suspension or Stay by this Court is governed by Rule 46 of the Rules which has been reproduced under paragraph 31 (supra).

42. We firstly hasten to note that, the interim order granted on 28 September 2022 by the FID lapsed when the FID declined jurisdiction so that there is nothing for us to enlarge.

43. Nevertheless, we have no hesitation in holding that the Court has inherent jurisdiction under Rules 3 and 46 of the Rules to exercise judicial powers to grant an order for stay of execution or suspension of any measure adopted by any Member State pending appeal, and the jurisdiction to grant the order is unquestionable.

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44. Rule 3 of the Rules provides:

> "Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to administer substantive justice without undue regard to technicalities, and to preserve the dignity, or prevent abuse of the process of the Court".

45. This inherent power of the Court to do justice is also reflected, in the actual case, by the Applicant's prayer number iv where it requested from this Court such orders as the Court may deem just in the circumstances.

46. The law governing interlocutory injunctions was laid down in the case of **American Cyanamide v Ethicon 1975 1 AllER 504.** Other cases which have dealt with this issue are **Giella v Cassman Brown Co. Ltd 1973 EA 358**, **Prof. Anyang Nyongó & Others v The Attorney General of Kenya & Others, EACJ Ref. No. 1 of 2006**. The principle which comes out from these cases is that for an interim injunction to be granted, the Applicant must establish a prime facie case and that irreparable harm will ensue if the remedy is not granted. More appropriately, there must be a serious question to go for trial, damages are not an adequate remedy, and the balance of convenience militates in favour of the granting of the remedy.

47. In **Hassan Basajjabalaba & Muzamiru Basajjabalaba Vs. The Attorney General of Uganda**, Application No . 9 of 2018 at para 21, the East African Court of justice pointed the aforementioned trifold principle for the Grant of interlocutory injunction where it was stated that :

> *"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience"*

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48. Having considered the submissions of both parties and the law governing the grant or refusal of applications for injunctions, we find that the correct approach on appeal is not the prima facie one in **American Cyanamid v Ethicon** *(supra)* which, though justified at first instance level, is not appropriate on appeal as it may give the impression that the court has prejudged the appeal. The deference to the demonstration of a serious triable issue rather than a prima facie case in applications for interlocutory injunctions was recognised in **Forsc & Others vs. Attorney General of the Republic of Burundi & Another, EACJ Appl. No.16 of 2016**. In that case, the East African Court of Justice cited with approval the following text in Blackstone's Civil Practice 2005, para. 37.19- 37.20, p.392 which reads:

> *"Therefore, the Court only needs to be satisfied that there is a serious question to be tried on the merits. The result is that the Court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality."*

49. Therefore, the correct approach, in our view, is to consider whether the appeal raises substantial legal issues, is not frivolous or vexacious, that there is a risk that if the injunction is not granted, the applicant will be irreparably damaged, and that the balance of justice weighs in favour of granting the injunction.

50. This approach was fortified in the case of **Msadinee v INEC (2010) all FWLR (Rt 547)** where the Court of Appeal of Nigeria listed the conditions and the principles upon which the Court will exercise its discretion as follows:

> *a) where the grounds of appeal disclose serious or substantial issues of law for determination;*
> *b) where the ground of appeal is substantial and arguable;*
> *c) where there is need to preserve the res so as not to render the decision of the appellate court nugatory; or*
> *d) where there is the interest of justice to make such order, having regard to the facts and circumstances of the case.*

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51. It must be emphasized, that in this context, the grant of an order of an injunction pending Appeal is not as a matter of course. The grant is discretionary. The discretion must be exercised both judiciously and judicially. The court in exercising its discretion must consider the balance of the competing interests and rights of the parties to do justice to the case because the effect of the order is to deprive the successful party the profits of his judgment, a practice which courts are generally reluctant to invoke. However, the other side of the coin is that if the remedy is refused, it could render the appeal effort useless and nugatory if the appellant were successful and cannot be placed in the same position as before unless the *status quo* is preserved.

52. In light of the forgoing, and taking into consideration the different authorities from various jurisdictions, we summarise the principles for the grant of an injunction pending appeal in the following tripartite:

1- The grounds of appeal must raise substantial legal issues and a reasonable ground of appeal.

2- There are special circumstances why the injunction should be granted, more appropriately, damage to the aggrieved party which cannot be reasonably compensated in damages.

3- The balance of justice weighs in favour of granting the injunction.

53. We will now apply the principles to the case at hand.

a) **Substantial Legal Issues**

54. The above authorities set out the principles which the Court considers when deciding whether interim measures should be granted pending an appeal. It is clear that an order should only be refused if, for instance, the grounds of appeal are frivolous or unreasonable. In this context, the legal points must be recondite or serious enough as to display convincingly that the points of law may tilt the balance of justice in the favour of the Applicant.

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55. Indeed, as we reiterated earlier on in this Ruling, the Court sitting on appeal ought not to consider the merits of the appeal at this stage or to invite the applicant to address the court on the probability of the appeal succeeding. It is not the duty of the court at this stage to consider whether the appeal will succeed or not. It is sufficient if the ground raises a point of law on the face of it. Thus, the Newfoundland and Labrador Supreme Court of Canada, in **United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 740 v. Peter Kiewit Sons Co., 2005 NLCA 8, 244 Nfld**, made the following conclusion about the test to be applied

> *"The Court, in [RJR-MacDonald], stated the general rule to be that, on hearing an application either for a stay of proceedings or for an interlocutory injunction, "a judge should not engage in an extensive review of the merits". Thus the test must be "a serious issue to be tried".*

56. In this regard, we echo the East African Court of justice in **Hassan Basajjabalaba & Muzamiru Basajjabalaba Vs. The Attorney General of Uganda**, *(supra)* at para 23 where it held that:

> *"For a serious triable issue to be established, substantive suit should, on the face thereof without recourse to merits, disclose a cause of action."*

57. Having considered the evidence before us and in light of the submissions of Counsel of both parties, we hold that the Applicant has amply demonstrated that it is legitimately exercising its right of appeal and that the grounds of appeal cannot be said to be frivolous.

58. We find that the ground of appeal raises a legitimate legal question under the Treaty law regime as spelt out in Articles 26 of the Treaty. More specifically, whether the Appellant had effective, available, and sufficient remedies before the national Courts and Tribunals of the Respondent. Whether it could not exhaust local

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remedies for the purposes of Article 26 of the Treaty in light of the judgment of the Supreme Court of Mauritius in the Polytol case. It goes without saying that the main ground of appeal is directly related to the violation of the customary international law rule of exhaustion of local remedies (ELR) which aims at safeguarding state sovereignty by requiring individuals to seek redress for any harm allegedly caused by a state within its domestic legal system before pursuing international proceedings against that state **(IISD Best Practices Series - January 2017: Exhaustion of Local Remedies in International Investment Law -Martin Dietrich Brauch, p. 1).**

59. To that extent, therefore, any questions as to the exhaustion of local remedies before the national Courts and Tribunals of the Respondent for the purposes of the proviso to Article 26 of Treaty **do pose serious legal issues for determination by this court.** Consequently, we are satisfied that the present Application does raise serious triable issues. We so hold.

b) <u>Special Circumstances</u>

60. We now turn to the question of irreparable damage. The Applicant went to great length to argue that no award of damages could adequately compensate the damages caused by the subsidies of MUR 500 Million granted to the STC, which has enabled the STC to commercialise its edible oil at a lower price and has financially affected the business of the Applicant as it has started losing the market share which it had secured over the years, and is struggling to meet its financial commitments, as far as:

i. it has invested heavily in supporting infrastructure in its business of importing and distributing edible oil;

ii. it has entered into irrevocable forward contracts with a supplier in the Republic of Egypt;

iii. it has financial commitments towards banking institutions for the edible oil segment;

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iv. *the non-payment of the oil segment loans will impact its overall import line with its banking institutions and its working capital for the other segments of the business, thus jeopardizing the entirety of the business which it had built over 70 years; and*

v. *it may be forced to close its edible oil business or its business as a whole which would lead to a loss of employment of around 350 employees.*

61. The Applicant has also tendered financial statements pertaining to the amount of loss sustained and attributable to the impugned subsidies as well as evidence of the price of the edible oils distributed by Correspondent 3 in view of the subsidies.

62. We have carefully considered the elaborate submissions of both parties on these issues. It is trite law that if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted (see **American Cyanamid Co. v Ethicon Limited 1975 1 ALL ER.504)**.

63. Thus, we cannot help noting that in common law jurisdictions, it is equally true that the Respondent must show that ~~he~~ it would suffer irreparable harm if the injunction were granted.

64. Damages at common law may in general terms be defined as follows;

> "*General damages are given for losses that the law will presume are the natural and probable consequence of a wrong .. general damages may also mean damages given for a loss that is incapable of precise estimation such as pain and suffering of loss of reputation. In this context special damages are damages given for losses that can be quantified.*" **(Oxford Dictionary of Law, Oxford University Press (8th Ed.), p. 246).**

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65. In the case before us, on the totality of the law and facts, it is abundantly clear that if the application for interim measures is not granted, the Applicant will suffer loss which cannot adequately be compensated by damages.

66. We find that according to the figures submitted by the Applicant as supported by its financial statement, the Applicant is losing a big part of the edible oil market monthly. This loss of sales is undoubtably due the subsidies granted by the Respondent to Correspondent 3 in June 2022. The Applicant has successfully established that prior to introduction of the subsidy, it used to sell an average of 516.000 litres of edible oil per month but after the subsidy, its selling capacity has been adversely affected and reduced in November 2022 to 201,836 liters, almost 50 % of the quantity of edible oil it used to sell in 2021.

67. We therefore agree with the submission of Counsel for the Applicant that in the event of continuous loss of its market share as illustrated in the above paragraph, the Applicant stands in peril and will struggle to meet its financial commitments bearing in mind that it has entered into irrevocable forward contracts with a supplier in the Republic of Egypt. This critical situation would lead to the closure of its business.

68. It goes without saying that under the principles setting out the conditions for granting interim measures, the Applicant, having succeeded to demonstrate that the collateral circumstances it has sustained may force it to close its business activities thereby being ruined, irreparable damage has been established justifying the grant of an interlocutory injunction in view of the continuity of the subsidies to by the Respondent to Co-Respondent 3 which, unless stayed by order of this Court, will destroy the subject matter of the appeal and render the appeal nugatory if it succeeds.

c) Balance of Convenience/Justice

69. Having held that damages are not an adequate remedy, it is to the question of balance of convenience that we now turn.

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70. The Court's consideration of the balance of convenience whilst deciding whether to grant an interlocutory injunction is clearly set out in **Halsbury's Law of England / Civil Procedure (Volume (11 (2009) 5th Edition, paras 1-1108 ; Volume 12 (2009) 5th Edition paras 1109 -1836) 12 at para 386** ;

> " *In order to determine where the balance of convenience lies, the Court must weigh two matters. The first is to protect the Claimant against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in his favour at trial. The second matter is the defendant's need be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainly were resolved in the defendant's favour at the trial*".

71. In the case of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] UKPC 16**, the Court of Appeal of Jamaica, describing the Court's consideration of the balance of convenience, held that the Court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld. The basic principle is that the Court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other.

72. In light of the forgoing, and whereas the Applicant has shown in its affidavit in support of the application the irreparable damage it is likely to suffer if it later turns out that the injunction was wrongly refused, the Respondents, not having filed any affidavits in opposition, have not demonstrated any likely irreparable damage they would suffer if it later turns out that the injunction was wrongly granted. We therefore agree with the submission of Counsel for the Applicant that the balance of convenience or justice, as one may view it, weights in favour of granting the injunction in the case.

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73. It follows from our findings earlier in this ruling that, in exercise of our inherent jurisdiction, we find that the Applicant has demonstrated before this Court sufficient grounds to grant a fresh interim order against the Respondent suspending the decision to grant to Co–Respondent 3 a subsidy pending the hearing and determination of the Appeal.

VII. CONCLUSION

74. In view of our findings on the two issues identified in this Ruling for the Court's determination, we hold in the final analysis as follows:

1- The application for Stay of the Ruling dated 21 October 2022 delivered by the FID in Reference No.2 of 2022 is dismissed.

2- An Interim order is hereby issued against the Respondent suspending the decision to grant to Co–Respondent 3 a subsidy pending the hearing and determination of the Appeal;

3- Each party will bear their own costs.

DATED this ..02..... Day of ..MARCH..... 2023

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HON. LADY JUSTICE LOMBE P. CHIBESAKUNDA **– Judge President**

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HON. DR. JUSTICE MICHAEL C. MTAMBO **– Judge**

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HON. DR. JUSTICE WAEL RADY **– Judge**