

COUR DE JUSTICE

محكمة العدل



COMESA



COURT OF JUSTICE

IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND
SOUTHERN AFRICA – FIRST INSTANCE DIVISION

(SITTING IN LUSAKA, ZAMBIA)

REFERENCE NO.1 OF 2025

TEWODROS GETACHEW TULU..... APPLICANT

VERSUS

THE SECRETARIAT AND
THE SECRETARY GENERAL OF COMESA..... RESPONDENT NO.1

COUNCIL OF MINISTERSRESPONDENT NO. 2

A. F. CHUI CHEONG.....RESPONDENT NO. 3

AND

EAST AFRICA LAW SOCIETY.....INTERVENER

CORAM:

Hon. Lady Justice Qinisile Mabuza.....(Principal Judge)
Hon. Mr. Justice Ali Sulaiman Mohammed
Hon. Lady Justice Mary N. Kasango
Hon. Mr. Justice Bernard Georges
Hon. Dr. Justice Léonard Gacuko
Hon. Lady Justice Clotilde Mukamurera
Hon. Mr. Justice Chinembiri E. Bhunu

REGISTRY:

Hon. Philippe Ruboneza.....Deputy Registrar
Hon. Asiimwe Anthony.....Assistant Registrar
Ms. Mutinta Chinganya – Mulenga..... Legal Officer

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COUNSEL:

Mr. Kiya Tsegaye LemessaFor the Applicant
Mr. Solomon Ayano Hirpo.....For the Applicant
Mr. Hannington Omondi Amol.....For the Applicant
Mr. Lubinda Linyama..... For the Respondent
Ms. Mailesi Undi.....For the Respondent
Prof. Elisha Ongoya.....For the Intervener
Ms. Emily Osiemo Lumumba.....For the Intervener
Dr. Harrison Mbori.....For the Intervener
Mr. David Sigano.....For the Intervener

COURT REPORTERS

Mr. Mutale Mpemba

Mr Kambole Ng'andu

JUDGMENT

A. INTRODUCTION

1. The Common Market for Eastern and Southern Africa (COMESA) is a prominent regional economic community comprising 21 African countries. Its object is to foster regional economic integration through the promotion of trade, investment and the development of a viable common market for its members.
2. The COMESA Court of Justice (CCJ) is the judicial organ of COMESA, established under Article 7 as read with Article 19 of the Treaty establishing the Common Market for Eastern and Southern Africa (the Treaty). It was created for the just and fair resolution of internal disputes. As stated before, the CCJ is divided into two divisions comprising the First instance Division (FID) and the Appellate Division (AD).
3. The judges of the CCJ are elected for a renewable term of 5 years. The elections are held under the auspices of the Rules of Procedure for the Election of the Judges of the COMESA Court of Justice (2005) (the Election Rules).

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4. Elections to the Court are conducted by an Electoral College comprising Ministers of Justice and Attorneys General of Member States. The Secretary General of COMESA is the prescribed Returning Officer in terms of Rule 8 of the Rules.

B. THE PARTIES

5. The Applicant, Tewodros Getachew Tulu, is a resident of the Federal Democratic Republic of Ethiopia (Ethiopia). Ethiopia is a member of COMESA as specified under Article 1(2) of the Treaty.
6. This is a Reference filed on 15th April 2025 by the Applicant. The Applicant was represented by Mr Hannington Omondi Amol, with Mr Kiya Tsegaye and Mr Solomon Ayano Hirpo.
7. The Reference cited the Secretariat and Secretary General of COMESA as the 1st Respondent, the Council of Ministers of COMESA as the 2nd Respondent and A.F. Chui Cheong a resident of the Republic of Mauritius, a member of COMESA as the 3rd Respondent.
8. In a Ruling dated 5th June 2025, the Court ordered the recasting of the Respondents. Accordingly, the Secretariat, Secretary General and Council were to be collectively referred to as the Respondent and A.F. Chui Cheong as the 2nd Respondent. Save where extracts are reproduced referring to the parties otherwise, they will be so referred to in this Judgment.
9. The Respondent was represented by Mr Lubinda Linyama, with Ms Mailesi Undi.
10. The 2nd Respondent did not appear and was not represented.
11. The Intervener was represented by Prof. Elisha Ongoya, with Mrs Emily Osiemo Lumumba, Dr Harrison Mbori and Mr David Sigano.

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C. SUMMARY OF THE CASE

12. At the centre of this matter is the CCJ and the election of judges to serve in that Court which took place on 21st November 2024. That election was for the selection of twelve judges who would serve from 6th June 2025, when the term of the previous bench would end. Out of the twelve judges to be elected five of them would serve in the AD and seven in the FID.
13. Following her nomination by the Republic of Mauritius, the 2nd Respondent was elected to serve in the FID. Prior to taking the oath of office, Mauritius addressed to the Secretary General of COMESA a letter, dated 7th January 2025, informing the Secretary General that the 2nd Respondent was unable to take up her position on the CCJ.
14. Unbeknown to it that Mauritius had withdrawn the 2nd Respondent from taking up the appointment as a judge, the Registrar of the CCJ wrote to the 2nd Respondent requesting her to be prepared to attend the taking of the oath of office once an appointment was available with the Chair of the COMESA Heads of State.
15. In response, the 2nd Respondent informed the CCJ that, though she had initially declined to take up the office of judge, she subsequently changed her mind. That retraction of her withdrawal, although the Respondent's state otherwise in evidence, was not supported by any communication from Mauritius and made available to the Court.
16. The Applicant, a candidate for election, nominated by Ethiopia, was aggrieved by the electoral process and by the Secretary General's failure to refer the withdrawal of the candidacy of the 2nd Respondent to the Electoral College and consequently filed this Reference.
17. Additional to his Reference, the Applicant filed an application supported by affidavit wherein he moved this Court for an Order granting a preliminary injunction, pending a full trial on the merits, to prohibit the Respondent from appointing and swearing in the judges-elect who were elected on the 21st November 2024 and whose

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election were adopted on 28th November 2024 by the Council of Ministers. That preliminary injunction subsists up to now.

18. The Court granted the preliminary injunction on 16th April 2025 and ordered:

“1. THAT a preliminary injunction is hereby issued, restraining the Respondent from proceeding with the appointment of judges to the COMESA Court of Justice following the election done by the COMESA Ministers of Justice and Attorney’s General on 21st of November 2024, and adopted on 28th of November 2024 by the Council of Ministers, until this application is heard and determined;

2. THAT the Respondent is prohibited from proceeding with preparations for the swearing-in of the judges-elect until this application is heard and determined;”

19. Preliminary issues having been dealt with, the hearing of the Reference was held on 20th to 22nd October 2025 in Lusaka, Zambia.

D. APPLICANT’S CASE

20. On 5th April 2024 the Secretary General called upon Member States to submit nominations of qualified persons to replace the complement of outgoing judges following the impending termination of their tenure of office. The elections were subsequently conducted on 21st November 2024.

21. The Applicant, who was nominated by his Member State, Ethiopia, was an unsuccessful candidate in the election of 21st November 2024. As a consequence of his grievances, he approached the Court by way of this Reference, seeking relief.

22. His disapproval of the election was especially directed at the manner the successful candidates of Mauritius, the 2nd Respondent, and Burundi, were elected. He further complained of the irregular manner in which the Secretary General had processed his candidacy in the election from start to finish.

23. With regard to the 2nd Respondent, the Applicant alleged that she was not qualified to be appointed as a judge of the CCJ. He further alleged that in any case the 2nd

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Respondent had been withdrawn from appointment and was not entitled to reinstatement, to his loss and prejudice. He therefore sought to replace the 2nd Respondent on the FID, arguing that he had scored the next highest votes after her. It was his argument that the principle that the next best candidate takes over when the candidate-elect withdraws or is disqualified must apply.

24. The Applicant alleged that the candidate from Burundi had been included in the election at the last moment without presenting his curriculum vitae (CV) for circulation and his name did not appear on the list of candidates in flagrant violation of the Rules. He however sought no direct relief against the Burundi candidate, who is not cited in these proceedings.

25. The Applicant sought monetary compensation in the form of damages arising from the mishandling of the elections.

26. Finally, the Applicant sought costs of the suit.

27. The Applicant's claim is basically that the conduct of the elections was vitiated by fatal procedural irregularities before, during and after the elections. That being the case, he sought the relief set out hereafter from the Court.

28. The relief that the Applicant seeks is in the following terms:

“(1) The Applicant seeks a declaration that the decision of the Secretary General on 18th of February 2025 is made without its mandate and invalid.

(2) The Applicant also seeks to annul the decision of the Electoral College made on the 21st of November 2024 to the extent that it ruled on nominations of nominees as judges whose nominations were not received formally by the Secretariat and those who were non eligible due to age requirement.

(3) As the nominee who received the 8th highest vote, immediately after the 3rd Respondent, who is not qualified to be a candidate in the first place, the Applicant seeks a ruling by this Honorable Court:

A series of six handwritten signatures in blue ink, arranged horizontally. The first signature is 'QM' followed by a flourish. The second is a stylized 'A' with a dot. The third is a wavy line. The fourth is 'Lg'. The fifth is 'Lg'. The sixth is 'CE'.

a) that the 3rd Respondent was ineligible to be seated as a Judge of the Court; or

b) The position of the 3rd Respondent be declared vacant starting from the date of communication to the Secretariat that the 3rd Respondent is unable to assume the role for personal reasons; and

c) That the Applicant be appointed to fill the position unlawfully held by the 3rd Respondent; and/or

(4) That the 1st Respondent has acted ultra-virus by calling again the 3rd Respondent to allow filling the position after a formal communication from her own country coordinating ministry; and/or

(5) That the 1st, 2nd and 3rd Respondents jointly or severally make good injuries and damages (both monetary and moral) sustained by the Applicant.

b. The costs, including legal fees, of and incidental to this reference.

c. Any other ancillary orders as the Court may deem fit and expedient under the circumstances.”

Applicant's Evidence

29. After being sworn, the Applicant gave evidence on his own behalf. It was his testimony that he is a reputable lawyer in his own country and internationally. He is the President of Ethiopian Federal Bar Association, the current President of the East African Bar Association comprising a large number of lawyers in the region and also the President of the Pan-African Lawyers Union (PALU) which groups continent-wide Bar Associations. He is the advisor to the African Union and has vast experience in international commercial arbitration.

30. His testimony is as briefly summarised above. It finds support from the evidence of the Ethiopian Ambassador, His Excellency Rashid Mohammed Abdulwahid (the Ambassador) who is also the Permanent Representative of Ethiopia to COMESA.

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31. It was the Applicant's testimony that his country nominated him for the post of judge of the CCJ. His name and CV were duly submitted to the Secretary General by email dated 21st October 2024. The email was written by the Chief of Staff in the Ministry of Justice, addressed to the Secretary General and copied to the Applicant. The Respondent, however, alleged that he had not submitted his CV along with his name as required by the Election Rules. He was later advised by the Ambassador that on the day of election the electoral officials in the Secretary General's office had confused his name with that of his country's Minister of Justice with the result that it was the name of that Minister which appeared on the list of candidates on the date of the election instead of his.
32. The submissions of the Applicant's name and CV marked the beginning of the process of formal nomination. He thus expected justice, fairness and transparency in the conduct of the elections.
33. It was on the eve of the election that he came to know that his CV that had been submitted was missing. It is his testimony, however that the Secretary General acknowledged receiving his CV.
34. The Applicant's CV should have been circulated among delegates before the elections in terms of the Electoral Rules. Nevertheless, it was not circulated as required by the Electoral Rules. It was the Applicant's contention that, had his CV been circulated, the result of the elections would have been different.
35. On 27th November 2024, the Applicant says he wrote to the Secretary General protesting the irregular conduct of the elections. She denied some of the facts but later conceded her error and assured him that there would be no repeat of the lapses in future. She intimated to him that there would be an improvement in the conduct of future elections.
36. His perception of the elections was that they were marred by bias against him and his country.

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37. He later came to know from various sources that, by a letter written by the Government of Mauritius on 7th January 2025, Mauritius had withdrawn the 2nd Respondent from taking up the appointment of judge at the FID. That the 2nd Respondent would not take up that post for personal reasons. In the circumstances, the Applicant took the view that the Electoral College was obliged to fill the ensuing vacancy by appointing the candidate who garnered the next highest number of votes. The Applicant was the one who garnered the next highest votes. He was, however, surprised to learn that, by an email dated 28th January 2025, the 2nd Respondent had written to the Registrar of the CCJ, indicating her willingness to take up the post of judge due to changed circumstances.

38. The Applicant testified that he later learnt that the name of the candidate from Burundi had been listed onto the ballot on the day of the elections without following the necessary formalities.

39. The Applicant said that he had the following grievances concerning the running of the elections:

- i. The Secretary General denied receiving his CV sent on the 21st October 2024 when receipt had already been acknowledged.
- ii. The elections were not conducted according to the election guidelines. A candidate from Burundi was irregularly put onto the ballot during the course of the elections without a CV, and contrary to the Rules.
- iii. There was some lobbying for votes on the floor on the day of the elections, contrary to laid down procedures.
- iv. The Secretary General did not screen candidates before the election. The Secretary General neglected her duty in this respect and allowed an unqualified candidate from Mauritius, the 2nd Respondent, to participate in the elections. The 2nd Respondent was ineligible for appointment because she had retired in her own country and was not a jurist of recognised competence.

40. In expounding on the ineligibility of the 2nd Respondent, the Applicant explained that her CV shows that she was born on 12th August 1950. This means she is past retirement age in her own country and has since retired. Also, that her CV does not show that she is a jurist of recognised competence as that is a preserve of specialists in law, such as law professors.
41. It was the Applicant's testimony that, once a candidate has been withdrawn by the nominating Member State from an elected post, this creates a vacancy, and there is no room for recanting the withdrawal. There are, moreover, no rules regulating the withdrawal of candidates before being sworn in. The issue should therefore have been referred to the Council of Ministers for determination in terms of Rule 16 of the Rules.
42. Under cross-examination, the Applicant explained that the Ethiopian Minister of Justice was unable to attend the elections of 21st November 2024 because the Minister was not invited.
43. The Applicant denied knowledge of a letter produced by Mr Masuku, a witness for the Respondent, purporting to invite the Ethiopian Minister of Justice to attend the elections on 21st November 2024. The letter is dated 25th September 2024. He however conceded that the Government of Ethiopia, which nominated him, has not taken any steps to make a formal complaint to the Respondent.
44. Asked what his prayer was, the Applicant stated that his prayer was as stated in the Reference and, in particular, the nullification of the election of the 2nd Respondent and the Burundian candidate, and substitution of the 2nd Respondent by himself.
45. In support of his case, the Applicant called the Ambassador who doubles up as his country's Permanent Representative to COMESA. The Ambassador gave evidence after being affirmed. It was his testimony that he has been Ambassador of the Republic of Ethiopia covering Zimbabwe, Zambia and Mauritius for about three years now.

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46. In support of the Applicant's case, the Ambassador gave evidence to the effect that Ethiopia was not invited to attend the elections of the CCJ judges on 21st November 2024. Prior to the elections, he had been contacted by the Ethiopian Minister of Justice instructing him to attend at short notice. He made frantic efforts to attend the meeting by contacting the organisers of the elections to no avail. Despite his concerted efforts, he was unable to attend the elections. The net result was that the elections were conducted in the absence of a representative from Ethiopia.
47. The Ambassador, however, managed to attend the Council of Ministers meeting held on 28th November 2024 to, *inter alia*, receive the report of the outcome of the elections. He signed the attendance register but the minutes of the meeting did not acknowledge his presence and participation at the meeting. Although he protested at the meeting against the adoption of the results of the election, no one paid heed. His presence at the meeting and protests were not recorded in the outcome.
48. Under cross-examination, the Ambassador conceded that his country is not a party to this case as it has not lodged any complaint regarding the conduct of the elections. He further conceded that he was not aware that the Rules did not allow attendance by proxy at the Council of Ministers meeting. That notwithstanding, he continued to pursue the Applicant's issues with the Secretariat.
49. He wrote to the Assistant Secretary General complaining about the mistreatment of the Applicant at the elections and ensuing procedural flaws. The letter was copied to the Secretary General. The response he got was that there was no authority to review the contents of the report until the next Council of Ministers meeting to be held the following year. Under cross-examination he was adamant that his position as Ambassador and Permanent Representative to COMESA gave him an automatic right to attend the Council of Ministers meeting as he has the right to attend all COMESA meetings on behalf of his country. His status is such that he needs no delegation from anyone to attend COMESA meetings.

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50. The Ambassador, like the Applicant, denied knowledge of the letter of 25th September 2024 purporting to invite the Ethiopian Minister of Justice to the elections of 21st November 2024.

Counsel For Applicant's Submissions

Burden of Proof

51. Counsel for the Applicant concedes that the Applicant bears the initial burden of proving the factual existence of the alleged procedural irregularities. He however contends that, once he has discharged that onus, the burden shifts to the Respondent to show on the balance of probabilities that those proven irregularities did not materially affect the outcome of the elections. For that proposition of law, he placed reliance on the Kenyan case of ***Raila Odinga v Independent Electoral and Boundaries Commission Petition 1 of 2017***. In that case it was held that:

“... the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law”.

52. In advancing the Applicant's case, Learned Counsel contended that the Applicant has discharged his onus of proving the existence of fatal procedural irregularities in the conduct of the elections of 21st November 2024. He argued that the proof is undoubtedly to be found in the admissions made by the Respondent and its witnesses in the course of this case. The alleged admissions were that:

- i. Ethiopia nominated the Applicant as its candidate on 21st October 2024 but the Respondent failed or neglected to circulate his name and CV by the date of the elections on 21st November 2024.
- ii. On the date of the elections the Respondent mistakenly put the name of the Ethiopian Minister of Justice on the list of candidates instead of that of the Applicant, who was the candidate, and not the Minister.

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- iii. The name of the candidate from Burundi was belatedly introduced to the delegates at the time of the elections, contrary to the Rules.
- iv. The candidate from Mauritius, the 2nd Respondent, had retired and was ineligible for appointment to high judicial office in her own country.

53. Having said that, Learned Counsel submitted, on the adduced evidence, that the Applicant discharged the onus of proving that the elections of 21st November 2024 were fraught with fatal procedural irregularities. He contended this on the basis of laid-down precedent in **Karanja Kabage v Joseph Kiuna Karinambega Nganga & Others (2013) e KLR** where the Court held that:

"In determining the question of the validity of the election of a candidate, the Court is bound to examine the entire process up to the declaration of results".

54. On that score, Learned Counsel submitted that the irrefutable evidence before the Court establishes that the elections of 21st November 2024 were fraught with material defects throughout the process and beyond. For that reason, they cannot stand. He, therefore, urged the Court to find that the impugned elections were not free and fair and the Court should provide appropriate remedy. In the words of Lord Denning, in **Morgan v Simpson [1974] 3 ALLER722** such an election is vitiated because its outcome is affected.

55. Learned Counsel submitted that the Respondent was unable to rebut the existence of the admitted and proved factual irregularities. The Respondent was further unable to discharge the onus of proving that the proved irregularities did not affect the outcome when they resulted in the disenfranchisement of a Member State and its national and nominee.

56. In his opening statement, Learned Counsel for the Applicant implored the Court to be alive to the weighty issues before it. This is because the Court is sitting to test the integrity of the process of selecting judges of the CCJ, the primary issue at

hand being whether the election on 21st November 2024 met the requirements of the Election Rules generally, as read with Article 20 of the Treaty.

E. INTERVENER'S CASE

57. The Intervener supports the claim of the Applicant and has filed a Statement of Intervention mirroring the Applicant's Reference and seeking broadly similar relief.

58. In supporting the Applicant and following the Ruling dated 9th June 2025, the Intervener, the East African Law Society, on 11th June 2025, submitted an amended Statement of Intervention.

59. The Intervener sought the following relief:

"1. A declaration be and is hereby issued that there were illegalities and irregularities during the election of Judges of COMESA Court of Justice held on 21st of November 2024 which contravened the COMESA Treaty and the Rules of Procedure for Election of Judges of COMESA Court of Justice 2005.

2. A declaration be and is hereby issued that the decision of the Secretary General of 18th February 2025 was made without her mandate and is invalid.

3. An order do issue annulling the decision of the Electoral College made on 21st November 2004 to the extent that it ruled on nominations of nominees as judges whose nominations were not received formally by the Secretariat and whose CV's were not disseminated before the election as per the Rules of procedure for the election of judges and those who were not eligible due to age requirement also does not fulfil the conditions to hold a high judicial office in respective country domicile.

4. The Applicant being the nominee who received the 8th highest vote, immediately after the 3rd Respondent (A.F Chui Cheong), who is not

qualified to be a candidate in the first place, the Applicant seeks a ruling from the Honorable Court:

1. An order that the 3rd Respondent was ineligible to be seated as a Judge of the Court;

2. The position of the 3rd Respondent be declared vacant starting from the date of communication to the Secretariat that the 3rd Respondent is unable to assume the role for personal reasons; and/or

3. That the Applicant be appointed to fill the position unlawfully held by the 3rd Respondent; and/or

5. That the 1st Respondent acted ultra-vires by calling the 3rd Respondent to allow filling the position after a formal communication from her own country's coordinating ministry; and/or

6. That the 1st, 2nd and 3rd Respondents jointly or severally make good injuries and damages (both monetary and moral) sustained by the Applicant.

7. The costs, including legal fees, of and incidental to this reference.

8. Any other reliefs that the Honorable Court may order to meet the ends of justice.”

60. The Intervener enumerated the shortcomings of the election in a similar manner to the Applicant.

61. The Intervener stated that, notwithstanding the shortcomings, the election went ahead, and the Applicant was ranked eighth in the election of Judges for the FID, behind the 2nd Respondent who was ranked seventh.

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62. It was further the evidence of the Intervener that, on 7th January 2025, Mr. S. D Khundoo, Principal Analyst, Co-operation, Regional Integration Division, Ministry of Foreign Affairs, Regional Integration and International Trade of Mauritius, notified the Respondent that the judge-elect, the 2nd Respondent, would not be able to take up the position of Judge of the FID.
63. The Intervener alleges that the Respondent did not notify the Applicant of the vacancy created by that withdrawal, despite the Applicant having been next in line immediately after the withdrawn judge-elect, the 2nd Respondent.
64. It is the Intervener's submission that the 2nd Respondent, having formally withdrawn and declined to take up the position, became ineligible for consideration for the position of Judge of the Court.
65. In the same vein, the Intervener submits that the 2nd Respondent is ineligible to be nominated and appointed as a Judge of the Court under Article 20(2) of the Treaty.
66. That the 2nd Respondent's illegibility is grounded on the fact that she is a retired Judge in Mauritius, thus ineligible to hold high judicial office in Mauritius pursuant to Article 78(7) of the Constitution of Mauritius as read with section 3 (2) of the Courts Act of Mauritius.
67. To buttress its submissions, the Intervener relies on the witness testimony and evidence adduced.
68. The sole witness for the intervener was Hon Nyambura Mbatia, current Registrar of the CCJ. She is a member of the Law Society of Kenya as well as the East African Law Society. She was present the day of the impugned election of judges. She adopted the Intervener's statement through both her witness statement and her oral testimony.
69. To the question from Learned Counsel for the Intervener about what happened on 21st November 2024, the witness relates a series of events on that day. She states as follows:

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“... I was in that meeting, for the record, Honorable Judges. I was in that meeting, and on that day, of course, the elections started on the floor of the meeting, and during that meeting, as the elections were going on, a candidate, the Republic of Burundi submitted a name from a person that had not been on that list that was circulated the previous day. And as I've mentioned in paragraph 11, the Minister of Justice from the Republic of Uganda raised an issue and said, this is rather unprocedural to receive a name on the floor of the house, on the floor of the meeting, that had not been circulated before as per the election rules of judges, which I believe the Honorable Judges have had a look at. And so he raised the issue, but I remember him saying it is unprocedural, but you know, he just let it go, but he noted the lack of, the fact that it was unprocedural for a name to be submitted on the floor of the house of the meeting, and without a CV. There was no CV for the candidate from the Republic of Burundi.”

70. Furthermore, the witness testified that, despite the complaint, *“the elections went on and the name without a CV went ahead and was placed among the nominees that were to be elected that day”* and there was lobbying on the floor as the election was about to take place.

71. On the lack of CV of the Burundian nominee, the witness testified that:

- i. There was no reference to a *Note Verbale*, a formal or diplomatic note, from the Government of Burundi formally forwarding a CV and the email nominating the candidate; and
- ii. There was no attachment on the face of the email from Burundi to the Secretary General. The email referred to the CV attached but it did not show as an attachment icon on the email.

72. To the question posed by the Court that, if the CV had not been sent with the email or it had not been sent through under cover of a *Note Verbale*, but it had simply been sent as an email, whether the nomination would have been complete, the witness, answered as follows:

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“ I don't think so, Judge, and I'll tell you why. Because this is not about the sender, even though the sender from what we are seeing might have been the Minister, but this is supposed to be the government; from the government of the Republic of Burundi to the Secretary General, and that actually as submitting their nominee for position of Judge. So, that if it's not under cover of a note verbale, then the officialness of it is questionable. If it is not under cover of a note verbale because that's what makes it official; official diplomatic communication from one diplomatic mission to another.”

73. As regards the representation of Ethiopia during the judges' election process, the Intervener's witness states that, on the day of the election, there was no delegate from Ethiopia.

74. Concerning the elected judge from Mauritius, the 2nd Respondent the witness recalled the letter sent by Mr S. D. Khundoo of Mauritius, to the Secretary General informing her that the 2nd Respondent would not be able to accept the position of Judge of the FID of the Court on account of personal circumstances.

75. Following that communication, the witness stated that the first thing she did was to discuss with the Judge President of the CCJ about the letter and about this development, and they agreed that the next candidate in terms of votes garnered ought to be considered as the elected seventh judge of the FID.

76. According to the witness, following the discussion with the Judge President, and under her direction, she wrote a letter on 27th January 2025 to the Secretary General proposing that first she confirms from the 13th candidate, the Applicant in the instant case, considering the overall vote for the CCJ, whether he was still interested in serving on the Court and, if in the affirmative, then circulate a no-objection letter to all the members of the Electoral College who were present on the day of election.

77. In addition, the witness informed the Court that the Mauritian COMESA Desk officer, Mr. Khundoo, never sent an email to the Secretary General, or any communication recanting the withdrawal of the 2nd Respondent.

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78. The Intervener's written submissions set out the issues to be determined. These are as follows, verbatim:

"a. Whether there was a vacancy by virtue of the Communication from the Republic of Mauritius dated 7th January 2025.

b. Whether the Secretary General acted ultra vires in her communication to the Applicant dated 19th February 2025.

c. Whether there were illegalities and irregularities in the period before the election, during the election and after the election of CCJ Judges.

d. Whether the 2nd Respondent was eligible to be nominated a Judge of COMESA Court of Justice.

e. Appropriate reliefs to be granted."

79. Counsel for the Intervener elaborated on each of the issues raised.

a. *Whether there was a vacancy by virtue of the communication dated 7th January 2025 from the Republic of Mauritius.*

80. It is the Intervener's submission that, during the hearing, it became apparent and undisputed that the Republic of Mauritius, through its coordinating Ministry of Foreign Affairs, Regional Integration and International Trade, did communicate to the Secretary General on 7th January 2025 that its judge-elect (the 2nd Respondent) had been withdrawn, and that the same was confirmed again on 27th January 2025.

81. In addition, Counsel for the Intervener states that, during the hearing, it became apparent that the Secretary General had alleged that the Republic of Mauritius had recanted the withdrawal.

82. The Intervener's position is that the Respondent did not furnish any evidence to support this allegation. Therefore, the Intervener submitted that there was a

vacancy created on 7th January 2025 when the Republic of Mauritius (with the consent of the 2nd Respondent) communicated to the Secretary General regarding the withdrawal of the 2nd Respondent's election due to personal reasons. According to the Intervener, the letter of 7th January 2025, from the coordinating Ministry of Mauritius, was a lawful and valid communication.

83. Concluding her written submission on the issue, Learned Counsel for the Intervener was of the view that a vacancy was created on 7th January 2025 when the Republic of Mauritius notified the Secretary General of the withdrawal of the 2nd Respondent.

b. *Whether the Secretary General acted ultra vires in her communication to the Applicant dated 19th February 2025.*

84. On the second issue raised by the Intervener, Learned Counsel submitted that the Secretary General acted *ultra vires* in her communication to the Applicant dated 19th February 2025 regarding the withdrawal of the 2nd Respondent, where she stated:

"... COMESA did receive formal correspondence from the Republic of Mauritius, dated 7th January 2025, withdrawing the Judge elect Hon. A. F. Chui Cheong from appointment to the COMESA Court of Justice First Instance Division. However, on 28th January 2025, the Republic of Mauritius sent communication to the COMESA Court of Justice retracting the correspondence dated 7th January 2025, effectively restoring status quo ante. This, therefore, meant that there is no vacant seat on the bench."

85. The Intervener submitted that, as at 7th January 2025, a vacancy was created because of the 2nd Respondent's withdrawal. If the vacancy were to be filled or recanted, it could only be done by the Electoral College pursuant to the Election Rules .

86. The Intervener maintains that the Secretary General has no powers under the Treaty and the Election Rules to fill a position or process a recanting of a withdrawn judge-elect so as to restore the *status quo ante*.

87. In conclusion, the Intervener submitted that the Secretary General acted beyond the powers given to her under the Election Rules by purporting to accept the recanted withdrawal of the 2nd Respondent and restoring the *status quo ante*.

C. *Whether there were illegalities and irregularities in the period before the election, during the election and after the election of CCJ Judges.*

88. It is the Intervener's submission that there were illegalities and irregularities committed by the Respondent before the elections, during the elections, and after the elections, in breach of the Treaty and the Election Rules.

89. The Intervener is of the view that the procedures for election of Judges to the Court are designed to align with international standards that safeguard judicial independence.

90. To buttress her argument, Learned Counsel for the Intervener relied on the UN Basic Principles on the Independence of the Judiciary (1985) that emphasize that judicial appointments must be based on integrity, competence, and relevant qualifications, and must be free from discrimination or improper motives.

91. In the same vein, she referred to Principle 2 of The Burgh House Principles on the Independence of the International Judiciary that provides as follows:

"Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations. Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process."

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92. Based on the foregoing international standards, as read with the Treaty and the Election Rules, and relying upon the testimony of the Intervener's witness, the Intervener urged the Court to examine the process of the election of the judges in order to determine whether transparency was impaired and whether the Treaty and the Election Rules were complied with.

d. *Whether the 2nd Respondent was eligible to be nominated a Judge of the COMESA Court of Justice.*

93. The Intervener submitted that the 2nd Respondent was not eligible to be nominated and elected as a CCJ Judge. She argued that eligibility concerns the qualifications that an individual must meet to be appointed as a Judge of the Court. To fortify her stance, Learned Counsel for the Intervener relied on Article 20(2) of the Treaty that provides that:

"The Judges of the Court shall be chosen from among persons of impartiality and independence who fulfil the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence:

Provided that no two or more Judges shall at any time be Nationals of the same Member State."

94. According to the Intervener, the 2nd Respondent is ineligible to hold high judicial office in Mauritius, as her CV filed in Court showed that she had retired from the Supreme Court of Mauritius eight years previously at the age of 67 years.

95. The Intervener submitted that a textual reading of Article 20(2) of the Treaty creates the rule that it would be unlawful for a candidate to be appointed to serve as a CCJ Judge if the candidate is ineligible to hold high judicial office in the candidate's country.

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96. In addition, Learned Counsel for the Intervener relies on Article 78(7) of the Constitution of Mauritius, read together with Section 3(2) of the Courts Act of Mauritius.

97. In conclusion, the Intervener asserts that the 2nd Respondent is not eligible to hold high Judicial Office in Mauritius and consequently was not eligible to be appointed a CCJ Judge under Article 20(2) of the Treaty. That also the 2nd Respondent is not a jurist of recognized competence for the purpose of the CCJ. The Intervener refers on this point to a number of authorities, *inter alia*, **Malawi Mobile v COMESA (Reference No. 1 of 2017)**.

e. Appropriate relief to be granted

98. On this issue, the Intervener submitted that, since it has been shown that there was a vacancy created on 7th January 2025 as a result of Mauritius' communication to the Respondent, and because it had been demonstrated that there were irregularities and illegalities committed during the election, and that the 2nd Respondent was not eligible to be nominated as Judge under Article 20(2) of the Treaty, the Court could award the orders sought, or appropriate relief within the confines of the orders sought, in accordance with the circumstances.

99. To buttress the prayer, the Intervener relied on the case of **Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community, EACJ Appeal No. 2 of 2017 at para. 35** where the Appellate Division of the East African Court of Justice stated as follows:

“The Court is the guardian of the Treaty and is charged with ensuring adherence to the law in the application of and compliance with the Treaty. In plain language, it is the Court's duty to ensure that the Partner States and other duty bearers under the Treaty march in step with the Treaty and any breaches thereof are remedied as may be appropriate in the circumstances.”

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100. Based on the foregoing authority, the Intervener urged the Court to grant appropriate remedies within the purview of the orders sought. In particular, that should the Court find that there were illegalities and irregularities which were committed, it could annul the election of 21st November 2024.

101. In the same vein, the Intervener urged that the Court be satisfied that there was a vacancy created by the communication of Mauritius of 7th January 2025, to declare the vacancy as sought, and order the Electoral College to fill the vacancy within the purview of the Election Rules.

102. That, in granting an appropriate remedy, the issue whether the Court can grant the prayer to the extent of annulling the election affecting other judges-elected whose election has not been questioned and who had not participated in these proceedings, the Intervener submitted that it is within the jurisdiction of the Court to issue such a remedy.

103. Specifically, the Intervener prays the Court that if it finds that there were illegalities which breached the Election Rules and the Treaty, such an order can issue.

104. In the same breath, the Intervener prays that if the Court is of the view that illegalities override principles of natural justice, then the Court could nullify the election without hearing the other affected judges-elect.

F. RESPONDENT'S CASE

Respondent's Pleadings and Procedural History

105. The Respondent filed a Statement of Reply in defence to, and denial of, the pleadings by the Applicant and the Intervener.

106. In its reply, the Respondent opposed the Reference and raised several preliminary objections which included a challenge to the Court's jurisdiction.

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However, at the hearing of the interlocutory applications, these preliminary objections were abandoned.

107. The Respondent denied that any illegalities or irregularities occurred during the election of Judges to the COMESA Court.

108. The Respondent further denied the assertions by the Applicant and the Intervener that the 2nd Respondent was not qualified to be nominated and elected as a Judge of the CCJ.

109. Regarding the duties of the Secretary General in the election of Judges, the Respondent pleaded that the Secretary General neither represented any Member State during the election process nor selected candidates nominated by Member States. The Respondent set out the duties of the Secretary General as provided under the Election Rules, as follows:

- a) Informing Member States of vacancies at the Court and inviting nominations by submitting the curriculum vitae of eligible candidates;
- b) Acting as Returning Officer for the election of Judges;
- c) Providing secretariat services to the meeting of the Electoral College;
- d) Causing minutes of the meeting to be kept and transmitting copies thereof to members as soon as possible;
- e) Preparing ballot papers for the election of judges-elect to the Appellate Division; and
- f) Preparing ballot papers for the election of judges-elect to the First Instance Division containing the names of nominees received from Member States.

110. The Respondent further pleaded that judges of the CCJ are elected purely on the basis of their CVs, in accordance with the COMESA Treaty and the Election Rules.

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111. The Respondent denied that the Secretary General shortlisted nominated candidates for election as judges and denied that the name of the Minister of Justice of Ethiopia was included in the list of candidates placed before the Electoral College in place of the Applicant.
112. The Respondent also denied the allegation that the Secretary General did not invite the Minister of Justice of Ethiopia to attend the 27th Meeting of Ministers of Justice and Attorneys General. The Respondent contended that the Minister was duly invited by letter to attend the meeting.
113. The Respondent denied receiving any nomination from the Republic of Burundi on the floor of the Electoral College.
114. The plea by the Intervener alleging that the 2nd Respondent was ineligible for election as a Judge of the CCJ on the grounds that she had retired and had declined to assume the position was equally denied by the Respondent.
115. The Respondent denied that Article 20(2) of the Treaty, as pleaded by the Intervener, governs the eligibility of candidates for election as Judges of the CCJ. The Respondent further pleaded that Member States' Constitutions do not constitute a legal framework applicable to the COMESA Electoral College in the election of Judges.
116. The Respondent reiterated that the nomination of candidates for election as Judges of the CCJ is a national prerogative of each Member State.

Procedural Developments Concerning the 2nd Respondent

117. Pursuant to the Court's Order dated 25th April 2025, the Applicant was granted leave to serve the 2nd Respondent with all pleadings. The Applicant subsequently served the 2nd Respondent with the Reference by email on 29th April 2025. However, that service on the 2nd Respondent was deemed inconclusive.

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118. By a further Order dated 3rd June 2025, the Court directed the Applicant to re-serve the 2nd Respondent by DHL courier with the Reference and pleadings.
119. The 2nd Respondent was duly served on 6th June 2025 with the Court's summons, Reference, and pleadings. Despite such service, she failed to file a Defence as required under Rule 27(1) of the COMESA Court of Justice Rules of Procedure, 2016 (the CCJ Rules of Procedure).
120. The 2nd Respondent further failed to attend Court on 20th to 22nd October 2025, the dates that the full hearing of the matter took place.
121. Accordingly, and in accordance with Rule 27(5) of the CCJ Rules of Procedure, the Court proceeded to hear the matter in the absence of the 2nd Respondent.
122. The Respondent relied on the evidence of Mr Gabriel Mthokozisi Sifiso Masuku. Mr Masuku is the Director, Legal and Corporate Affairs and Legal Counsel of COMESA. The Legal and Corporate Affairs Division is the convener of a statutory sectoral meeting on legal affairs. That office facilitates preparation of letters of invitation that are sent to Member States to attend annual meetings of the Committee on Legal Affairs.
123. In his evidence in chief, Mr Masuku adopted and relied on his written statement dated 21st October 2024. He began his testimony by stating that the facts he would testify to in the matter had come to his personal knowledge as the Director of Legal and Corporate Affairs responsible for coordinating the convening of the 27th Meeting of the Ministers of Justice and Attorneys General and receipt of nominations of candidates for election as Judges of the Court.
124. He stated that, on or about 5th April 2024, the Secretariat sent, through email, correspondence to all COMESA Member States, including Ethiopia, calling for nomination of a candidate for election to serve as a Judge of the CCJ effective 6th June 2025.
125. Further, on 3rd October 2024, the Secretariat sent an invitation to Ethiopia to attend the 27th Meeting of the COMESA Ministers of Justice and Attorneys General which was scheduled to take place on 21st November 2024. On 21st October 2024,

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the Secretariat received a communication from Ethiopia nominating the Applicant as a candidate for election to serve as a Judge of the Court. Ethiopia was, in the same letter of 3rd October 2024, invited to attend the 28th Meeting of the Committee of Legal Affairs scheduled for the 17th to 20th November 2024. The Ethiopian Minister of Justice did not attend that meeting and also did not attend the meeting of 21st November 2024 where the election took place of judges to serve at the CCJ from 6th June 2025.

126. On the day prior to the election of judges, the Legal and Corporate Affairs Division prepared a summary list of received nominees and relevant documents and shared them with Member States. Two queries were raised regarding the list, firstly in respect of the missing name of the Burundian candidate and, secondly, the insertion of the name of the Minister of Justice of Ethiopia instead of the Applicant's name as the candidate of Ethiopia. It was confirmed by Mr Masuku that the Minister of Justice of Burundi had sent his country's nomination by email to the Secretary General, copied to Mr Masuku, on 30th July 2024 but his name was missing from the list of candidates. Mr Masuku referred to those errors as bona fide and clerical mistakes, which he said were corrected, and a rectified list was prepared and disseminated before the election. At the conclusion of the election, Justice Sium Tekle Belete (Eritrea) and the Applicant herein, Mr Tewodros Getachew Tulu, were not successful.

127. The election was carried out under the Election Rules. At the conclusion of elections, the Electoral College recommended the names of the judges-elect for endorsement by the Council of Ministers and submission to the Authority for appointment in line with Treaty provisions.

128. On 29th November 2024, the Applicant wrote to the Secretary General submitting a formal complaint on a number of issues regarding the election. No formal complaint was however received by the Secretariat from the Ethiopian Government.

129. The Mauritian candidate, the 2nd Respondent, was ranked the 7th judge amongst the judges elected to sit in the FID. However, on 7th January 2025 the Republic of Mauritius wrote informing the Secretariat that the 2nd Respondent was

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being withdrawn as a candidate for the position of judge. It is the Respondent's case that the withdrawal of the 2nd Respondent's candidacy was recanted via communication of 28th January 2025 sent by the Republic of Mauritius directly to the Court.

130. At the conclusion of his evidence in chief, Mr Masuku was cross examined on behalf of the Applicant by Learned Counsel, Mr Amol.

131. Mr Masuku confirmed that his office was an extension of the office of the Secretary General's office. His office also supports all the organs of COMESA, including COMESA Member States. In that regard, his office handles all legal matters, for example, drafting legal instruments, provision of legal advisory services and generally supporting the Secretary General's office. His office however has not provided legal guidance following the withdrawal of the 2nd Respondent.

132. Mr Masuku's evidence was that, after the withdrawal of the 2nd Respondent, by letter dated 7th January 2025, Mauritius again communicated to the CCJ on 28th January 2025 and recanted the withdrawal of its candidate. He confirmed that that communication of recanting the withdrawal had not been produced before the Court. He confirmed the letter dated 7th January 2025 had not been circulated to any Organ of COMESA, nor to the Electoral College, not even the Council of Ministers and since that letter was not addressed to his office, Mr. Masuku declined to speak further to it.

133. Questioned on the contents of the statement of the Intervener's witness, in particular where that witness stated that the CV of the Burundian nominee was introduced on the floor of the election meeting, leading to the Ugandan's Minister of Justice and Constitutional Affairs to raise concern, Mr Masuku conceded that the concern was not reflected in the report produced after that meeting.

134. The reason he gave for failing to list the name of the Burundian candidate was that the email forwarding the Burundian name and his CV went into his junk e-mailbox and he only retrieved it after the complaint was raised by the Burundian

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Minister of Justice. Mr Masuku did accept, however, that that same email had been copied to the office of the Secretary General.

135. The witness was cross-examined by Prof Ongoya, Learned Counsel for the Intervener. In response, he stated that his knowledge of IT was limited, and he therefore was unable to confirm that the exhibited email from the Burundian Minister of Justice, dated 30th July 2025, and the CV, was in Hyper Text Markup Language (HTML) format, which format was incompatible with email correspondence. Even after being informed by Counsel that the email had bullets and other characteristics compatible with Microsoft Word, Mr Masuku failed to confirm the same. He did however confirm that the email did not have an icon showing attachment of the Burundian candidate's CV.

136. He however was able to confirm that the email forwarding the Applicant's CV had an icon entitled CV and that the email had been acknowledged by the Secretary General.

137. He was adamant that the Secretary General's office and his office do not vet the candidates proposed by Member States. Such vetting he said was done by Member States who made the nomination.

138. He did accept that the CCJ was a stakeholder in the election process.

139. In response to further cross examination, Mr Masuku again admitted that irregularities had occurred.

140. On being re-examined by Ms Undi, Mr Masuku stated that, if issues were raised at a Council of Ministers meeting, they would feature in the minutes for escalation to the COMESA Authority. In this regard, he reiterated that Ethiopia had not officially complained about the election of judges of the CCJ. He did concede, however, that there were minor glitches relating to that election.

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G. ANALYSIS AND DECISION

141. The story of the Igbo man up a palm tree which Learned Counsel for the Applicant uses to start his final submissions, as well as the language of catastrophe he uses to describe the alleged failings of the Respondent and First Respondent in the election of judges in November 2024 (*“injustices of unfathomable proportions”; “a premeditated pattern of events designed to disenfranchise the candidacy of the Applicant”*) have put the Court in mind of *The Second Coming*, the poem of W. B. Yeats which inspired Chinua Achebe’s classic work:

“Things fall apart; the centre cannot hold / Mere anarchy is loosed upon the world.”

For “world” read “Court” and the quote is apposite in the context of this case.

142. For the Applicant, unless remedial action is taken to undo the failings of the electoral process, the very *“health and future of COMESA as a Common Market as well as the integrity and independence of the COMESA Court of Justice as a citadel of justice”* are at risk.

143. These are weighty words and beg the Court to consider the Reference as a seminal indictment on the Secretariat.

144. This is an important matter, and it raises a number of significant issues for determination which have the possibility of influencing the role of the Secretariat, the Court, and elections of Judges who serve on it. At the centre of the case are the procedures for the election of judges and whether, in the election held on 21st November 2024, these procedures were adhered to in a manner which preserved the integrity of the Court and would enable it to continue to uphold its dignity among its users.

145. The Court is indebted to Learned Counsel who appeared before it for their mastery of the facts, their professionalism in elucidating and placing these before the Court, their competence and guidance in the best traditions of the Bar, and for

their comprehensive final submissions. The Court's task has been greatly facilitated by their competence and diligence.

Procedure for the Election of Judges

146. From the evidence led and the Election Rules , the following procedure can be established for the election:

- i. The Secretariat initiates the process by writing to all Member States and asking each to propose a name for election. Names are to be accompanied by a CV of the candidate. (It has been stated that names are normally submitted to the Secretariat by *Note Verbale* although there is no legal provision for this).
- ii. Once the names are gathered, the Secretariat appoints a date for the election.
- iii. Candidates are elected by an Electoral College made up of the Ministers of Justice and Attorneys General of Member States, whether or not their States have nominated a candidate. Candidates are not present at the vote. There is no provision made for candidates to make a presentation to the Electoral College, nor for lobbying by candidates or members of the Electoral College, although it has been alleged that lobbying did take place on the floor of the meeting in respect of the Burundian candidate at the election.
- iv. There is no vetting of candidates by Secretariat or the Court. Any vetting is left to the Member State in respect of the candidate it submits. In consequence, there is no shortlisting of candidates. All candidates proposed go forward for election.
- v. On the date of election, the Electoral College appoints a bureau consisting of a Chairman, Vice-Chairman and Rapporteur. Once the meeting is quorate, the election proceeds. Each member of the Electoral College has one vote.

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- vi. The election proceeds on the basis of assessment of the CVs of the candidates only. The CVs are circulated to members present at the meeting before the election takes place. (There is no consensus as to whether this should be in good time for members to consider before the election or on the day of the election, and then only to members present).
- vii. The Secretary General acts as Returning Officer for the election. He or she prepares the ballot papers. These include the names of the nominees, the identity of the Member State nominating each candidate, the official language(s) of the nominees, their current occupation and the legal system used in their State.
- viii. Election is in two rounds, the first for the AD and the second for the FID. In the first round, the electors choose five candidates, at least two of whom must be from a different legal system than the other three. The one receiving the highest number of votes becomes the Judge President. In the second round, the electors choose seven candidates, at least three of whom must be from a different legal system than the other four. The one receiving the highest number of votes becomes the Principal Judge.
- ix. Motions and proposals, with or without notice, or opinions, may be made or sought by members of the Electoral College during the election. These will be decided by the members. The Chairman rules on questions of procedure.
- x. The Secretary General, as Returning Officer, ensures that minutes of the meeting are kept and circulated to members of the College after the meeting. (Despite this requirement, minutes are not kept and only a report of the meeting is prepared and circulated. In this matter, and because of failure to keep minutes, the Court was deprived of a primary source of information about what transpired at the meeting).
- xi. In any procedure not provided by the Election Rules, the Electoral College will determine the procedure to be followed.

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Issues for Determination

147. The Applicant and Intervener have each proposed a set of issues for determination and from these the Court has discerned the following.

What is the effect of the lack of participation of the representative of Ethiopia at the election?

Was Ethiopia properly notified of the election?

Was the omission deliberate?

148. It is common cause that no Ethiopian delegate was present at the election of judges to the Court. The Applicant alleges a deliberate act by the Respondent to exclude representatives of Ethiopia from the election. In fact, the Applicant does not mince his words regarding the electoral process as a whole. In his letter of 17th February 2025, specifically on the issue of the 2nd Respondent, he goes as far as to allege bias against Ethiopia, including from the Court:

“...[T]he way the situation was handled so far in addition to being totally unfair to me as a candidate, I'm forced to believe that it is an evidence of bias against Ethiopia and also raises questions of whether Ethiopia will get a fair trial or appeal where it is a party to any litigation in the future, as appointment of the judges is equally relevant.

I strongly believe that the process followed by the secretariat and the procedure followed to handle the situation that arises after the election, is major irregularity, determinant to the interest of Ethiopia and that needs to be redressed immediately.”

149. Mr Masuku has testified to the fact that, by letter of 25th September 2024, all Ministers of Justice and Attorneys General of Member States were invited to attend the 27th Meeting of the COMESA Ministers of Justice and Attorneys General to be

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held in Lusaka, Zambia, on 21st November 2024 and, prior to that, to the 28th Meeting of the Committee on Legal Affairs on 17th to 20th November 2024.

150. The copy of the letter of the Secretary General to the Ethiopian Minister of Justice was produced. It contains a request for the Minister to attend personally and, in the event that that is not possible, that he nominates a senior official to represent him. The letter details the programme of work of the two meetings, including the election of a new bench to the Court.

151. The Applicant denies that the letter was received. Unfortunately, the Court was not provided with proof of the sending and receipt of that letter by the Respondent. This lapse is unfortunate as it would have enabled the Court to determine the matter more clearly. On the one hand, it could mean that there was no record of the sending of the letter because it was not sent. On the other hand, the letter is identical in its addressee, and the addressee's address details, with the letter of 5th April 2024 sent to the Minister of Justice inviting nominations for election to the Court. That letter was received and the nomination of the Applicant sent.

152. Why should the letter inviting the same Minister to the election not have been sent or received?

153. Counsel for the Respondent on this point has referred to the English Court of Appeal decision in ***Constantine Line v. Imperial Smelting Corporation [1942] AC 154:***

"In general the rule which applies is Ei qui affirmat non ei qui negat incumbit probatio [Proof rests on he who affirms not he who denies]. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons"

154. The Applicant alleges that the letter was not received. The Respondent states that it was sent. On the basis of the principle in ***Constantine Line***, the burden of proving non-receipt would be on the Applicant. Once that statement was in evidence, the evidentiary burden would shift to the Respondent. The best way of

discharging that burden would have been for the Respondent to provide proof of the sending of the communication. This it failed to do.

155. On the basis of the principle that he who alleges must prove, the Court holds that the Respondent has failed to discharge the onus that it sent an invitation letter to the Ethiopian Minister of Justice to attend the elections.

156. The Ambassador testified that, as the Permanent Representative of Ethiopia to COMESA, all correspondence from COMESA are copied to him. He did not receive a copy of the letter of 25th September 2024 inviting his country's Minister of Justice to the 27th Meeting of the Ministers of Justice and Attorneys General (at which the election of judges would occur) and the 28th Meeting of the Committee on Legal Affairs.

157. The Ambassador testified that, at the eleventh hour, he was asked by his Minister of Justice to see what he could do to attend the meeting. His calls to Mr Masuku were not returned and his request to attend virtually was declined on the basis, which the Court accepts, that attendance at the election of judges must be in person. In the event, Ethiopia was not represented at the election. The Applicant's position is that this exclusion was deliberate and part of a conspiracy against Ethiopia.

158. The Court is unable to determine that the Ethiopian Minister of Justice was invited, because from the evidence before it, the Respondent failed to prove that the invitation letter was sent to the Minister of Justice.

159. However, the grievance of the Applicant is that he was prejudiced by his representative's absence from the election. The Ambassador testified that Mr Masuku had informed him that, had a representative of Ethiopia been present, the result of the election would have been different. It is most probable, with the presence of an Ethiopian delegate, that the Applicant would have scored one extra vote, taking his total to at least five. With a bit of lobbying (which the Applicant decries, at least as far as Burundi is concerned) he may have received more votes, but that is not proved. In any event, also speculative is whether he would have scored more than the next higher candidate.

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160. There is nonetheless no gainsaying that the lack of communication to Ethiopia of the meeting of Ministers of Justice was a breach of the Rules of Procedure and of the principle of procedural fairness generally. All Member States are entitled to be present and participate in the proceedings. In the words of the Intervener's submissions, "*This also violates the fundamental principle of equality and inter-dependence of member States under Article 6 (a) of the COMESA Treaty.*"

161. While the Court is not able to categorically say whether the presence of the Ethiopian Minister of Justice would have made a significant difference to the outcome of the election, it decries the lapse on the part of the Secretariat which meant he was not present. On this issue, the Court makes a recommendation later about the method of giving and recording notice of meetings.

162. The Court does not share the view of the Ambassador that he should have been copied in the invitation to the meeting. The communications were directed specifically at Ministers of Justice and Attorneys General, not Member States generally. The invitation of 25th September 2024 from the Secretariat clearly encouraged the Minister to attend personally. It is only the Ministers of Justice who were authorised to nominate a senior official to represent them, and then only if they could not attend personally.

163. The Court notes that Ethiopia has not made a formal complaint, although the Ambassador testified to having made one at the meeting of the Council of Ministers a week later, but which was neither recorded nor pursued. In his statement, the Ambassador states that the complaint he made concerned the capacity of candidates for election as well as the inclusion of a candidate at the last minute. The Ambassador felt that the moment he had objected to the Council about the election, his objection should have been escalated to the Authority in accordance with the provisions of Article 9(7) of the Treaty.

164. The Court considers that the absence of the Minister of Justice of Ethiopia from the election of judges through no fault of his own was sufficiently serious to warrant recommendations from this Court to address the failure.

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What is the effect of lapses by the Secretariat with regard to the wrong name of the Ethiopian candidate, the lack of his CV, the omission of the Burundian candidate from the list, the last-minute inclusion of the Burundian candidate, and the late notification of the CVs of both?

165. The call to Member States to forward nominations for election to the Court was made by letter dated 5th April 2024. That letter contained two requirements and information. These two requirements were:

- i. That nominations should comprise the name of the candidate and a curriculum vitae.
- ii. That nominations should be submitted by 30th July 2024 via email to the Secretary General and to Mr Masuku.

166. The information supplied comprised in that letter a background paper with information about the election process, the Rules of Procedure for the Election of Judges to the Court, and a partial reproduction of Article 20 of the Treaty. The letter indicated that the election would be held in the last quarter of 2024 to coincide with the meeting of Ministers of Justice and Attorneys General, that the elected Judges would serve from 6th June 2025, and that after closure of the receipt of nominations of candidates, a dossier comprising the nomination letters and the CVs of all nominees would be circulated to all Member States for their consideration in preparation for the election.

167. The Court has not been supplied with information as to when the nominations of the candidates, other than those from Burundi and Ethiopia, were received.

168. On the eve of the election, Mr Masuku created a link which included a list of candidates and their CVs and sent this to all Ministers of Justice and Attorneys General. On the day of the election, he projected the list to the members who had constituted themselves into an Electoral College in accordance with the Election Rules.

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The candidate from Burundi

169. It was revealed by Mr Masuku in evidence that the nomination of the Burundian candidate was received on the deadline date of 30th July 2024. That nomination comprised an email emanating from the Minister of Justice of Burundi (but using a Yahoo domain) addressed to the two email addresses contained in the call for nomination letter of 5th April 2024. The email message stated that Mr Baroreraho Onesphore was being nominated. It also mentioned that a CV was attached, although the email produced did not show any attachment. There is a dispute as to when and in what manner the CV of the Burundi candidate was received by the Secretariat. Mr Masuku said that the CV had gone to the junk folder on his computer but, when he was later informed that the CV had been sent on the deadline date, he was able to retrieve it.

170. On the date of the election, the Chair of the Electoral College, the Burundian Minister of Justice, noticed that the Burundian candidate's name did not appear on the list of candidates for election. Mr Masuku testified that, as soon as this was realised, he rectified the error and circulated the CV of the candidate to all members of the Electoral College. The Applicant criticises this as violating the Election Rules, particularly Rule 7 which requires that the CVs of candidates be circulated among Member States before the election. To this complaint, Mr Masuku responded in evidence that all that was required was that the CVs be circulated to all members present. This was done, albeit in the case of Burundi on the day of the election itself. The Intervener's witness, the Hon Registrar of the CCJ, testified that in fact the nomination of the Burundian candidate was received on the floor of the meeting of the Electoral College without a CV. The Ugandan Minister of Justice and Constitutional Affairs raised some reservations about that, but the election went ahead.

171. The Applicant aligns himself with the testimony of the Intervener's witness and submits that the receipt of the nomination of the Burundian candidate on the date of the election itself violates the rules of procedural fairness and reveals bias. As against that argument, the Court has the testimony of Mr Masuku that the

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nomination had been received on the date of closure of nominations, 30th July 2024.

172. The Court does not accept the Respondent's evidence that there was a nomination and CV of the Burundian candidate made before election and accordingly this was in breach of Rule 7 of the Election Rules which provides that CVs must be circulated before elections.

The candidate from Ethiopia

173. Notwithstanding the deadline for nominations, a *Note Verbale* dated 17th October 2024 containing the nomination of the Applicant as the Ethiopian candidate to the Court was sent by email to the Secretariat. This is not in issue because Mr Masuku acknowledged in his testimony that the deadline for the receipt of nominations was indicative only and not rigid. While there is no indication in the letter of nomination that the CV of the Applicant was also attached, the CV was subsequently forwarded by email on 21st October 2024. For some reason, this CV was not recorded by the Respondent, and the Applicant was requested to send another copy. This was done by email on 20th November 2024, the day prior to the election. The CV was circulated on the day of the election.

174. There is no indication, notwithstanding the statement in the letter calling for nominations that the Secretariat would circulate a dossier containing, inter alia, the CVs of candidates to all Member States, that this was done. The testimony of Mr Masuku is to the effect that the circulation was only done to Ministers and Attorneys General attending the election, and that only the day prior and, in the case of Burundi, and maybe Ethiopia, on election day itself.

175. Despite the irregularities, and although best practise would require otherwise, the Court finds that all candidates were substantially treated the same in the manner of dissemination of their CVs to the members of the Electoral College. At most, the CVs of the other candidates were received one day earlier than those of the Burundian and Ethiopian candidates. While this is open to criticism, it does not appear to the Court to be a fatal lapse.

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176. There is a further complaint by the Applicant that when the list of candidates was circulated on the day prior to the election, the Applicant's name did not appear. Instead, it was the name of the Ethiopian Minister of Justice which was listed. Mr Masuku testified that this was an error, which was rectified as soon as his attention was drawn to it. The election proceeded with the correct name of the Applicant.

177. What is the effect of these irregularities?

178. The Applicant submits that they reflect poorly on the Institution and need to be corrected for the maintenance of the integrity and authority of the Court as the judicial arm of COMESA. Because of the importance of the Court as a COMESA Organ, it was imperative that all processes reflecting on the Court be seen to be fair, transparent and carried out in accordance with the Treaty.

179. In his second prayer, the Applicant seeks the annulment of the elections of the Burundian and Mauritian candidates, albeit in the case of the Burundian candidate he was not named, but inferred to by implication, nor was he made a party to this action. Although he could have done so, the Applicant did not pray for the whole election to be annulled. In respect of the Burundian candidate and with due regard to the principles of natural justice, the Court will say no more as he was not made a party to this action.

180. With regard to the Applicant's candidature, the Applicant submits that he was handicapped for two reasons vis-à-vis the other candidates: his CV was only circulated on the day of the election and, save for the Burundian candidate, those of other candidates had been circulated the day prior, and his name was only corrected on the day of the election. The Intervener submits that the late circulation of the Applicant's CV meant that the Applicant "*would not have enjoyed his right to participate equally and competitively with other nominees.*"

181. On this point, Learned Counsel for the Respondent relied on the provisions of Rule 7 of the Election Rules and submitted that "*for this Court to read into "before the election takes place" an additional requirement that CVs must be circulated*

some "reasonable" number of days in advance would violate [a] fundamental principle. It would constitute adding words to the text that the framers did not include." For him, circulation on the day of the election was in compliance with the Election Rules.

182. The Court finds that the late circulation of the CV of the Applicant, in itself, handicapped his chances in the election. The Court is of the opinion that more time should be given to members of the Electoral College to peruse and take cognisance of the quality of the candidates prior to election, in particular because the CVs are the sole documents on which they are to decide as between candidates. Such a procedure was envisaged in the letter of 5th April 2024 calling for nominations. It is regrettable that it was not followed through.

183. On this point, the Court makes a recommendation below for future reference.

Capacity of 2nd Respondent to be appointed

184. The 2nd Respondent was nominated by her Member State, Mauritius. In the election, she garnered 8 votes and was placed seventh in ranking of votes. She was therefore elected to the FID.

185. The Applicant challenges 2nd Respondent qualification as a candidate and the witness of the Intervener deponed that the 2nd Respondent was retired in her Member State and was consequently "*ineligible for nomination, election and appointment.*"

186. In his second prayer to this Court, the Applicant seeks the annulment of the election of the 2nd Respondent by reason of her incapacity due to age.

187. The Applicant contends that the appointment of the 2nd Respondent was unlawful and contrary to the provisions of the Treaty, on the ground that she had been in retirement in her country since 2017 and, therefore, was not "*qualified to hold high judicial office in her Member State*" within the meaning of Article 20(2) of the Treaty.

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188. The Applicant seeks, inter alia, a declaration that the appointment of the 2nd Respondent and her election as a judge is null and void, owing to her ineligibility to be elected, and an order that her position be declared vacant.

189. It is noted that the election of the 2nd Respondent is challenged by the Applicant on the sole ground of her age and retirement from judicial office in Mauritius and not on the ground that she is not qualified as a jurist of recognised competence. In its Amended Statement of Intervention, the Intervener also limits its pleadings to the same challenge.

H. ISSUES FOR DETERMINATION

190. Having considered the pleadings and submissions of Learned Counsel, the Court identifies the following issues for determination on this complaint:

- i. Whether retirement from judicial service in a Member State disqualifies a person from appointment as a judge of the CCJ under the first limb of Article 20(2);
- ii. Whether the appointment of 2nd Respondent contravened the Constitution of Mauritius or the Treaty; and
- iii. Whether the Applicant has established sufficient grounds for the removal of the 2nd Respondent from the list of elected judges.

I. APPLICABLE LAW

191. Article 20(2) of the Treaty cited hereinabove in paragraph 93 is the law to which this issue applies.

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J. SUBMISSIONS OF PARTIES

192. The parties have made full submissions on the issue of the capacity of the 2nd Respondent for nomination, election and appointment to the Court. Despite the self-imposed limitation by the Applicant on the capacity of the 2nd Respondent in terms of her age and retirement, the parties have widened the scope of the challenge to her election in their final submissions so as to extend the challenge to her capacity as a jurist of recognised competence. We shall restrict ourselves to the issues raised in the pleadings in accordance with Rule 33 (1) of the CCJ Rules of Procedure which states that:

“Rule 33

Departure from Pleadings

(1) No party may, in any pleading, make an allegation of fact, or raise any new ground of claim, inconsistent with that party’s previous pleading in the same case.

(2) Sub rule (1) shall not prejudice the right of a party to apply for leave to amend any previous pleading.”

193. The Rule prohibits departure from pleadings without the leave of the Court. No leave was sought to amend pleadings in accordance with Rule 33 (2).

Whether the age and retirement of the 2nd Respondent bars her from nomination, election and appointment.

194. Learned Counsel for the Applicant submitted that the 2nd Respondent,

“...does not qualify to be appointed to high judicial office in the Republic of Mauritius solely on the basis of her age; she served until retirement, had an extension of her tenure in accordance with the law, and eventually retired. Article 78 of the Constitution of Mauritius which governs tenure of judges does not

envisage a circumstance under which a judge who has already proceeded on retirement can be recalled to the service.”

195. As for the Intervener, Learned Counsel submitted that the 2nd Respondent is ineligible to hold a high judicial office in Mauritius as her CV revealed that she had retired at the age of sixty-seven years from the Supreme Court of Mauritius eight years previously.

196. For Learned Counsel, a textual reading of Article 20(2) creates a rule that it would be unlawful for a candidate to be appointed to serve as a judge if the candidate is ineligible to hold a high judicial office in his or her Member State.

197. According to Article 78(7) of the Constitution of Mauritius, read with Section 3(2) of the Mauritius Courts Act, the retirement age for a person holding the office of Judge of the Supreme Court is sixty-seven years. In consequence, the 2nd Respondent, being a retired Judge, is ineligible to be appointed a judge at the Supreme Court of Mauritius, having already retired and, by virtue of that handicap, was not eligible to hold high Judicial Office in Mauritius and to be appointed a Judge of CCJ under Article 20(2) of the Treaty.

198. For the Respondent, Learned Counsel was content to rely on the previous determination of this Court in **Malawi Mobile** (*supra*) and on the principle of *res judicata*.

199. The 2nd Respondent did not file a defence and did not appear before the Court to defend her election, or her capacity for election. The Court was handicapped in this context and has reviewed the law and the capacity of the 2nd Respondent only on the materials and arguments before it.

K. THE COURT’S ANALYSIS

200. The Applicant contends that the 2nd Respondent, having retired and completed an extended tenure in 2017, ceased to be qualified to hold high judicial office in Mauritius but the court is of the view that retirement terminates domestic service,

not professional qualification. In the case of the 2nd Respondent, who is past the age eligibility to be appointed to high judicial office in Mauritius, she does not qualify for appointment under the first limb of Article 20 (2) of the Treaty.

201. The Applicant has relied on Article 78 of the Constitution of Mauritius to support his position. This Article, which limits reappointment of retired judges domestically, relates to administrative recall within service, not to international eligibility under the Treaty. The CCJ draws its authority from the Treaty, not from domestic constitutional limitations of Member States. Article 78 of the Constitution of Mauritius, the relevant part, reads:

“1. Subject to this section, a person holding the office of a judge of the Supreme Court shall vacate that office on attaining the retiring age:

Provided that he may, with the permission of the President, acting in his own deliberate judgment, in the case of the Chief Justice or in any other case, in accordance with the advice of the Chief Justice, continue in office for such period as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age....

7. The retiring age for the purposes, of subsection (1) shall be the age of 62 years or such other age as may be prescribed by Parliament:

Provided that a provision of any Act of Parliament, to the extent that it alters the age at which judges of the Supreme Court shall vacate their offices, shall not have effect in relation to a judge after his appointment unless he consents to its having effect.

202. Article 78(7) of the Constitution of Mauritius is read together with Section 3 of the Courts Act of Mauritius, which the relevant part reads:

“2. (a) Subject to paragraph (b), the retiring age of a Judge of the Supreme Court shall, for the purposes of section 78 (7) of the Constitution, be the age of 67 years.

(b) Any person holding office as a Judge on 24 July 2008 may elect to retire at the age of 62 years.”

203. The Court does not need to address the plea of *res judicata* raised by the Learned Counsel for the Respondent, save to say that it is not of the view that the plea would succeed, and this for two reasons. First, the plea is limited to matters

between the same parties which is not the case here, and second, while **Malawi Mobile** determined the legal principle concerning the interpretation of Article 20(2) of the Treaty, each case must be tested against that principle anew.

204. The Court accordingly concludes that the 2nd Respondent was disqualified from appointment as a judge of the CCJ on account of her age. Had the 2nd Respondent appeared in this case she may have persuaded the Court on her qualification under the second limb of Article 20 (2) of the Treaty.

205. The 2nd Respondent's failure to attend Court was not due to lack of service. She was first served by the Applicant with the pleadings by e-mail and, because the Court was not satisfied with that service, the Court ordered the Applicant to serve the 2nd Respondent with all the pleadings filed in this case by DHL courier service. It was only after the Court was satisfied she had been served as ordered that the case proceeded for full hearing in her absence.

Effect of withdrawal of the 2nd Respondent

Best loser rule

206. As mentioned above, the evidence adduced before the Court shows that the 2nd Respondent, having been elected, her Member State, Mauritius, by letter of 7th January 2025 to the Secretary General, withdrew her from appointment as a Judge. Subsequently, on 28th January 2025, the 2nd Respondent communicated, by email, with the Court that she was ready to serve as a judge of the CCJ. There was no further communication from the Government of Mauritius, the nominating State, indicating that Mauritius' withdrawal of her appointment had been retracted. Therefore, the Court does finds that there was a vacancy as an effect of that withdrawal.

207. The Applicant, aggrieved with that development, complained to the Secretary General by letter of 17th January 2025 in the following terms:

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“Relying on the office's responsiveness and transparency in the process of appointing judges and as a candidate who got the next higher vote next to Mauritius's candidate, I was hoping to hear back from your esteemed office on the recent development, since 07th of January 2025, thereby recalling me as a candidate to immediately fill in the position. The government of Mauritius notified this update before any other procedures were conducted.

Unfortunately, that was not the case and to my shock, after a month of silence on the matter, we learnt the office sent an appointment letter to the candidate whose country officially declined to accept the position who also formally communicated the same to the secretariat of COMESA. This is completely unacceptable under any circumstance. It amounts to a grave procedural irregularity denying a substantive right of a state and its individual in breach of national and international laws and practices.”

208. To this complaint, the Secretary General responded on 19th February 2025 as follows:

“... COMESA did receive formal correspondence from the Republic of Mauritius, dated 7 January 2025, withdrawing the judge elect Hon. A.F Chui Cheong from being appointed to the COMESA Court of Justice First Instance Division. However, on the 28 January 2025, the Republic of Mauritius sent communication to the COMESA Court of Justice retracting the correspondence dated 7 January 2025, effectively restoring the status quo ante. This therefore meant that there is no vacant seat on the bench.”

209. The withdrawal from appointment by Mauritius of the 2nd Respondent as judge-elect and her subsequent communication are major issues in this Reference.

210. Briefly put, the Applicant seeks the annulment of the election of the 2nd Respondent and that he be appointed in replacement, on the basis that he was next in line in numbers of votes received in the election.

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211. This is the subject of the Applicant's first and third prayers, the first seeking a declaration that the letter of the Secretary General dated 19th February 2025 was made without the mandate of the Electoral College, and the third that, once the withdrawal of the 2nd Respondent had been made, the Applicant stood to be declared elected in lieu. In submissions, Learned Counsel for the Applicant states his position:

"Where a higher ranked candidate is not available, the next ranked candidate automatically takes up the slot. This is the practice for selection of staff at the COMESA Secretariat. It should not be different for the election and appointment of judges."

212. In response, Learned Counsel for the Respondent submits that:

"...the Applicant's attempt to bypass Rule 16 and have this Court create a "best-loser" principle violates the Treaty's allocation of institutional competences. The Electoral College is the body vested with authority to fill procedural gaps in the electoral process."

213. The Court is, in effect, being asked by the Applicant to either introduce a best-loser rule or to bump up the Applicant to the rank the 2nd Respondent obtained at the election. The Election Rules are silent on the matter. Nonetheless, in the structure of elections to the Court, there are no exclusions; all candidates remain on the ballot. This is what may have prompted the Applicant to the view that, once a candidate opts out, the next in line is called automatically to fill the vacancy.

214. The Court is of the view not to rule on this issue. This is because the Court holds the view that the election of judges to the Court is a matter purely and solely for the Electoral College. Having elected a candidate who subsequently withdraws, the procedure thereafter is a matter for the College to determine, not, with respect, this Court. In fact, the Secretary General alluded to this in her correspondence of 19th February 2025 where she says:

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“The election of judges in the COMESA Court of Justice is undertaken by Ministers of Justice and Attorneys General sitting as an Electoral College in accordance with Rules of Procedure for the Election of the Judges of the COMESA Court of Justice (2005). In that regard, whenever there is a vacancy on the bench, such is dealt with within the purview of that body.”

215. The Court respectfully agrees. If the Electoral College refuses to act, or if its decision is unacceptable to a party, then that party has the right to make a relevant application to the Court.

216. The Intervener submits that a vacancy arose among the judges-elect the moment that the Member State, Mauritius, informed the Secretary General of the withdrawal of the 2nd Respondent. Since the Treaty provides that the channel of communication between a Member State and COMESA is only through the designated ministry in a Member State and the Secretary General, the Applicant submits that it follows that any further communication not in conformity with the Treaty (in particular the 2nd Respondent's email addressed to the Court) is ineffective.

217. On the other hand, the Secretary General took the view that there was no vacancy on the Court.

218. Her view only goes so far. It does not address the real issue of what the Secretary General should do in the face of a withdrawal of a candidate.

219. The Applicant challenges the decision of the Secretary General that, because after the withdrawal of the 2nd Respondent there was email addressed to the CCJ by the 2nd Respondent intimating willingness to take up the position of a judge, there was no vacancy on the bench. He posits, at paragraph 39 of the Reference, that one of the alternative options open to the Secretary General was to refer the question of how to proceed to the Electoral College and not to accept the communication by the 2nd Respondent by that email as a *fait accompli* that the matter was resolved.

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220. The Applicant's fourth prayer is that the Secretary General acted *ultra vires* in purportedly allowing the 2nd Respondent to unilaterally fill the position from which had been withdrawn by her country of residence, Mauritius.

221. Learned Counsel for the Intervener supports the position of the Applicant and submits that, as at 7th January 2025, a vacancy was created because of the 2nd Respondent's withdrawal:

"If the vacancy were to be filled or recanted, it could only be done by the Electoral College pursuant to the Rules of Procedure for Election of Judges of CCJ 2005. The Secretary General has no powers under the Treaty and the Rules of Procedure for Election of CCJ Judges to fill a Judge position or process a recanting of a withdrawn Judge Elect to restore the status quo ante."

222. For the Learned Counsel for the Respondent,

"The [Secretary General's] letter is a formal administrative reply acknowledging the Applicant's correspondence of 17 February 2025. It merely explains the factual position surrounding the Republic of Mauritius's temporary withdrawal and subsequent retraction of its nominee. Nowhere in the letter does the SG annul, amend or purport to review the decision of the Council of Ministers; appoint remove or replace a judge; or exercise any discretion inconsistent with the Rules of Procedure for the Election of Judges (2005)."

223. The Court finds that the Secretary General had no power to determine who was validly elected as a judge and who was not. To the extent, thus, that her letter of 19 February 2025 purported to make a determination that there was no vacancy on the bench, instead of deferring the matter to the Electoral College, that was *ultra vires*.

224. Notwithstanding the foregoing, there is, happily, as is evident from the foregoing references to communications and submissions, a meeting of minds between the

Secretary General and the Intervener as to the proper process to be followed, namely referral of the matter to the Electoral College.

225. It is the Electoral College which must decide on the effect of the withdrawal of the 2nd Respondent and, depending on its decision, how to fill the vacancy created by that the withdrawal.

Cumulative effect of irregularities

226. The Applicant's case is to the effect that the election of 21st November 2024 as a whole fell short of appropriate standards. He states that, individually and collectively, the following irregularities in the process require some form of rectification and redress:

- a. His candidature was prejudiced and disenfranchised by the failure to have his name and CV circulated to the delegates prior to the election.
- b. The mix-up of his name and that of his Minister just minutes to the election caused him prejudice and disenfranchised his candidature.
- c. The introduction of the name of the Burundian candidate on the floor of the elections, and without circulation of his CV affected the credibility of his candidature.
- d. The canvassing that went on, unchallenged by the Respondents in evidence or in their pleadings, violated Rule 7 of the election rules and denied the elections credibility.
- e. Subjecting the 2nd Respondent to the vote while it was clear on the face of her CV that she was not qualified to be a candidate in the circumstances affected the credibility of the vote.

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227. For the Applicant, the irregularities have a double deficit. They affected him personally but also affected the Court and COMESA generally. In his letter dated 17 February 2025 to the Secretariat raising these complaints, he said:

“Our courts are the custodians of the fundamental principles of democracy, rule of law, integrity, and transparency. Not only the court but all organs are expected to serve the members states and residents equally which is also enshrined under the treaty establishing the common market for eastern and southern Africa.”

228. For the Respondent, on the other hand,

“such irregularities were purely administrative in nature, incapable of affecting the substance or outcome of the election, and cannot justify nullifying the valid appointment of Judges to this Honourable Court”, and no evidence had been led “to demonstrate that any alleged omission, whether in the form of a missing document, the timing of circulation, or the participation of one Member State had any material bearing on the outcome of the election.”

229. Learned Counsel for the Respondent relied upon the authority of ***Morgan v Simpson [1975] QB 151***, where Lord Denning MR held that elections are not voided by trivial errors unless these are shown to have affected the result:

“Collating all these cases together, I suggest that the law can be stated in these propositions:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case, 2 O'M. & H. 77, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.

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2. *If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the Islington case, 17 T.L.R. 210, where 14 ballot papers were issued after 8 p.m.*

3. *But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated. That is shown by Gunn v Sharpe [1974] Q.B. 808, where the mistake in not stamping 102 ballot papers did affect the result."*

230. For Learned Counsel for the Respondent,

"...even taking the Applicant's and Intervener's allegations at their highest, the irregularities complained of are de minimis, procedural, and non-prejudicial. They do not and cannot justify nullifying an electoral process of such institutional gravity as the appointment of Judges to the COMESA Court of Justice."

231. The process of elections, as pointed out by the Learned Counsel for the Applicant, is not confined to *"the act of casting ballots; it is the totality of processes starting from nomination, campaigns/assessment, casting of ballot and the processes following the casting of the ballot."*

232. The Court is not persuaded, however, that the lapses during the election of 21st November 2024 are sufficiently so grave, singly or cumulatively, as to invalidate the process of the whole election in this case. The election was held substantially in accordance with the Rules, and the Court is not satisfied that the mistakes and irregularities affected the outcome such that it can conclusively say that the result would have been different had they not occurred.

233. After all, the Applicant did receive votes from delegates from Member States notwithstanding the absence of an Ethiopian representative in the process and

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notwithstanding the mix-up in his name and the late circulation of his CV. This speaks to the independence of the Ministers and Attorneys General and reinforces the democratic quality of the process.

L. RECOMMENDATIONS

234. Nonetheless, the Court is of the view that it is its duty in this judgment to provide some pointers for bettering the process of elections in the future. The Court recommends that:

- a. Firstly, a fixed date be given for the submission of nominations of candidates for election to the Court by Member States. That date should be sufficiently long to enable Member States to seek, vet and submit names. Nominations received after the date, unless for good cause shown, the decision being that of the Electoral College, should not be considered.
- b. Secondly, a clear method of submitting applications, including recorded delivery and evidence thereof, should be put in place.
- c. Third, the letters calling for candidates and invitation to the election should be sent with recorded delivery and evidence thereof kept.
- d. Fourth, curricula vitae and the list of all nominated candidates should be circulated at least one month ahead of the election to all Member States, irrespective of whether they proposed a candidate. This will allow for the vetting of candidates by the electors prior to the election.
- e. Fifth, greater care should be taken to correctly reproduce the names and CVs of candidates.
- f. Sixth, minutes of the process of the election should be prepared and circulated after the meeting.

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- g. Seventh, and for the benefit of Ministers of Justice and Attorneys General who will constitute themselves into an Electoral College, a background paper should be prepared and circulated along with the candidates' nominations and CVs, which paper should include a synopsis of the general duties of Judges of the Court, the types of cases they are asked to deal with, and a synopsis of the decision of the Court in **Malawi Mobile** and this Reference on the issue of the capacity of judges to be nominated and elected, as well as any other important decisions of the Court.
- h. Eighth, while the Court should not play any role in the election of judges, the Registrar of the CCJ does have a role in assisting the Secretariat with the preparation of the background paper and the synopsis of relevant decisions of the Court, as well as ensuring that calls for nominations and invitations to the elections are promptly issued and served. The Registry of the Court is well-resourced and has the institutional memory which may be lacking in the Secretariat.

M. DETERMINATIONS

235. Invoking the authority of **Hon. Dr. Margaret Zziwa vs. The Secretary General of the East African Community, EACJ Appeal No. 2 of 2017**, and despite the fact that the Applicant has restricted his prayers to the annulment of the election of the judge-elect from Burundi and the 2nd Respondent, the Intervener has invited the Court to consider annulling the whole election. This, on the basis of the illegalities which the Applicant has pointed out in the whole election process and on the principle that illegalities in elections override natural justice.

236. As earlier stated, the Court does not believe that sufficient reasons have been adduced for it to annul the whole election. Nor does it feel, for reasons given, that the elections of the candidate of Burundi and 2nd Respondent should be annulled by order of the Court.

237. The Court is nonetheless sufficiently concerned at the absence of the Ethiopian Minister of Justice or his designated representative from the election of judges, and

at the consequences of the withdrawal of the 2nd Respondent, to partially allow the Reference.

238. The Court is of the view that the effects of the withdrawal of the 2nd Respondent's appointment after the Electoral College had risen are not for the Secretary General to resolve. The effects are squarely in the province of the Electoral College.

239. To reiterate the Court's previous finding is that, Mauritius having by letter dated 7 January 2025 to the Secretary General had withdrawn the 2nd Respondent from her appointment as judge of the CCJ, and there being no recanting by Mauritius of that withdrawal, a vacancy of the compliment of judges at CCJ was created.

240. The Court therefore remits to the Electoral College the decision with regard to the vacancy caused by the withdrawal of the 2nd Respondent.

241. When the Electoral College reconvenes to consider the effect of that vacancy, the Secretariat should ensure that all Ministers of Justice and Attorneys General are properly invited.

242. The Court has been advised that the Ministers of Justice and Attorneys General are meeting soon hereafter for their annual meeting. This would, in its view, be a good time for them, convening as an Electoral College, to address the matter now referred to them. In the event that the Ministers of Justice and Attorneys General do not meet as planned, the Court orders them to consider the matters set out in paragraph 240 hereof within 60 days of this Judgment.

243. Insofar as the relief sought by the Applicant and Intervener are concerned, the Court makes the following findings.

244. There were irregularities and lapses in the process of gathering nominations and circulating these, as well as in ensuring that the Government of Ethiopia was represented at the elections. These should not have occurred, and they reflect badly on the Respondent as a whole. The consequences of these could have led to the annulment of the elections as a whole. Such an outcome has been averted by the decision of the Applicant to limit his prayers to the election of the Burundian candidate and the 2nd Respondent.

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245. To the extent that the Secretary General, in her letter of 19th February 2025 (erroneously stated as 18th February 2025 by the Applicant) stated that there was no vacancy on the Court following the 2nd Respondent's withdrawal, that decision was *ultra vires*.
246. The Electoral College will decide within 60 days of this Judgment to determine the filling of the vacancy in the FID following the withdrawal of the 2nd Respondent and the position of the Applicant in light of that withdrawal.
247. In respect of his claim for damages, the Applicant did not submit any evidence of any loss. In the circumstances of the Court's decision, the issue of the Applicant's claims for damages or ancillary relief do not arise. No orders are made in these respects.
248. It needs to be borne in mind that when the application for preliminary injunction was filed and brought before the Court, the Court issued restraining orders forbidding the swearing-in of the two Courts of CCJ, the AD and the FID.
249. The restraining orders were issued due to the allegations presented in that application which touched on judges-elect of AD and FID. The preliminary injunction was issued with a view of taking abundant caution, absent of the pleadings of the Respondent and the oral evidence adduced during the hearing.
250. Having considered the pleadings and the oral evidence, it becomes clear that the interest of justice will best be served in preserving the restraining orders against the swearing-in only against the 2nd Respondent. There is no legal basis for preserving the injunction against the other judges. Accordingly, the injunction shall be discharged except in respect to the 2nd Respondent. The injunction against the swearing-in of the 2nd Respondent subsists pending the filling of the vacancy left by the 2nd Respondent's withdrawal from taking appointment of a judge of CCJ.

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N. COSTS

251. The Applicant and Intervener are partially successful. The Court therefore is of the view that they should recover part of their costs in prosecuting this Reference. The Court accordingly makes an order that the Applicant and the Intervener are awarded half of their costs against COMESA Secretariat, to be claimed and taxed.

O. THE COURT'S STATUS

252. In its ruling of 9th June 2025, the Court extended the mandate of the Judges of the FID in order to complete consideration of this Reference. With this Judgment, the terms of appointment of the Judges of the FID end automatically, except where there are prayers required in respect to this Judgment in terms of Rule 70, 71 and 72 of the CCJ Rules of Procedure

253. In view of the findings and orders made, the process of taking the Oath of Office by the Judges-elect of the Court will be further delayed pending the convening of the Electoral College and its decision on the matters referred to them.

254. The Court will have to continue to function administratively until these matters are resolved. The Court therefore orders that the Judge President, Her Ladyship Lombe P. Chibesakunda, remains in office to oversee the functions of the Court until the Judge President-elect is duly and legally appointed and has taken his oath of office.

P. ORDERS

255. **The orders of this Court are:**

- a) **There being a vacancy at the COMESA Court of Justice, the Electoral College shall decide, not later than 60 days from the date of this judgment, on the effect of that vacancy created by withdrawal of A.F. Chui Cheong's appointment to the COMESA Court of Justice.**

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- b) The interim injunction issued on 16th April 2025 in as far as it relates to A.F. Chui Cheong is extended until the vacancy is filled but, in respect of all the other judges elected on 21st November 2024, the injunction is discharged.
- c) The Applicant and the Intervener are awarded half their costs to be taxed and borne by COMESA Secretariat.

IT IS SO ORDERED.

DATED this 07th day of NOVEMBER 2025 at LUSAKA, ZAMBIA



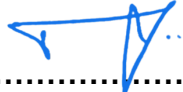
 HON. LADY JUSTICE QINISILE M. MABUZA


 - PRINCIPAL JUDGE



 HON. MR JUSTICE ALI SULAIMAN MOHAMMAD

- JUDGE



 HON. LADY JUSTICE MARY N. KASANGO

- JUDGE



 HON. MR JUSTICE BERNARD GEORGES

- JUDGE



 HON. DR. JUSTICE LEONARD GACUKO

- JUDGE



 HON. LADY JUSTICE CLOTILDE MUKAMURERA

- JUDGE



 HON. MR. JUSTICE CHINEMBIRI E. BHUNU

- JUDGE