REFERENCE No. 1 OF 2006
AND
APPLICATIONS 1 AND 2 OF 2006

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

Coram: **Rugege (Lord Principal Judge), Ogoola, Malaba, Maphalala and Rakotomena LJJ**

Acting Registrar: **Habben Nkonkesha, Esq.**

EASTERN AND SOUTHERN AFRICAN TRADE ..... APPLICANT
AND DEVELOPMENT BANK (PTA BANK)

VERSUS

THE REPUBLIC OF BURUNDI REPRESENTED .....RESPONDENT
BY THE MINISTER OF JUSTICE

For the Applicant: **Anil Gayan, Esq.**

For the Respondents: **No appearance**

JUDGMENT OF THE COURT

Lord Justice Malaba delivered the Judgment of the Court.

On 16 November 1985 the Applicant, hereinafter referred to as "the Bank", entered into a Host Agreement with the respondent, (the Republic of Burundi) in the territory of which the Authority had determined to locate its principal office. The bank became the registered owner of an immovable property in the city of Bujumbura in which its

principal office was housed. The Principal Office shall hereinafter be referred to as the "building" or the "Principal Office" as the context allows.

The Principal Office was under the control and authority of the Bank. In that regard Article 3 of the Host Agreement concluded by the Parties provides that:

> *"(a) The Principal Office of the Bank shall be inviolable and its property and assets in that respect shall be immune from reach, requisition, confiscation, expropriation and any other form of interference".*

The provisions of Article 3, of the Host Agreement were consistent with the undertaking the Republic of Burundi made as a member of the Bank under Article 43(1) of its Charter to accord the Bank the status, capacity, privileges, immunities and exemptions necessary to enable it to achieve its objectives and perform the functions with which it was entrusted. It was in that regard that the Republic of Burundi recognized under the Host Agreement that the Bank possessed full juridical personality and had in particular full capacity to enter into contracts, to acquire and dispose of immovable property and to institute legal proceedings. The Host Agreement also deals with the issue of the resolution of disputes.

Article 21 of the Host Agreement provides that:

> *"Any dispute between the Bank and the Republic of Burundi concerning the interpretation or application of this Agreement or of any supplementary agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators. One to be named by the Government of the Republic of Burundi, one to be*

named by the President and an umpire to be chosen by the two, or if they should fail to agree, by the Secretary General of the PTA". (now COMESA)

Equally relevant in this regard is the Charter which in Article 46 states:

"1. If a dispute shall arise between the Bank and a Member or between the Bank and a former Member of the Bank, such dispute shall be submitted to arbitration by a tribunal of three arbitrators. One of the arbitrators shall be appointed by the Bank, one by the Member or former Member concerned and the third, unless the Parties otherwise agree, by the Executive Secretary of the United Nations Economic Commission for Africa. The third arbitrator shall be empowered to settle all questions of procedure in any case where the parties fail to reach agreement with respect to the procedure to be adopted by them.

2. A majority vote of the arbitrators shall be sufficient to reach a decision which shall be final and binding on the Parties and a decision of the arbitrators may include an Order as to payment of costs and expenses.".

In 1994 the Board of Governors took a decision to move the operations of the Bank from Bujumbura to Nairobi in the Republic of Kenya leaving a few of its officers to occupy part of the building. On 28 September 2004, the Bank entered into a lease agreement with the United Nations Development Programme (UNDP) in terms of which it agreed to let the building for a period of five years with effect from 1 February 2005 at a monthly rental of US$26,000.

On 8 October, 2004 the Government of the Republic of Burundi, through the Minister of Foreign Affairs (the Minister), wrote a letter to the Chief Representative of UNDP in Bujumbura prohibiting the leasing of the building. Paragraph 3 of the letter, as translated from French read:

> *"The Government of Burundi hereby would wish to communicate its formal prohibition in respect, of the leasing of the PTA Bank's building to anybody operating in Burundi. In fact, the premises are being kept for the return of the PTA Bank to Bujumbura at any time and Burundi cannot authorize such a transaction".*

As a result of the letter, UNDP did not take occupation of the building in terms of the lease Agreement. Taking the decision of the Government of the Republic of Burundi to prohibit the UNDP or anyone else from leasing its building to be an unlawful usurpation of its authority over the use of the building, the Bank commenced proceedings against the Republic of Burundi on 29 March 2006. The document filed as a reference had no prayer. The Bank stated that the Government of Burundi had acted in violation of the Host Agreement, thereby giving rise to a dispute between the parties which they had failed to settle through negotiations. It said that the only recourse in the circumstances was to arbitration in accordance with the provisions of Article 21 of the Host Agreement or Article 46 of the Charter. At the same time the Bank filed what purported to be an urgent application under Rule 75 of the Rules of Court.

On the assumption that the matter in dispute between the parties was to go to arbitration the applicant averred that it was apprehensive that the Government of Burundi would, pending any final award from the arbitration proceedings, further interfere with the management, control and administration of its premises causing further loss and damage. The Bank contended that the actions of the Government of Burundi in prohibiting the leasing of the building to UNDP constituted an infringement of the enjoyment of its rights and immunities under the Host Agreement and the Charter.

Consequently the following orders and declarations were sought:

> *"A. An order that, pending the arbitration between the parties, the Respondent, its servants and/or agents do refrain from doing any act of any nature whatsoever which adversely affects the rights, immunities, privileges and status of the Applicant.*
>
> *B. An Order suspending the contents of the letter of 8th October 2004 written by the Respondent to the Representative of the United Nations.*
>
> *C. A declaration that the letter dated 8th October 2004 from the Respondent to the UNDP is of no legal effect.*
>
> *D. An order that the Respondent restores forthwith to the Applicant its status, privileges, immunities and rights".*

On 28 March, 2006 the applicant's lawyer wrote a letter to the Minister indicating that a dispute had arisen between the parties over the effect of the letter of 8 October, 2004 and that the dispute had to go to arbitration as instructions from the Bank were that the parties had failed to settle the dispute by negotiations. The Minister was also advised of the fact that an urgent application for interim relief had been made to the Court.

On 11 April, 2006 the Minister replied to the letter of 28 March. He denied the existence of any dispute between the parties caused by the letter of 8 October, 2004. He also denied that the Government of Burundi had been approached for the settlement of the alleged dispute by negotiation. In his opinion the soured relationship that may have arisen between the parties was caused by the reluctance of the Bank to return to Bujumbura and take occupation of the Principal Office.

Following the letter from the Minister, a second application for interim measures was made by the Bank on 20 June 2006. The application prayed for the following orders and declarations:

> *"A. A declaration that there exists a dispute between the Bank and the Government of Burundi.*
>
> *B. An Order compelling the Respondent to submit to Arbitration in accordance with the provisions of Either Article 21 of the Host Agreement or Article 46 of the Charter as this Honourable Court deems fit.*
>
> *C. An order that the Parties do commence such Arbitration process within (60) days of the granting of (B) above.*
>
> *D. An order that the decision of the Arbitrators ultimately be referred to this Court for any further order, steps or measures that may be necessary to enforce the same.".*

There has been no response from the Government of Burundi to any of the applications made by the Bank. At the hearing, Mr. Gayan for the Applicant produced a document containing resolutions passed by the Board of Governors of the Bank at the meeting held in Harare, Zimbabwe on 29 June 2006. In the Preamble to the resolutions the Board of Governors welcomed, *"the undertaking by the Minister of Finance and Governor for Burundi for the Government of Burundi to uplift the embargo it imposed on the leasing of the Headquarters building"*. It appears that the undertaking was not discharged within one month as promised thereby justifying the continuance by the applicant with these proceedings.

The orders and declarations sought by the applicant under the guise of interim relief would if granted have the effect of restraining the Government of Burundi from committing conduct it has not been shown to be about to commit, determining the legality of its decision to prohibit the leasing of the building, deciding for the applicant the existence of its cause of action and compelling the Government of Burundi to submit to arbitration. The question for determination is whether the Court has jurisdiction to determine the above matters.

Mr. Gayan argued that the Court has the power under Article 23 of the COMESA Treaty to determine the matters brought to it by the applicant. Article 23 states that the Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the Treaty. The matters which may be referred to the Court for adjudication, the circumstances in which the references may be made and the persons who may refer them are set out in the Articles that follow Article 23. When it was pointed out that Article 23 dealt with general jurisdiction and that a party had to found jurisdiction on a specific provision Mr. Gayan, on further reflection conceded that Article 26 of the Treaty would be applicable. Article 26 provides that:

"Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council, or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty: Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts, or tribunals of the Member State".

The matter for determination over which the Court would have had jurisdiction in this case was the legality of the decision by the Government of Burundi, to prohibit the leasing of the building by UNDP or anyone else operating within the territory of Burundi as stated in the letter of 8 October, 2004. As will be shown later in the judgment, there was no reference as such filed by the Applicant with the Court for the determination of such a matter. In fact, notwithstanding the form of the remedy by which the Orders and declarations were sought, in substance the Court was being asked to make a determination on the legality of the decision of the Government of Burundi to prohibit the leasing of the building by UNDP.

When asked by the Court whether the Applicant would have had the matter determined before it had first exhausted local remedies in the national courts or tribunals of the Republic of Burundi as it would have been required to do by the proviso to Article 26 of the Treaty, Mr. Gayan contended that the principle of exhaustion of domestic remedies was not applicable in this case. He argued that the parties had excluded the local remedies of the national courts by the arbitration clause contained in the Host Agreement. He also suggested that Article 26 did not apply to international institutions

but only to natural persons. However, the clear wording of Article 26 shows that it relates to legal persons. The Bank is a legal person for purposes of this provision as clearly indicated by Article 43(1) of the Charter of the Bank. The Applicant could not seek to found jurisdiction of the Court under Article 26 of the Treaty at the same time excluding the application of the proviso.

Mr. Gayan conceded the fact that even if the national courts or tribunals of the Republic of Burundi had no jurisdiction to determine the matter question of the legality of the decision of the Government of the Republic of Burundi to prohibit the leasing of the building by UNDP or anyone else operating from Burundi, they had the power to declare that a dispute had arisen between the parties which needed to be settled by arbitration. He, however, contended, that the creation of the Appellate Division of the Court meant that matters that hitherto were referred to national courts for determination could now be placed before the First Instance Division of the Court.

The argument loses force when consideration is had of the fact that notwithstanding the creation of the Appellate Division of the Court the requirements that a party seeking to found jurisdiction of the Court under Article 26 of the Treaty, must first exhaust local remedies in the national courts or tribunals of the Member State remained unchanged. If it was the intention of the framers of the Treaty that the creation of the Appellate Division of the Court should have the effect of substituting the First Instance Division of the Court for the national courts in the hierarchy of jurisdiction envisaged under the Treaty, they would have said so and removed the proviso to Article 26. They would also have removed Article 29 of the Treaty which provides that except where the jurisdiction is conferred on the Court by or under the Treaty, disputes to which the Common Market is a party shall not on that ground alone, be excluded from the jurisdiction of national courts.

The finding of the Court is that it has no jurisdiction to determine the matters placed before it by the Bank. This is sufficient to dispose of the matter. Nevertheless the Court has found it necessary for purposes of future guidance to comment on the

defects in the applications made by the Bank. There must be a subject – matter for determination by the Court in proceedings commenced by means of "a Reference" filed with the Registrar in terms of Rule 31 of the Rules of the Court before the special procedure for the application for interim measures under Rule 75 can be invoked. A study of the scheme of the provisions of Rules 75, 76, 77 and 78 contained in Part XIV of the Rules of Court headed "SPECIAL FORMS OF PROCEDURE" shows that the interim measures, which are granted in circumstances of urgency only, are intended to have interim effect pending the final determination of the subject – matter of the proceedings in which they are applied for and issued.

Rule 31(2) states that a reference: by means of which a matter in dispute is brought to the Court for determination must state the following:-

> *"(a) the name, address and residence of the applicant;*
> *(b) the designation, name, address and residence of the respondent;*
> *(c) the subject – matter of the proceedings and a summary of the points of law on which the application is based; and*
> *(d) the form of Order sought by the applicant.".*

All these factors are of equal importance and must be stated in a reference for it to be valid. It is clear that a reference must state the order sought by the applicant. In this case there was no order sought by the applicant in the purported reference. There was, therefore, no matter for determination by the Court.

Mr. Gayan admitted that the Court was not called upon to determine any substantive subject matter. He argued that the orders and declarations sought in the applications for interim measures under Rule 75 constituted the orders required for

purposes of Rule 31(2) (d). If that were to be the case, a reference and an application for an interim measure under Rule 75 would fuse into one document. There would be no distinct procedure for a final judgment on the matter in dispute and another for an interim measure both in the same proceedings. The fallacy in the argument is exposed in the admission by Mr. Gayan of the fact that in the event that the orders and declarations applied for were granted there be no further proceedings before the Court. But Rule 75(4) states that an application for an interim measure must be in accordance with Rules 30 and 31. What that means is that the application must be by a separate document from the "reference". It must have its own form of an Order sought. Rule 78(1) provides that the decision on an application for an interim measure shall take the form of a reasoned order as opposed to a final judgment. Rule 78(3) is to the effect that unless the order determines the date on which the interim measure is to lapse the measure shall lapse when final judgment is delivered. Rule 78(4) puts the matter beyond doubt when it declares that the Order shall have only an interim effect and shall be without prejudice to the decision of the Court on the substance of the case. As there was no case before the Court apart from the purported applications for the interim measures the applications would have been inadmissible.

Other issues on which the Court found it necessary to comment relates to the nature of the Orders and declarations sought by the Applicant. Interim measures under Rule 75 are intended to be granted under circumstances of urgency to prevent irreparable harm to the rights of the Applicant to be determined under the main proceedings. In this case the letter at the centre of the controversy between the parties was written and delivered to the Chief Representative of UNDP eighteen months ago. The sting of urgency in the applications is no more. The Court is even asked to make an order restraining the Government of the Republic of Burundi from committing some unknown acts pending arbitration. There was no evidence of anything done by the Government of the Republic of Burundi after the letter of 8 October, 2004 that could have justified the granting of an order of interim restraint as a matter of urgency.

Some of the orders sought are not of interim effect at all. They are final relief. For example an order that the letter of 8 October, 2004 is of no legal effect determines the very question of the legality of the decision of the Government of the Republic of Burundi to prohibit the leasing of the Bank's Principal Office. That would be the matter for determination by the arbitrators. In any case an interim measure granted under Rule 75 is not meant to undo past events. It is also clear that a declaration is not an appropriate remedy for an interim measure.

The decision of the Court is that it has no jurisdiction to determine the matters brought by the Applicant.

It is so ordered.

DATED and Delivered at Lusaka, Zambia this 16th day of August, 2006.

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S. Rugege
Lord Principal Judge

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J. M. Ogoola
Lord Justice

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L. Malaba
Lord Justice

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S.B. Maphalala
Lord Justice

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H.R. Rakotomena
Lady Justice