REFERENCE NO. 1 OF 2009

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

CORAM: Nyankiye, Malaba, Tadesse, Maphalala and Rakotomena LLJ

Registrar: D. Kayihura

INTELSOLMAC - **APPLICANT**

VERSUS

RWANDA CIVIL AVIATION AUTHORITY - **RESPONDENT**

For the Applicant: Mr. Isaac Walukagga Esq.

For the Respondent: Mr. Butare Emanuel Esq.

JUDGMENT OF THE COURT

Lord Justice Malaba delivered the Judgment of the Court.

This case started when the applicant filed a Reference with this Court on 22nd May 2009. After setting out the cause of action, the applicant claimed against the Respondent the following Orders:

(i) *A declaration that the act of the Respondent in so far as it has failed to fully pay the Applicant for services rendered to it is unlawful;*

(ii) *A consequential Order for the Respondent to pay the Applicant a sum of US$49,829;*

(iii) *General damages and interest on the sums in (ii) above; and*

(iv) *Costs of this Reference.".*

The Respondent seeks, by way of a preliminary objection, dismissal with costs of the case referred to the Court for lack of jurisdiction, on the ground that the applicant did not comply with the mandatory requirements of prior exhaustion of local remedies prescribed under Article 26 of the Treaty Establishing the Common Market for Eastern and Southern Africa ("the Treaty").

The facts of the case are these. The Respondent is a parastatal organization established by Law No. 21/2004 of 10 August 2004 with the overall authority for the control and governance of matters relating to civil aviation in Rwanda.

Desirous of putting in place efficient and effective systems of financial management in its operations, the Respondent invited tenders for the preparation of the 2005, and 2006 annual financial reports and addressing accounting issues raised by the Auditor General on the 2003 and 2004 financial statements.

The Applicant is a private company incorporated under the laws of Uganda, carrying on the business of providing financial consultancy services. It won the tender floated by the Respondent. The parties entered into a written contract on 2nd October 2007. In terms of the Agreement, the Applicant undertook to provide financial consultancy and to ensure that the Respondent's financial systems were stable and running smoothly. It undertook to provide reliable support during the contract period and four months after the consultancy.

Under Article 2 of the Agreement the Parties set out details of the responsibilities of the Applicant as follows:

"1. To carry out objective staff capacity assessment, quality and qualifications requirement and recommend optimal staffing levels.

2. *Identify the opportunities for training and skills of key departmental staff.*

3. *Review the existing financial management information system for its effectiveness in reporting and make the necessary recommendations for improvement as may be necessary.*

4. *Review the existing accounting controls with a view to eliminating the gaps or loopholes and make any necessary recommendations for strengthening the controls.*

5. *Preparation of the Financial Accounting Policies and Procedures Manual.*

6. *Finalize the financial reports for the year ended 2005 and address the issues raised by the Auditor General in 2003 and 2004 financial statements.*

7. *Supply and install the Sage pastel evolution Financial Management Software as per its offer number QUA 30005.*

8. *Provide a technical support at no cost within 4 months after the consultancy but transport and accommodation shall remain a responsibility of the client.".*

The Respondent agreed to pay the Applicant the amount US$54,300 for both the consultancy and the financial management software. The Applicant was entitled to payment of 30.9% of the total amount at the start of the provision of consultancy services, 25.1% after the installation of the financial management software, 34% after submission of the financial statements for years 2003 to 2006, while 10% of the

remaining amount was to be retained until after the expiry of the support period of four months after the consultancy.

Under Article 9 the Parties provided that the agreement constituted the entire rights and obligations between them and that there were to be no additions, deductions or alterations except upon written agreement of both Parties. Article 10 of the contract provided that:

> *"Unless settled amicably, any dispute, controversy or claim arising out of or relating to this contract, including its formation, its interpretation or breach, termination or invalidity thereof shall be settled by arbitration in accordance with the laws in Rwanda as at present in force.".*

On 10th October 2007 the Respondent paid the Applicant an amount of US$30,408 representing 30.9% of the total contract amount leaving a balance of US$23892. When it started the consultancy work the Applicant, through its personnel, discovered that data that had to be entered into the new system had not been recorded in appropriate books of account. It prepared the necessary books of account such as General Ledger, Cash Books, Petty Cash Books, Debtors and Creditors Ledgers by posting all accounting transactions to the new books from January to December of each of the years from 2003 to 2006. The Applicant charged the Respondent a sum of US$ 26,000 on the basis that what it had done was "extra work". In the letter to the Respondent's Director General dated 22 October 2007 its Managing Director justified the claim by saying that the accounting work done was a "completely different exercise from the Financial Consultancy work already contracted for". The total amount demanded by the Applicant from the Respondent at the end of submission of the final report on 8 March 2008 was US$49,829.

The Respondent refused to pay the money on two grounds. The first was that the extra work for which the Applicant charged US$ 26,000 was not approved. It stated that the work was part of the exercise of the duty the Applicant had undertaken to discharge under Article 2 of the Agreement to eliminate gaps or loopholes discovered in

the existing internal accounting controls following review. The second ground was that there were errors in the work done by the Applicant which needed to be rectified before due payment was made. On 19 May 2008, the Respondent's Director General wrote to the Applicant's Managing Director saying:

> *"After consultations on the way forward regarding the consultancy work done by your company (Intelsomac (U) Ltd), I would like to update you on the resolutions that have been adopted:*
>
> *(i) That you are to be invited to come to Rwanda on the 26th May 2008. Your transport, accommodation will be catered for by Rwanda Civil Aviation Authority Staff (RCAA);*
>
> *(ii) That you will resume finalizing the original contractual work, i.e. training of RCAA staff, installation and commissioning of Sage pastel evolution software. This will be followed by balance payment of 35% that has been outstanding; and*
>
> *(iii) That it has been difficult to find at the moment enough supporting documentation (amended contract or other documentary evidence) to allow RCAA to make payment for the extra work.".*

On 22nd May 2008 the Applicant's Managing Director accepted by letter the invitation. There is no evidence that he went to Rwanda on the appointed date. An immigration office stamp on his passport shows that he entered and exited from Rwanda on 28 May 2008. It is not said anywhere in the papers filed on behalf of the Applicant what business he conducted on that day.

On 12th July 2008 Applicant's lawyers in Uganda contacted KAMANZI NTAGANIRA & Associates in Rwanda inquiring whether they could take instructions to recover the sum of US$ 49,829 from the Respondent on behalf of the Applicant. The lawyers replied indicating that they would advise whether they would take the instructions after perusing documents that they requested from the Applicant. The

documents were forwarded to them on 15 July 2008. After inquiring about progress on the matter on 25 July and before receiving a reply, the Applicant had its mandate withdrawn by letter from its lawyers in Uganda on 28 August. In the letter the lawyers in Rwanda were thanked for their efforts to have the dispute over the debt allegedly owed to the Applicant by the respondent settled amicably.

It appears that before the mandate to Kamanzi Ntaganira and Associates was withdrawn, the Applicant had already instructed another firm of lawyers in Rwanda. This is because on 27th August 2008 NDAHIRO FAROH sent to the Respondent a notice of demand for payment of the sum of US$ 49,829 on behalf of the Applicant. After setting out the cause of the alleged debt which the Respondent was said to have neglected or refused to pay despite repeated demands, the letter ended thus:

> *"In view of the above, therefore, you are required immediately upon receipt of this letter, in any case, not later than 48 hours from the date hereof to pay to our client the outstanding balance of US$49829 plus our professional fees otherwise we shall proceed to institute civil proceedings against you in the competent Court of the Republic of Rwanda.".*

By letter dated 22nd September 2008 the lawyers indicated that no progress had been made on the recovery of the money beyond the issuance of the letter of demand because, certain answers to questions raised by the Respondent on the demand had not been provided by the Applicant. On 27 November, 2008 the lawyer also indicated that they filed a suit. The letter reads:

> *"Please note, that we have filed a suit against RCAA and we are now awaiting a hearing date we shall send a copy of the summons and statement of claim to you.".*

On 15 December the lawyer advised the Applicant's Managing Director that he had held a meeting with the Respondent's Director General on 12 December 2008 to discuss the matter. The letter reads:

"Please be informed that we held a meeting with the Director General RCAA on 12th December 2008 where we were informed that the dispute between RCAA and Intelsomac (U) Ltd hinged on two issues namely:

(i) Remuneration for additional work. RCAA argues that additional work claimed by Intelsomac (U) Ltd is not known nor is it covered under the contract; and

(ii) Refusal by Intelsomac to make clarification on certain issues in the report. We were further informed that you have despite several invitations refused to come to RCAA to discus the above issues. We are of the view that the above issues can be resolved amicably. We have, therefore, set 22nd December 2008 as the date for this meeting. Kindly let me know whether you will be available on this date and arrange to meet ahead of time so that we can prepare for the meeting.".

There was no reply from the Applicant's Managing Director. He complains, however, that on 27th November 2008 the lawyer had written to say a suit had been filed with the High Court in Rwanda for the recovery of the debt yet there was no evidence of such action having been instituted in the Court concerned.

What is clear, however, is that by 17th February 2009 the Applicant had engaged yet another firm of lawyers in Kigali. By letter of that date GUMISIRIZA HILARY advised the Applicant that they had sent a letter of intention to sue to the Respondent. The letter reads:

"(1) We have issued a letter of intention to sue the other Party (RCAA) if they do not clear the outstanding debt as requested and upon the contract.

(2) *We have given RCAA 5 days to settle the debt, if not, shall be informed of the seizure of the competent court of jurisdiction.*

(3) *We have decided that the competent Court shall be the Arbitration Court as you provided for it in the contract. The commercial Court cannot admit any claim if the provided jurisdiction is not seized.*

(4) *We need to be informed of the interest and damages on your part such that they can also be computed among the claims to be made before the Arbitration Court.*

(5) *Our legal fees shall be US$7000. The first instalment shall be US$3500, and the other after the case.*

(6) *The mode of payment can be Western Union in the names of KAZUNGU JEAN BOSCO or GUMISIRIZA HILARY.".*

The Applicant's Managing Director replied on 20th February 2009 by asking the lawyer to send the letter of demand and tell him what final offer he had made to the Respondent. On 4th March, the lawyers sent to the Applicant's Managing Director an excerpt of the letter of intention to sue the Respondent if it did not pay the debt within the time limit prescribed in the letter.

The Applicant sued the Respondent in this Court, on the basis that its act of refusal to pay the money claimed constituted breach of the contract entered into and was an act of the government of Rwanda which is a Member State under the Treaty. The Respondent raised as part of the defence, by way of a preliminary objection to the admissibility of the reference, lack of jurisdiction on the part of the Court. The contention is that the Applicant did not comply with the mandatory requirements of the rule of prior exhaustion of local remedies provided under Article 26 of the Treaty.

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, decision or regulation is unlawful or an infringement of the provision 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 in this case on the merits would be whether the refusal by the Respondent, to pay the money claimed by the Applicant for the reasons given constituted a breach of the contract between the Parties. The cause of action was clearly based on the alleged violation of the law of contract. The act related to the respondent in which the government of Rwanda which is a Member State within the meaning of Article 26 has a major share. The Applicant which is a person resident in Uganda, a Member State, was, therefore, bound to observe the mandatory provisions of Article 26 of the Treaty. It was under a duty to exhaust local remedies under the laws of Rwanda provided they are shown to the satisfaction of the Court to have been available, effective and adequate for the purposes of the determination of the matter in dispute between the parties.

There is no doubt that the exhaustion of local remedies requirement prescribed under Article 26 of the Treaty is an important principle of customary international law. The purpose of the rule is to ensure that the State accused of a violation of the law should have an opportunity to redress the alleged wrong by its own means within the framework of its own domestic legal system. It is based on the principle that claims for local wrongs must seek local remedies before international remedies are sought for the

same local wrongs. So, where both international and local remedies are available, effective and adequate for the determination of the same measure alleged, for example, to be a breach of contract, that is to say the same cause of action against a Member State, the local remedies must take precedence to international remedies unless, there has been a denial of justice in the local remedies, either through inadequate review of the matter in dispute or a refusal to permit access to local courts or tribunals. Local Courts provide fora for development and exploration of the factual issues behind the dispute, as well as to the crystallization of the domestic legal claims.

NSONGURUA J UDOMBASA referred to some of the most important functions of the rule of exhaustion of local remedies in an article titled, *"So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights,"* 97 American Journal of International Law 6 (2003 at p.9. He said:

> *"The rule also reinforces the subsidiary and complementary relationship of the international system to systems of internal protection. To the extent possible, an international judicial tribunal should be prevented from playing the role that it cannot under any circumstances arrogate to itself. Access to an international organ should be available, but only as a last resort after the domestic remedies have been exhausted and have failed. Giving domestic courts the opportunity to decide upon cases before they are brought to an international forum avoids contradictory judgments of law at the national and international levels. Moreover, local remedies are normally quicker, cheaper and more effective than international ones. They can be more effective in the sense that an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect, although it will engage international responsibility of the state concerned.".*

It is clear that the rule of exhaustion of local remedies prescribed under Article 26 of the Treaty is a procedural rule based on the principle that local courts or tribunals can exercise their power without any interference from the state party. In other words underlying the provisions of Article 26 is an assumption that the local legal system can afford an effective remedy for the breach of law by the Member State.

It is common cause that the Applicant did not exhaust local remedies before filing the Reference challenging the legality of the refusal by the Respondent to pay the money it claimed on the ground that the refusal constituted breach of the contract between the parties. There was no submission of the decision of the Respondent to arbitration as the parties were required to do by Article 10 of the Agreement. There was a claim arising out of the contract which gave rise to the dispute as to whether the respondent had breached the contract by refusing to pay the money or put in another way, whether the applicant was entitled under the contract to payment of the money claimed. The obligation to exhaust local remedies includes the obligation to initiate the proceedings by which the remedies are exhausted. That requires that the party under the obligation must demonstrate that he vigorously pursued or acted with due diligence in pursuit of the local remedies.

The Applicant gave as the explanation for its failure to comply with the requirements of Article 26 that there was a reluctance by the community of lawyers in Kigali to prosecute its claim against the government of Rwanda. The insinuation was that the lawyers were under the influence of the state party designed to prevent the applicant from accessing the local remedies.

A party who when challenging the legality of an act of a Member State, seeks to place blame for non compliance with the requirements of Article 26 (which are the pre-condition for engaging the jurisdiction of the Court) on the alleged conduct of the state party or its agents to prevent him from accessing the local remedies, must produce clear evidence of the steps he took in the pursuit of the local remedies and describe the nature of the acts used by the state party or its agents to prevent him from accessing the local remedies. In that way the Court would be able to decide whether a reasonable and acceptable explanation for the failure to comply with Article 26 of the Treaty has been given. Bald and unsubstantiated allegations of obstruction by the state party would not meet the standard of proof required.

In this case the onus was on the Applicant to show by concrete evidence the steps it took to in pursuit of the local remedies and the difficulties it encountered. It was required to act in good faith and make clear and open demands of the right of access to the local remedies. The applicant had to show some act by which it pursued the local remedies. The Applicant entered into the contract in Rwanda and voluntarily bound itself to use arbitration proceedings governed by the laws of Rwanda to resolve questions of breach of the contract. In this respect there is no doubt that the Applicant did not perform the obligation it voluntarily undertook under the contract.

There was no evidence that the Government of Rwanda by itself or through the Respondent deliberately obstructed or prevented the Applicant from accessing the local remedies the availability and effectiveness of which it had acknowledged by the undertaking it made to have any dispute arising from the contract resolved by arbitration governed by the laws of Rwanda. There was also no evidence that the state party indirectly prevented the Applicant from accessing local remedies by influencing lawyers against executing the duties of their agency.

It was alleged in argument that the applicant contacted, in all, eight lawyers all of whom showed reluctance in prosecuting its claim against the Respondent. There is no evidence of five of the lawyers having been contacted. In fact the conduct of the three lawyers actually contacted by email is instructive. All three of them were willing to assume agency on behalf of the Applicant. They must be taken to have been acting independently of any governmental influence at that time.

The Applicant engaged the second firm of lawyers before it had withdrawn its mandate to the first lawyer. The second lawyer had served on the Respondent a letter of demand. The same lawyer sent a letter stating that a suit had been filed in the High Court of Rwanda. He held a meeting with the Director General of the Respondent with the view of having the matter resolved amicably. He advised the Applicant's Managing Director that he had arranged a meeting with the Respondent's Director General on 22nd December 2008 and asked whether he was able to attend the meeting. There was no response to the invitation. Instead, the Applicant engaged yet another lawyer to represent it. It is important to note that amicable settlement of a dispute arising out of

the contract was a result which the parties undertook to pursue before submitting to arbitration.

The last lawyer indicated to the Applicant that he would institute arbitration proceedings in accordance with Article 10 of the contract should the Respondent fail to pay the alleged debt within the time stipulated in the notice of intention to sue sent to it. The lawyer must be taken to have been aware of the availability of remedies for the alleged breach of contract by the Respondent under arbitration proceedings governed by the laws of Rwanda. He must have been aware of the conditions the Applicant would have had to comply with to institute those proceedings. He indicated to the Applicant that for him to pursue the particular remedy on its behalf he needed payment of US$7000 in two instalments and stated the specific mode of payment of the legal fees. Instead of meeting the conditions for legal representation the Applicant put more questions to the lawyer as counter – conditions for payment. One of the questions clearly suggests unwillingness on the part of the Applicant's Managing Director to co-operate with its agent. He asked the lawyer to say what *"final offer"* he had made to the Respondent, presumably in respect of a settlement of the dispute between the parties. There was no reference to an offer of a settlement having been made by the lawyer to the Respondent in the letter of 17 February 2009 to which the Applicant's Managing Director was supposed to have been responding. There is no evidence of what happened thereafter. It is clear, however, that the Applicant once again withdrew its agency from the lawyer. Evidence of the conduct of the lawyer shows that he acted independently of any influence from the Government or the Respondent. He was prepared to pursue local remedies in the form of arbitration proceedings on behalf of the Applicant on conditions he was paid for the services. Far from being an obstacle to applicant's efforts to seek local remedies as suggested in argument, the lawyer was a willing agent.

Photocopies of pages of the Applicant's Managing Director's passport bearing immigration date stamps were produced to support the argument that the Applicant took steps to invoke local remedies to no avail. Whilst the documents show a number of visits to Rwanda by the Applicant's Managing Director during the relevant period there is no evidence of what he did when he was in the country. There is no evidence that he held meetings with anyone with the view of engaging the local remedies particularly the

institution of arbitration proceedings. The Applicant is a business concern, its Managing Director could have been in Rwanda for any other business purposes. There was no basis on which a reasonable inference could be drawn from the visits to Kigali as depicted in the photocopies of pages of the passport, that the visits involved attempts to initiate local remedies in respect of the refusal by the Respondent to pay the money alleged to constitute breach of contract.

What is clear from the evidence available to the Court is that the applicant did not vigorously pursue the local remedies for the resolution of the dispute with the Respondent. It did not act with due diligence in that it failed to take advantage of measures suggested by its lawyers for seeking an amicable resolution of the dispute with the Respondent or failed to meet the conditions set by the lawyers for invoking the local remedies on its behalf. It must be recalled that the matter was pertinent to the Applicant, acting through its Managing Director who would have been privy to all the relevant information relating to the questions of measures taken in pursuit of local remedies. These are matters which would have been within the knowledge of the Applicant's Managing Director acting as its agent and yet no concrete evidence of what was done was provided to the Court.

There is no evidence of the Applicant in its conduct stretching over 12 months focussing through instructions to its lawyers, on the initiation of arbitration proceedings as provided under Article 10 of the contract. At no time was it ever suggested to or demanded of the Respondent that the parties should submit to arbitration. There was lack of commitment to compliance with the requirements of Article 26 of the Treaty on the part of the Applicant as opposed to inaccessibility of local remedies. The obligation to exhaust local remedies is imposed on a party under Article 26 for the benefit of the state party to the proceedings. Failure to comply with the requirements of the rule which has no conduct of the State party as its substantive cause is unlikely to constitute a ground for an exception to the rule. It is because of the assumption that failure to exhaust local remedies would prejudice the state party that compliance with Article 26 is made a pre-condition to filing a valid reference challenging the legality of an act of a Member State.

The matter referred to the Court is inadmissible by reason of the failure by the Applicant to exhaust local remedies before filing the Reference in terms of Article 26 of the Treaty. The Court has no jurisdiction to hear and determine the Reference. It is dismissed with costs.

It is so Ordered.

Dated and delivered at Lusaka, Zambia this 7th day of May, 2010.

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Hon. AdrienNyankiye - **Lord Justice**

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Hon. Luke Malaba - **Lord Justice**

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Hon. Menberetsehai Tadesse - **Lord Justice**

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

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Hon. Hortense R. neé Rakotomena - **Lady Justice**