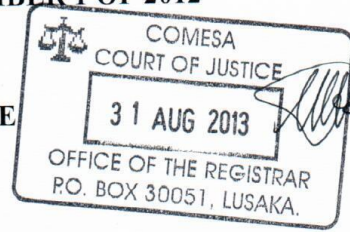


REFERENCE NUMBER 1 OF 2012



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

Coram: S. Rugege, Lord Principal Judge; A. Nyankiye J. M. Ogoola, M. Tadesse, L. Malaba, S. B. Maphalala and H. Rakotomena, LLJ

Registrar: (Acting) Nkonkesha, Esq.

POLYTOL PAINTS & ADHESIVES
MANUFACTURERS CO. LTD

APPLICANT

VERSUS

THE REPUBLIC OF MAURITIUS

RESPONDENT

For the Applicants:

Razi Daureeawo, S.C

For the Respondents:

Mr. B. Madhub, with Mrs. F. Malidarbocus
Moolna

JUDGMENT OF THE COURT

Lord Principal Judge Samuel Rugege delivered the judgment of the Court.

Background

The present Reference was filed by the Applicant, Polytol Paints and Adhesives Manufacturers Co. Ltd. a company incorporated in Mauritius, against the Republic of Mauritius the Reference seeks various remedies from this Court as detailed below:

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“(a) A declaration that the Respondent has infringed the Treaty, in particular by

- (i) Failing to give the Treaty force of law and the necessary legal effect within its territory;
- (ii) Failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the treaty;
- (iii) Levying customs duty on the Kapci products for the duration of the relevant period; and
- (iv) Imposing a discriminatory measure or legislation in the relevant period in levying customs duty on products including Kapci products imported from Egypt but not from other member states manufacturing same or like products.

(b) An order directing the Respondent to take all necessary steps and measures to properly implement the Treaty within its domestic legislation within such time frame as the Court deems just, fit and proper in the circumstances and in particular by:

- (i) giving the Treaty the force of law and the necessary legal effect within its territory; and
- (ii) Giving its national courts jurisdiction to deal with the matters concerning the application and interpretation of the Treaty;

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- (c) An order directing the Respondent to grant appropriate relief or remedy to the Applicant, including:
 - (i) the refund of the principal sum together with associated interest from the date of encashment of the principal sum by the Respondent to the date of refund to the Applicant; and
 - (ii) such other damages and compensation
- (d) An order awarding the Applicant's costs of and incidental to this reference
- (e) Such other orders as the Court deems just, fit and proper in the circumstances."

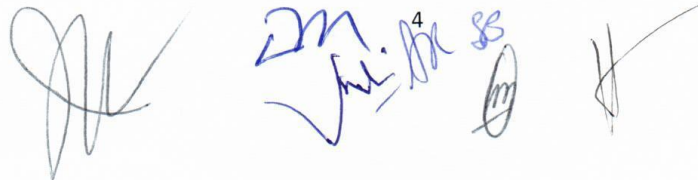
On 5 November 1993, the Republic of Mauritius signed the treaty establishing the Common Market for Eastern and Southern Africa (hereinafter COMESA). The Treaty was ratified on 8 December 1994. Under Article 46 of the Treaty, by the year 2000, Member States of COMESA were required to eliminate customs duties and other charges of equivalent effect imposed on goods eligible for Common Market treatment. Further, on 29 October 2000, the COMESA Council of Ministers issued a legal notice requiring Member States to issue legal or statutory instruments by 31 October 2000 to put into effect the elimination of customs duties and other charges required by Article 46.

In compliance with Article 46 of the Treaty, on 1 November 2000 the Republic of Mauritius eliminated customs duties on products originating in

Member States of COMESA. However, on 16 November 2001 the Republic of Mauritius amended the Customs Tariff Regulation of 2000 to introduce a 40% customs duty on specific products imported from the Republic of Egypt, including Kapci paint products. The Applicant claimed that same or like products from Member States other than Egypt were not subject to customs duties by the Republic of Mauritius.

The Applicant challenged the reintroduction of the levy of customs duty principally on the basis that imposition of duty on Kapci products was in violation of the provisions of the Treaty. In its letter dated 25 August 2005 to the Ministry of Finance, Polytol urged the authorities to remove the duty in order to comply with Article 46 of the COMESA Treaty. Similar letters were addressed to the Ministry of Finance on 2 February and 13 February 2006. A reminder was sent to the Ministry on 26 May 2006. (See Annexes 15-17 in Applicant's bundle of documents). However, no response was forthcoming.

In April 2008 Polytol sought a remedy before the national courts for alleged infringement of the Treaty and brought an action before the Supreme Court of Mauritius for leave to apply for judicial review of the Respondent's decision to levy the duty on Kapci products in the relevant period. On 15 April 2009, the Supreme Court delivered its decision, dismissing Polytol's application for leave to seek judicial review on two grounds. First, the Court found that the application made in May 2008 for leave to apply for judicial review was well outside the required time limit as the duty had been reintroduced in 2001. Secondly, the Court found that it could only take cognizance of the provisions of the COMESA Treaty to the extent that they have been incorporated into the municipal law which at the time was the

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First Schedule to the Customs Act as repealed and replaced by Customs Tariff Act (Amendment of Schedule) (No.4) Regulations 2006. The Supreme Court said:

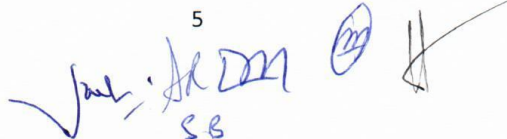
This Court can only consider the validity of the regulations against the backdrop of the Customs Tariff Act and our Constitution. In the absence of any such legislation to that effect, non-fulfillment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts.

[See *Polytol Paints and Adhesive Manufacturers Co Ltd v The Minister of Finance* 2009 SCJ 106 (Annex 8 of Applicant's bundle).]

Mauritius reduced the rate of duty on the Kapci products from 40% to 30% in 2006, and to 15% in mid-2008. On 20 November, 2010 the duty on Kapci products in issue was finally removed altogether by the Customs Tariff (Amendment Schedule (No.2) Regulations, 2010 (see Annexes 7 and 11 of Applicant's bundle.) However, Polytol was not satisfied with the mere removal of duties but sought to recover a refund of the duties which it claimed had been unfairly and unlawfully levied. On 10 August 2011, Polytol submitted a claim to the Mauritius Revenue Authority ("MRA") for the refund of the principal sum. By letter dated 8 September 2011 the MRA informed the Applicant that the claim for refund could not be entertained. An appeal to the Assessment Review Committee made on 29 September 2011 did not yield the desired result.

On 15 February, 2012, the Applicant filed a Reference in this Court under Article 26 of the COMESA Treaty, alleging breach of various Articles

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of the Treaty and seeking remedies from this Court as earlier indicated in this judgment.

On 13 June 2012, the Respondent filed a preliminary application (No.1 of 2012) seeking to set aside the Reference on the grounds that (a) the Applicant had no *locus standi* to file the Reference in matters relating to the implementation of Treaty obligations, (b) that the Applicant had not established a valid basis upon which was invoking the jurisdiction of the COMESA Court of Justice and (c) that the Applicant was not an aggrieved party as there was no regulation in violation of the Treaty at the date of the Reference.

The Court delivered its judgment on the preliminary application on 6 December 2012, finding that the Applicant had *locus standi* and that the Court had jurisdiction to hear the Reference in terms of Articles 23 and 26 of the Treaty. It further held that the determination as to whether the Applicant was an aggrieved party, could not be based on the circumstances pertaining at the date of filing the Reference as the claim was based on a period dating back to before the removal of customs duties on Kapci. The Court accordingly dismissed the preliminary objections. The Reference was subsequently heard on 26 April 2013, and the Court reserved its judgment.

Issues arising in the Reference

1. Whether there was a breach of the Treaty

The Applicant's main argument is that the Respondent breached the Treaty by imposing customs duties on imports from the Republic of Egypt after the date of elimination of the same, in accordance with the Treaty. This

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raises the question of the nature of the obligations of Member States under the Treaty.

Article 45 provides for the progressive establishment of a Customs Union among the Member States over a ten year transitional period commencing from the date of coming into force of the Treaty (that is, from December 1994). However, with respect to of establishment of a Free Trade Area within COMESA, the Treaty is more specific. Article 46 states

The Member States shall reduce and ultimately eliminate by the year 2000, in accordance with the program adopted by the PTA Authority, customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods which are eligible for Common Market tariff treatment.

It is on the basis of the above that the Applicant contends that by reinstating the customs duty on certain products originating from a Member State (Egypt), including Kapci paint products, from November 2001 to November 2010 the Respondent was in breach of the Treaty.

The Respondent in reply argues that Mauritius did not breach the Treaty, because the Customs Union is not fully established and that the Council extended the establishment of the Customs Union to 2014. [Refer to Council decision at its Meeting of 19-20 November 2012 para 129 (d) CS/CM/XXXI/4]. Counsel for Respondent argued that Member States have flexibility in the determination of when to implement certain aspects of the Treaty that would be most advantageous to a successful establishment of a

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Customs Union. He submitted that the requirement to eliminate duties by the year 2000 is "not cast in stone".

The position of the Respondent is thus that if the Treaty is taken as a whole then an extension of the implementation of the whole would necessarily extend the implementation period for all parts of the Treaty. On the other hand the position of the Applicant is that Article 46 of the Treaty, which has a definitive time period attached to its implementation and has not been specifically extended by the Council, ought to be taken as an individual stand-alone provision the implementation of which must comply with the time limit under the Treaty.

Applicant makes a number of allegations of breach of the Treaty by Mauritius. The questions raised by Applicant for consideration by the Court are summarized in paragraph 34 of Applicant's bundle (pages 11 & 12). These questions may be grouped into two categories: those which relate to purported failure to fulfill obligations under the Treaty in general contained in paragraph 34 (a) and those which are based on actions of a Member State that affect the rights of Applicant outlined in paragraph 34 (b) – (d). The questions relating to failure to fulfill obligations are the following:

- (a) Whether the Respondent has failed to fulfill its obligations under the Treaty, thereby infringing the Treaty, in particular Articles 5 and 29, by:
 - (i) Failing to take steps to implement or properly implement the Treaty within its domestic legislation;

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- (ii) Failing to give the Treaty the force of Law and the necessary legal effect within its territory; and
- (iii) Failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty.

The issue that arises in examining the first set of questions relating to the failure of Mauritius to take certain measures to fulfill its obligations under the Treaty is whether these questions are properly before the Court. Article 26 under which the Applicant based its Reference states 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...

Thus, a legal or natural person is only permitted to bring to Court matters relating to conduct or measures that are unlawful or an infringement of the Treaty but not the non-fulfillment of a Treaty obligation by a Member State. The responsibility of bringing a matter relating to non-fulfillment of obligations under the Treaty is reserved for Member States and the Secretary General. This is clearly indicated in Articles 24 and 25. Article 24 (1) states:

“A Member State which considers that another Member State or the Council has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court.”

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In paragraph 2 of the same Article, the Treaty gives a similar right to a Member State as that given to a legal or natural person in Article 26.

“A Member State may refer for determination by the Court, the legality of any act, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.”

With relation to the Secretary General, Article 25 of the Treaty confers on him an obligation to take measures to deal with a matter where he considers that a Member State has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty. These measures involve engaging the Member State concerned if that fails to remedy the situation, refer the matter to the Bureau of the Council which may decide that the matter be referred to the Court immediately or be referred to Council and if it is not resolved, the Council must direct the Secretary General to refer it to the Court.

In looking at Articles 24, 25 and 26, it is clear that the intention in the Treaty is to reserve matters relating to non-fulfillment of Treaty obligations to Member States and the Secretary General. The Applicant has no right to refer such matter to the Court for determination. It follows from the above analysis that the Court need not decide on the questions raised by the Applicant relating to the alleged failure by Mauritius to implement the Treaty within its domestic legislation, failing to give the Treaty force of law

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and failing to give its national courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty.

This brings the Court to the alleged breaches of the Treaty which involve acts or measures that affect Applicant and which fall under Article 26. The first question raised by Applicant in this respect is whether Respondent has infringed the Treaty by imposing customs duty on the import of products including Kapci for Egypt. As stated above, Article 46 of the Treaty requires Member States to have eliminated duties on goods from other Member State by the year 2000. Although Mauritius complied by the due date, it reimposed the duty with respect to certain products from Egypt in November 2001. The reason for this change is stated in the Defence filed by the Respondent and signed by the Chief State Attorney and Respondent's Attorney, Mrs F.M Moolna S.A, as follows:

"4. Respondent admits paragraph 9 of the Reference and avers that the said tariff Regulations were implemented following an import surge from the Republic of Egypt between 1997 and 2000. In view of representation from local industries, the state of Mauritius engaged in negotiations with the Republic of Egypt with a view to reach a compromise in lieu of application of safeguard measures under Article 6 of the Treaty."

Thus, Mauritius was clearly alive to its obligations under Article 46 and aware of possible exemption under the Safeguard provision in Article 61 but chose not to take that route. In the view of the Court, Mauritius infringed Article 46 by reintroducing duties on Egyptian products including Kapci paints even if it was for the protection of its industries.

The Respondent argues that there was no breach of the Treaty since this measure was based on a mutual agreement between two countries which agreed to have duties applicable only between themselves. However, the question then arises as to whether parties to a multi-lateral Treaty can have bilateral arrangements the effect of which are contrary to the purpose and objectives of the multi-lateral Treaty. This issue is examined later in this judgment.

The main argument of Respondent in response to the Applicant is that the provisions of the Treaty regarding establishment of the Customs Union are flexible, intended to facilitate a process rather than rigid rules "cast in stone". Counsel for the Respondent invited the Court to look at the objectives of COMESA –and to infer from them a process that is progressive irrespective of the Treaty timeframe. In support of this, he cites a number of decisions of the COMESA Council of Ministers which allowed certain countries to postpone joining the FTA and urged others to comply with Article 46. In particular, he refers to the meeting of the Council of Ministers of November 1999 whereby it was decided in paragraph 164 that:

"164. Council noted that the study has indicated that there was a possibility that not all the Member States should publish the 100% tariff reduction by the due date for the COMESA Free Trade Area and recommended that only Member States that would fulfill the conditions of a free trade area, form the Free Trade Area to the exclusion of those that would not have published the 100% reduction rate."

Contrary to the Respondent's argument, this Court finds that this statement emphasizes that Member States must comply with the deadline in order to benefit from FTA otherwise they will be left out. This is not

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flexibility for Member States to join whenever they choose too. The same can be inferred from the Council statements urging Member States to comply with the deadline.

On the other hand, once Mauritius had taken steps to join the FTA in November 2000, it could not selectively apply the obligations under Article 46 by imposing duties for products from some Member States in the FTA and not others. What Mauritius could have safely done was to take advantage of the Safeguard clause in Article 61 of the Treaty which permits a Member State to take necessary safeguard measure in the event of serious disturbances occurring in the economy, subject to informing the Secretary General and other Member States. As earlier indicated, Mauritius chose not to use this method probably because the safeguard would be only for one year with possibility of renewal upon approval by Council.

It is further argued by Respondent that the whole process leading to the Customs Union was extended by Council to 2014. This is in reference to the Meeting of October 2012 where Council took the decision at paragraph 55 (d) "That the transition period for the Customs Union be extended to June 2014". It should be noted that this "transition period for the Customs Union" is that referred to in Article 45 and does not affect the specific time limit of the FTA in Article 46. It would cover for instance matters relating to the Common External Tariff and non-tariff barriers, which are different aspects of the Customs Union referred to in Article 45.

One other thing that may be said about the flexibility argument is that in interpreting the Treaty, an attempt should be made to keep the ordinary meaning of the text of the Treaty where it is not vague or ambiguous. As it is

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expressed in Article 31 of the Vienna Convention on the Law of Treaties of 1969:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."

In the view of this Court Article 46 is clear and unambiguous and its terms must be interpreted with their ordinary meaning in the context of the purpose and objective of the treaty to achieve free trade within the COMESA area.

2. Whether there was breach on the basis of discrimination

Another question raised by the Applicant is whether there was a breach of the treaty by Mauritius in particular, Article 57, by imposing discriminatory legislation or measures in levying duty on products from Egypt but not from other Member States manufacturing the same or like products.

In the view of the Court, the allegation of infringement of the Treaty in this respect is misconceived. Article 57 states that

"A Member State shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of the Member States."

This provision is intended to protect products from Member States against protectionist measures such as duties, quantitative limitations and other non-

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