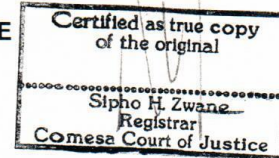


REFERENCE 1B/2000

IN THE COMESA COURT OF JUSTICE
LUSAKA, ZAMBIA



Coram: Korsah, Nyankiye, Kalaile, Sakala and
Ogoola LJJ
Registrar: S. H. Zwane Esq.

APPLICATION NO. 1D/2000

Eastern and Southern African Trade
and Development Bank (PTA BANK)

First Applicant

Dr. Michael Gondwe

Second Applicant

Versus

Martin Ogang

Respondent

For the Applicants - E. Torgbor Esq., Prof. E.F. Ssempebwa Esq.,
D. Mulira Esq., and W. D. Mungómba Esq.
For the Respondent - J. Ochieng' Oduol Esq.

JUDGMENT OF THE COURT

Lord Justice Korsah delivered the Judgment of the Court.

On 26th March 2001, we pronounced our decision and orders in this Application and reserved our reasons. Those reasons now follow:-

On 20 January 2000, the Respondent filed in the Registry of this Court, under Rule 75 of the Rules of Court of the Court of Justice of the Common

Market for Eastern and Southern Africa (hereinafter referred to as the "Rules"), an application for a Suspension Order (Reference Number 1A/2000). By that application, the Respondent prayed this Court for an order suspending the operation of Resolution Number 58/99/01 dated 6 December 1999, passed by the Board of Directors of the First Applicant herein at its 58th meeting, pending the hearing and final determination of Reference Number 1B/2000, filed contemporaneously with the Respondent's application for a Suspension Order. For the sake of convenience and clarity we shall refer to both Applicants as the "PTA Bank" and to the Respondent as "Martin Ogang".

In the instant application, the PTA Bank raised two preliminary objections to Reference Numbers 1A/2000, 1B/2000 and 1C/2000 filed by Martin Ogang. Firstly, it is contended by the PTA Bank that the failure by Martin Ogang to state the law or statute "upon which its standing before this Court is established" deprives him of a locus standi, and disentitles him from any of the remedies he seeks. Secondly, it is contended that the Comesa Court of Justice lacks jurisdiction to entertain the said References or try the issues therein raised as Martin Ogang has not pleaded the law or statute upon which the Court's jurisdiction is founded. We intend to deal with the jurisdictional issue first as the resolution of it may tend to unravel the question of Martin Ogang's locus standi in this matter. The application was vehemently opposed by Martin Ogang.

The PTA Bank's argument is that, by its Charter, which was concluded on 12 July 1985, but the date of promulgation is unknown, it was accorded certain privileges and immunities in territories of PTA Member States, from legal proceedings. Article 42 upon which great reliance is placed in support of this contention, as quoted by Martin Ogang at page 38 of Reference Number 1B/2000 provides as follows:

- “1. Actions may be brought against the Bank in the territories of the Member States or elsewhere in a Court of competent jurisdiction.
2. No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of the Bank made in accordance with the terms of contracts entered into with the Bank”.

Paragraph 2 applied to Members of the Bank who were all States, or financial institutions, as no individual was a member of the Bank.

As cited by the PTA Bank, at page 4 in Reference Number 1D/2000, Article 42 in relevant part, stipulates that:

- “1. Subject to paragraphs 3 and 4 below, the Bank shall enjoy immunity from every form of legal process except in cases arising out of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of the member State in which the Bank has its principal office, or in the territory of a Member State or non-Member State where it has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities.
2. No action shall be brought against the Bank by Members of the Bank or persons acting for or deriving claims from them. However, Members of the Bank shall have recourse to such special procedures for the settlement of disputes between the Bank and its Members as may be prescribed in this Charter or in the regulations of the Bank

made in accordance with the terms of contracts entered into with the Bank”.

For the purposes of this Judgement we accept that the original Charter may have been amended to create the scenario, which the PTA Bank presents – one favourable to the PTA Bank, but not so favourable to Martin Ogang. There are, however, serious obstacles to overcome before the validity of this amendment can be accepted.

Counsel for the PTA Bank contended that the PTA Bank was not an organ of COMESA and as such was not answerable to the laws and Regulations of the Common Market, because it has a Charter of its own which regulates its activities and relationship with its employees. This fallacious assertion does not take cognisance of the following facts:

The PTA Bank was established under Article 2 of its Charter pursuant to Chapter 9 of the Treaty for the establishment of the Preferential Trade Area for Eastern and Southern African States, which came into force on 2 September 1982 (see Legal Counsel’s Note at page 49 of the Charter). The first Charter of the PTA Bank was concluded at Bujumbura, Republic of Burundi, on 12 July 1985. Article 174 of the Treaty establishing COMESA, in paragraph 2 thereof, names the PTA Bank as one of its institutions continuing in force.

In the original Charter of the PTA Bank, which was exhibited in Reference No. 1B/2000 by Martin Ogang, Article 42 paragraph 1 stipulates, as above indicated, “That actions may be brought against the Bank in the territories of the Member States or elsewhere in a court of competent jurisdiction. Amendments to the said Charter were subsequently made by the Board of Governors. The first of such amendments being made in 1990.

Counsel further contended that by an amendment to its Charter in respect of Article 42, the PTA Bank now enjoys immunity from every form of legal process. Inviting, as that argument may seem, we are not persuaded by it.

In the first place, the fountain and origin of the powers, privileges and immunities of all organs and institutions of COMESA is the Treaty itself. By paragraphs 4 and 5 of Article 174, the privileges and immunities of the PTA Bank were fossilised as at December 1984. At that date its privileges and immunities were restricted to process in the Courts of Member States only, and could not extend to this Court. In the second place, the Treaty does not provide for the existence of a rogue organ or institution flouting with impunity, all the rules of the organisation from which it derives birth. Thirdly, any privileges and immunities that the PTA Bank, by an amendment of its Charter, assumed after 1984 are ultra vires the Treaty that breathed life into the Bank. How can subsidiary legislation have pre-eminence over the parent constitution when it is in conflict with that constitution? If indeed, the PTA Bank's Charter was amended by the Board of Governors in respect of Article 42 paragraph 1, to confer upon the Bank "immunity from every form of legal process" then that amendment was ultra vires Article 174 of the Treaty, which has not been amended.

It is a well-known principle of law that an international organization cannot confer on itself, privileges and immunities to be granted to it by its member states. The organization may set out the privileges and immunities that it considers necessary, which can only be given the force of law in the territories of its member states by the member states themselves. Article 42 of the Charter of the PTA Bank is only intended to describe the type of privileges and immunities that are to be conferred upon the PTA Bank and Article 43 then goes on to provide that these privileges and immunities shall be conferred not by the Bank upon itself, but by those who can do so, namely, the member states. In Kenya, for instance, it is the Privileges and

Immunities (Eastern and Southern African Trade Development Bank) Order, 1991, that conferred privileges and immunities on the PTA Bank and certainly not Article 42 of the Charter of the PTA Bank or any amendments made to it by the Board of Governors of the PTA Bank. That the Board of Governors of the PTA Bank has itself, the right to confer privileges and immunities on the Bank, which has the force of law in the Member States, is, therefore, a fallacy. The amended Article of the Charter of the PTA Bank purporting to confer privileges and immunities upon itself, confers no privileges and immunities that have the force of law within COMESA. They can only be given the force of law in the COMESA Member States if the Member States themselves provide for it in their national laws.

Lastly, paragraph 6 of Article 174 of the Treaty, for the avoidance of doubt, declares that:

“6. Any references in the agreements referred to in paragraph 5 of this Article to the Preferential Trade Area or any officer or authority thereof shall have the effect as if references therein were substituted by the Common Market and the corresponding officer or authority thereof”.

This emphasises the continuance of the PTA Bank as an Institution of COMESA though autonomous. But the PTA Bank does not exist in the air. It is composed of its Governors, officers and employees.

Article 43 paragraphs 3 and 4 of the Bank's Charter recite that:

“3. The Bank, its property and assets shall enjoy immunity from all legal process except in so far as in any particular case it has, through the President, expressly waived its immunity: provided however that no waiver of immunity shall extend to any measure of execution.

4. The principal as well as regional offices of the Bank shall be inviolable. The property and assets of the Bank shall be immune from search, requisition, expropriation, and any other form of interference, whether by legislative, executive, judicial or administrative action.”

It bodes well to remember that when these privileges and immunities were conferred on the PTA Bank, the only courts in existence were the national Courts of the Member States comprising COMESA and the Tribunal established under Article 10 of the PTA Treaty of 1982. Although a Court of Justice had been decreed to be one of the principal organs of the Common Market (Article 7 of the Treaty Establishing COMESA) it was still nascent.

The jurisdiction of the COMESA Court of Justice derives not from the Rules of the Court of Justice, as the PTA Bank erroneously assumes, but from the Treaty establishing the Common Market for Eastern and Southern Africa itself.

Article 7 paragraph 1 reads:

“1. There shall be established as organs of the Common Market:

- (a) the Authority;
- (b) the Council;
- (c) the Court of Justice;
- (d) Etc”.

And paragraph 4 of Article 7 of the Treaty, which recites that:

“ The organs of the Common Market shall perform their functions and act within the limits of the powers conferred upon them by or under this Treaty,” would be superfluous if neither the national courts nor this Court had jurisdiction over the organs of the Common Market. Article 19 of the

COMESA Treaty, which provides for the establishment of this Court emphasises that “the Court of Justice established under Article 7 of the Treaty shall ensure the adherence to law in the interpretation and application of this Treaty”. The question arises: who is likely to flout the adherence to law in the interpretation and application of the Treaty except its Member States, organs, and institutions, inclusive of the PTA Bank, and their employees?

To put the issue beyond doubt Article 27 of the Treaty entitled: “Jurisdiction Over Claims by Common Market Employees and Third Parties Against Common Market or its Institutions”, encapsulates the intendment of the framers of the Treaty, by providing that:

“1. The Court shall have jurisdiction to hear disputes between the Common Market and its employees that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market (emphasis added).

2. The Court shall have jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties”;

vests in this Court, jurisdiction not only to determine claims by employees of institutions of the Common Market against their employers, but also jurisdiction over claims by any person against the Common Market or an institution or employee thereof in the performance of any act within the scope of their employment.

It is not susceptible of doubt that the PTA Bank is an institution of the Common Market as illustrated above. Being an institution of the COMESA Treaty, the PTA Bank is not exempt from the jurisdiction of the COMESA Court. Its Charter is subservient to the Treaty, which endowed this Court

with jurisdiction over all organs and institutions of the Common Market inclusive of their employees.

Far from Articles 29 and 30 of the Treaty, which confer limited jurisdiction on national courts in disputes to which the Common Market is a party, being derogations from the powers of this Court, they underscore the fact that decisions of this Court shall have precedence over decisions of national courts in the interpretation of the provisions of this Treaty. For an illustration of the application of such Articles see Customs and Excise Commissioners v APS Samex (Hanil Synthetic Fibre Industry Co. Ltd, third party) [1983] 1 All E. R. 1042.

The reasons for granting immunity from judicial process in national courts of Member States of international organisations were succinctly stated in Broadbent v Organization of American States 202 U.S. App. DC 27, 628F. 2d 27 (D.C. Cir. 1980) at 34-35 thus:

“The United States has accepted without qualification the principles that international organisations must be free to perform their functions and that no member state may take action to hinder the organisation. The unique nature of the international civil service is relevant. International officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics... An attempt by the court of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organisations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively”.

It is precisely to obviate injustice to an international civil servant in such circumstances or happenstance that most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances. The World Bank has established an administrative tribunal to resolve employees' claims based on employment contract disputes. Article 179 of the E.E.C. Treaty and Article 152 of the Eurotom Treaty provide that the Court of Justice is to have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. (See Halsbury's Laws of England, Fourth Edition para. 2.97 for "persons covered"). In similar vein, Article 27 of the Treaty of the Common Market (supra) confers jurisdiction on this Court to "hear disputes between the Common Market and its employees that arise out of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market".

At first blush, it appears as if the provisions of paragraphs 4 and 5 of Article 174 which provide in relevant part as follows: -

- "4. The rights and obligations arising from certain agreements concluded under the provisions of the PTA Treaty shall not be affected by the provisions of this Treaty.
5. For the purposes of paragraph 4 of this Article, the agreements referred to in that paragraph are:
 - (a) the Agreement on Privileges and Immunities adopted by the PTA Member States in December, 1984;"

deprive this Court of jurisdiction to entertain judicial proceedings in cases in which the PTA Bank is a party. But a careful perusal of Article 43 of the

Bank's Charter discloses that the Bank's immunity from legal process is limited to national courts of Member States.

Paragraph 1 of Article 43 of the PTA Bank's Charter, reads:

"To enable the Bank to achieve its objectives and perform the functions with which it is entrusted, the status, capacity, privileges, immunities and exemptions set out in paragraphs 3 to 10 of this Article shall be accorded with respect to the Bank in the territory of each Member State".

Paragraphs 3 and 4 of the Article upon which the PTA Bank relies for immunity from process are, therefore, restricted in operation to the jurisdiction of national courts of Member States and have no application to the jurisdiction conferred on the international Court of COMESA by Articles 19, 23, 24, 25, 26, 27, 29, 30 and 32 of the Treaty Establishing the Common Market for Eastern and Southern Africa. Article 27 of the Treaty is entitled:

"Jurisdiction Over Claims by Common Market Employees and Third parties Against the Common Market or its institutions".

We are satisfied that the title of this Article is indicative of the intention of the framers of the Treaty to provide a forum to both employees of the Organs of the Common Market including the Secretariat and employees of the Institutions of the Common Market, including the PTA Bank, in disputes that arise out of the application and interpretation of the Staff Rules and Regulations of the Secretariat, or in respect of the terms and conditions of employment of the employees of the Institutions of the Common Market.

COMESA, not unlike a national government is comprised of several organs and institutions. As in government, public office means employment in the

Civil Service or in any other public sector capacity. Similarly those who work at the institutions of the Common Market, whether employed at the Secretariat or by an organ or institution of the Common Market, are also employees of the Common Market. They are international public officers in the COMESA Civil Service. The acts and decisions of all these organs and institutions, although they may be autonomous, are subject to challenge in this Court, which according to Article 19 of the COMESA Treaty, is to ensure the adherence to law in the interpretation and application of the Treaty. It is for these officers, who may not have recourse to national courts, because of the immunity from process that their employers enjoy, for whom Article 27 of the Treaty offers an avenue for redress. To interpret Article 27 in such a way as to deprive them of access to this Court could not achieve the effect of striking down the mischief which the framers of the Treaty were desirous of obviating.

Finally, it was contended that Martin Ogang held the post of President of the PTA Bank because he was a director of the Bank and, therefore, not an employee of the Bank as perceived under Article 27 of the Treaty. It is true that, generally speaking, directors are agents of their company. But directors may have a contract of employment with the company, such as service directors and managing directors. It is clear to us that remuneration of directors for their service, may be due either under a contract of employment, in which case if the contract is wrongfully terminated a cause of action will lie at the Director's instance; or determined by the general meeting in which case no action lies for termination of the office. But Martin Ogang, as Chief Executive of the PTA Bank, was not a director but acted in pursuance of the directions of the Board of Directors (see Article 30 of the Charter). As such, he was in the service of the PTA Bank and has a right to a cause of action if his contract is wrongfully terminated.

From the provisions of Article 27 (supra) it is evident that the Treaty, in granting this Court jurisdiction to determine claims by any person against the Common Market or its Institutions afforded Martin Ogang a right of action against the PTA Bank.

As to the locus standi of Martin Ogang, there are no Rules of the Court of Justice of the Common Market for Eastern and Southern Africa that have been breached, so as to deny Martin Ogang locus standi in this matter. He alleges the Bank breached the rules of natural justice and he has thereby suffered damage. Whether he can prove what he alleges is another matter altogether.

This application was supposed to have been heard on 22nd March. On that day counsel for the PTA Bank applied for a deferment of the application on the ground that leading counsel was somewhere in the Middle East and would only be available after 11a.m. on 23rd March, 2001. The Notice stipulating the date and time of hearing of this application was served on the legal representatives of the parties as early as 23rd January, 2001. This Court has a very tight schedule arising from the fact that it is composed of Judges from different countries, and we consider the omission of leading counsel to appear on the scheduled date to argue the application, and the refusal of his juniors to move the Court in terms of the application, a slight on this Court. It is for counsel to wait on the Court and not the Court to wait on counsel. Such a situation is unacceptable and one for which the party asking for deferment must be mulcted in costs.

Accordingly, the PTA Bank is ordered to bear the wasted costs of the abortive hearing on 22nd March, 2001.

The Court is satisfied that the application on both issues, is misconceived and is without merit and the same is accordingly dismissed with costs.

Dated and delivered at Lusaka, this 29th Day of March, 2001

K. R. A. Korsah.
Lord Justice

A. Nyankiye
Lord Justice

J. B. Kalaile
Lord Justice

E. L. Sakala
Lord Justice

J. M. Ogoola
Lord Justice

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of the original
Sipho H. Zwane
Registrar
Comesa Court of Justice

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29 MAR 2001
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