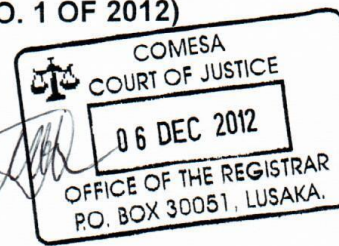


PRELIMINARY APPLICATION No. 1 of 2012
(Arising from REFERENCE NO. 1 OF 2012)

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



Coram: S. Rugege, Lord Principal Judge; J. M. Ogoola, M. Tadesse,
L. Malaba and S. B. Maphalala, LJJ

Registrar: (Acting) Nkonkesha, Esq.

THE REPUBLIC OF MAURITIUS - APPLICANT

VERSUS

POLYTOL PAINTS & ADHESIVES
MANUFACTURERS CO. LTD - RESPONDENT

For the Applicants: Mr. B. Madhub with him Mrs F.
Maudarboucous Moolna

For the Respondents: Mr Razi Daureeawo

JUDGMENT OF THE COURT

Lord Justice Tadesse delivered the judgment of the Court.

The Respondent in this application filed in the Registry of the Court a main Reference dated 15 February, 2012 asking the Court to declare that the Applicant in this application has infringed the Treaty Establishing the Common Market for Eastern and Southern Africa (The Treaty); and to give an order directing the Applicant to take all the necessary steps and measures to properly implement the Treaty through its

M. R. J. S. B. M.

domestic legislation within such time frame as the Court deems just. The Respondent also asked the Court to grant an appropriate remedy with costs against the Applicant.

The subject matter of the main Reference on which the above prayers of the Respondent were based can be summarized as follows. The Respondent is a private company registered in Mauritius and involved in the manufacture and sale of, among other things, automotive paints. As such it was importing Kapci paints from the Republic of Egypt for sale in Mauritius. The Respondent was not subject to payment of customs duties on imports of these products from the Republic of Egypt as of November 1, 2000 as the Applicant eliminated customs duty on goods originating from Member States of COMESA including the Republic of Egypt pursuant to the Legal Notice issued on 29 October 2000 by the COMESA Council of Ministers. The Applicant, however, amended the Customs Tariff and introduced a 40% customs duty on specified products including the Kapci products which the Respondent imported from the Republic of Egypt. The Regulations which imposed such duties on the products were in force from November 16, 2001 to November 20, 2010 when the customs duty was removed by another Customs Regulation. The Respondent claims that it had paid a total of Rupees 13, 275, 261 during this period as customs duty for the Kapci products imported from Egypt.

The main contention of the Respondent is that the levy of customs duty on the import of Kapci from the Republic of Egypt was an infringement of the Treaty. The Respondent sought a remedy on the matter through an application for review of the Regulations by the Supreme Court of Mauritius on the basis of the breach of the Treaty. The court dismissed the application on the ground that the Treaty is not enforceable by the domestic courts.



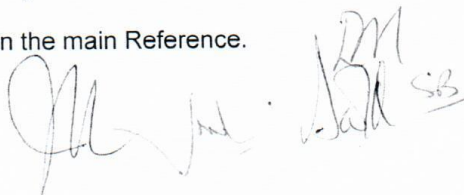
When served with the main Reference, the Applicant filed a Preliminary Objection dated May 22, 2012, seeking from the Court an order to set aside the main Reference of the Respondent on the following grounds:

- a. That the Respondent has no locus standi to file this Reference in matters relating to the implementation of Treaty Obligations
- b. That the Respondent has not established a valid basis upon which it is invoking the jurisdiction of the COMESA Court of Justice
- c. That the Respondent is not an aggrieved party as there is no regulation in violation of the Treaty provisions as at the date of filing of the Reference
- d. That the COMESA Court of Justice does not have jurisdiction to award damages or to order a refund as prayed for by the Respondent.

In their Reply to the Preliminary Objection, the Respondent prayed the Court to set aside the Preliminary Objection with costs averring that the Respondent has locus standi by virtue of Article 26 of the Treaty; and that the Court has jurisdiction under the same Article to determine the legality of an act, regulation, directive, or decision of a Member State on the grounds that such act, regulation, directive or decision is unlawful or an infringement of the provisions of the Treaty.

At the hearing, Counsel for both parties presented their oral arguments to the Court, along the lines indicated in their respective pleadings. Counsel for the Applicant elaborated on the points of objection which were otherwise put in a summary form in the pleadings.

The Court has gathered from the exchange of pleadings and oral presentations of both parties that the main preliminary issues which it has to address are; whether the Respondent has locus standi and whether this Court has jurisdiction to entertain the main Reference.

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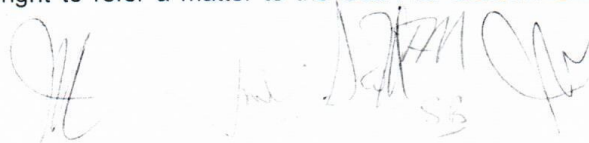
Both parties invoked Article 26 of the Treaty to show the presence or absence of locus standi of the Respondent. They have also referred to the provisions of the same Article in connection with the question whether the Respondent has exhausted local remedies. The main argument of the Applicant is that although Article 26 allows individuals to refer a matter to the Court for consideration, the present Respondent may not invoke this Article in the present case as the Regulation which it intends to have declared illegal had already been repealed by the Applicant before the filing of the Reference to the Court. In the opinion of Counsel for the Applicant, the Respondent does not have locus standi in this Court as there was no regulation in violation of the Treaty provisions as at the date of filing of the Reference. Counsel for the Respondent did not agree with this argument.

Article 26 of the Treaty around which the argument of both parties revolves provides as follows.

“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”.

It is clear from the provisions of this Article that a resident of any Member State has a right to refer a matter to the Court for determination under the Article

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against a Member State if three requirements are met; 1) that the reference is submitted by a resident of a Member State; 2), that the reference challenges, among other things, the legality of a regulation in view of the provisions of the Treaty; and 3) that the party has exhausted local remedies before filing the Reference. The Court finds on the documents submitted to it by the Respondent, which are not contradicted by the Applicant, that it is a company whose residence is in Mauritius, a Member State.

It is also clear from the prayers of the Respondent that it is asking the Court to determine the legality of a Regulation which it alleges has prejudiced it in its rights when it was in force. The Applicant argues that such challenge has no basis since the alleged contraventions of the Treaty no longer exists. The Regulation in question was indeed not in force at the time of the filing of the Reference on the 15th of February, 2012 as it was repealed by the Applicant with effect from November 20, 2010. It is the considered view of this Court that prejudice connected with an illegal Act arises at the commencement of the action. If the Respondent is correct in its claim, prejudice would have arisen from the date the Regulation came in to operation affecting it in monetary terms on each occasion of payment of import duty. The subsequent repeal of a regulation by Member State should not however deprive the Court of its jurisdiction under Article 26 in so far as there is a party that claims that it has been prejudiced during the time such Regulation was in force. The Applicant in the main Reference claims that it had paid customs duties due to the enactment and implementation of the customs Regulation and had also suffered monetary loss. The repeal of the Regulation may have prevented further payment of custom duties on goods imported after the repeal but does not cure previous grievances in so far as there is no recognition of the legality of the same when it was in force. The

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argument by Counsel for the Applicant that the Respondent is not an aggrieved party is not, therefore, accepted by this Court.

On the other hand whether the Regulation contravened the Treaty and whether the Respondent was actually prejudiced as a result are substantive matters which can only be considered by this Court during its consideration of the main Reference. Likewise consideration of the question whether the process of the establishment of the Customs Union is ongoing and the impact of such processes on the obligations of Member States are substantive matters which do not fall within the ambit of preliminary objections.

Article 26 requires that a party should exhaust local remedies in a Member State whose action is being challenged before approaching this Court. The documents in the pleadings as well as the oral presentations of both parties have shown the Court that the Respondent had filed an action in the Supreme Court of Mauritius requesting leave to challenge the legality of the said Regulation in light of the provisions of the Treaty. The judgment of the Supreme Court shows that the court dismissed the claim of the Respondent by stating that "in the absence of any specific legislation to that effect, non-fulfillment by Mauritius as a Member State of its Obligations, if any, under the Treaty is not enforceable by the national courts". In spite of that finding, the Applicant contends that the requirement of exhaustion of local remedies has not been met on two grounds: 1) that the cause of action of the Respondent before this Court is different from the cause of action that was before the Supreme Court of Mauritius alleging that the claim in the Supreme Court of Mauritius was a public law action seeking leave to challenge the legality of the Regulation whereas the Reference in this Court relates to a property right; and 2) that the Respondent had subsequently submitted another claim to the Mauritius Revenue Authority. The decision of the Mauritius Revenue Authority was appealed to



the Assessment Review Committee, whose decision in turn can be appealed to the Supreme Court.

As indicated in the previous paragraphs of this decision, the prayer in the main Reference is for the determination of the legality of the Regulation which was in force in Mauritius between November 2001 and November 2010. Of the same effect was the action that was brought by the Respondent to the Supreme Court of Mauritius. The Respondent applied to the Supreme Court of Mauritius for leave to apply for judicial review of the Applicant's decision to impose 40% duty on Egyptian products on the ground that it was in breach of its obligations under the Treaty. The effect of the applications submitted to this Court and to the Supreme Court of Mauritius are essentially the same. Both actions eventually seek determination of the compliance or non-compliance of the Regulation issued by Mauritius with the provisions of the Treaty. The Respondent has indicated in the Reference the amount of money which it claims to have paid as a result of the impugned Regulation which it claims was issued in violation of the Treaty. The claim for compensation is contingent on the determination of the legality of the Regulation which this Court is sought to address. The main cause of action in this Court, as was in the Supreme Court of Mauritius, is on the alleged illegality of the Regulation and not on proprietary claims as contended by Counsel for the Applicant. The Court therefore, does not accept the argument by Counsel for the Applicant that the cause of action in this Court is different from the cause of action that was before the Supreme Court of Mauritius.

The other point that was raised by Counsel for the Applicant relating to the exhaustion of local remedies is that the case is still pending in one of the tribunals in Mauritius. Indeed the Court has noted that the Respondent lodged an appeal with the Assessment Review Committee for a refund of the sum that had been paid as

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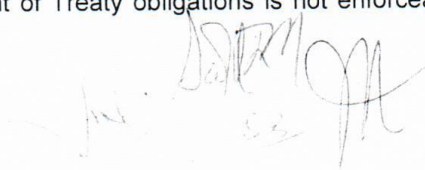
customs duty on the import of Kapci products from Egypt. The Court has also noted that the decisions of this tribunal are appealable to the Supreme Court of Mauritius.

Article 26 of the Treaty requires that an applicant should exhaust local remedies before coming to the Court in cases where the conditions set out there in apply. The point that needs determination in this connection is as to when a party is said to have exhausted local remedies for purposes of this Article. In this regard the European Court of Human Right's decision in the case of **Eberhard V Slovenia** (*applications nos. 8673/05 and 9733/45*) is instructive. It states that

"103 The Court recalls that the rule of exhaustion of domestic remedies obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system, regardless of whether the provisions of the [Treaty] have been incorporated into national law"

"104 Normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. However, there is no obligation to have recourse to remedies which are inadequate or ineffective".

In the case before this Court the Respondent lodged its claims with the Supreme Court of Mauritius. The Supreme Court dismissed the claim on the grounds that non-fulfillment of Treaty obligations is not enforceable by the national

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courts in so far as there was no specific legislation to this effect. Under such circumstances, one cannot reasonably expect that the Respondent would get an effective and sufficient remedy from the courts of Mauritius. Once the Respondent obtains a decision on this matter from the final court in the land, it should not be obliged to have recourse to other courts or tribunals within the country, as such courts and tribunals being subordinate to the highest courts are bound by the decision of that court. The Respondent could have directly had recourse to this Court after delivery of the decision of the Supreme Court of Mauritius. The subsequent actions taken by the Respondent in the domestic tribunals of Mauritius were, therefore, unnecessary to begin with. The Respondent cannot be reasonably expected to get a different effective remedy as the highest court has already expressed its position on the matter. . In this regard, the Court notes that in its judgment the case of ***The Republic of Kenya and the Commissioner of Lands V. Coastal Aquaculture, Reference No. 3/ 2001*** is distinguishable from the instant application because in that case the applicant withdrew the matter before reaching the highest court. The argument of the Counsel for the Applicant that the Respondent has not exhausted local remedies by virtue of the fact that a subsequent claim is still pending in one of the Tribunals of Mauritius is not accepted by this Court.

It follows therefore that the Applicant has locus standi to refer a matter before the Court. In the same vein the Court has jurisdiction to consider the matter now before it in terms of Articles 23 and 26 of the Treaty .

The Preliminary Objection is therefore dismissed with costs to the Respondent.

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It is so Ordered.

Done at Lusaka this ^{6th}.....day of December, 2012


.....
Hon. Samuel Rugege - **Lord Principal Judge**


.....
Hon. James Ogoola - **Lord Justice**


.....
Hon. Menberetschai Tadesse - **Lord Justice**


.....
Hon. Luke Malaba - **Lord Justice**


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