

COUR DE JUSTICE



محكمة العدل

COMESA



COURT OF JUSTICE

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IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND  
SOUTHERN AFRICA – FIRST INSTANCE DIVISION  
AT LUSAKA, ZAMBIA

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Coram: Qinisile Mabuza, Acting Principal Judge, Ali S. Mohammed,  
Mary N. Kasango, Leonard Gacuko, Clotilde Mukamurera, LJJ

Registrar: Nyambura L. Mbatia

**REFERENCE NO. 1 of 2015**

MALAWI MOBILE LIMITED (MML).....APPLICANT

*Versus*

GOVERNMENT OF THE REPUBLIC OF MALAWI .....1<sup>st</sup> RESPONDENT

MALAWI COMMUNICATIONS REGULATORY  
AUTHORITY (MACRA).....2<sup>nd</sup> RESPONDENT

For the Applicant: Mr. David Kanyenda

For the 1<sup>st</sup> Respondent: Hon. Mr. Kalekeni Kaphale, Attorney General of the  
Government of the Republic of Malawi with Ms. Apoche  
Itimu

For the 2<sup>nd</sup> Respondent: Mr. Ted Roka

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**RULING**

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AM *[Signature]* MNK GL MC

The applicant in this reference is **MALAWI MOBILE LIMITED** (hereinafter referred to as "MML"). The First Respondent is **GOVERNMENT OF THE REPUBLIC OF MALAWI** (hereinafter referred to as "the Government"). The Second Respondent is **MALAWI COMMUNICATIONS REGULATORY AUTHORITY** (hereinafter referred to as "MACRA").

### **BACKGROUND**

1. The thread that holds the above parties together is a Licence Agreement dated 19<sup>th</sup> April, 2002. That agreement was between MML and MACRA. By that agreement MML was required to provide public mobile radio telephone services in the Republic of Malawi for a period of fifteen years.
2. Under that agreement MML was also required to undertake the roll out of its network in Malawi within 12 months from the date of the launch. The Licence Agreement was entered into between MML and MACRA as provided under Section 3.1 of the Communication Act, 1998 of Malawi.
3. By January 2005 MML had not rolled out the mobile telephony network. On or about 27<sup>th</sup> January 2005 MML sought an extension from MACRA for up to 31<sup>st</sup> October 2005 to roll out the network.
4. In their response by their letter dated 9<sup>th</sup> February 2005 MACRA issued a revocation notice to MML. That revocation notice was in terms of clause 21 of the Licence Agreement of 2002. Relying on that clause MACRA demanded from MML Licence fees and penalties. Further MACRA required MML to roll out the mobile telephony network within 90 days. In default of the payment of the Licence, penalties and the roll out of the network, MACRA stated by that response that MML's Licence would stand as revoked.
5. By yet another letter dated 15<sup>th</sup> March 2005 MACRA informed MML that their request for extension to roll out the network would be placed before the MACRA Board

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of Directors. MACRA also requested by that letter for MML to submit their progress report.

6. By their letter dated 21<sup>st</sup> March, 2005 MML renewed their request to MACRA for extension for roll out of network and by that letter MML submitted their schedule of that roll out of the network.

7. By this Reference MML pleaded that the Board of Directors of MACRA resolved, on 29<sup>th</sup> March 2005, to extend the roll out period and following that resolution an irrevocable written agreement was entered into.

8. That by that irrevocable agreement MACRA granted MML an extension as it had sought which extension was granted on the following conditions amongst others:

- That MML would make two payments of annual Licence fee for USD 100,000 for the period of the years 2004 to 2005 and a similar amount for the period of 2005 to 2006;
- In consideration of the above payments MACRA would extend the roll out period up to 31<sup>st</sup> October 2005;
- That the Licence of MML would be revoked after close of business of 31<sup>st</sup> October 2005 if MML failed to fulfill the Licence obligation; and
- That the effect of the said agreement was to vary the Licence and superseded any notices, memoranda and or communication that had been between MML and MACRA.

9. By this Reference MML pleaded that it fulfilled its obligation by making two payments to MACRA of the Licence fee each of USD 100,000 on 19<sup>th</sup> and 20<sup>th</sup> April, 2005.

10. MML allege in their Reference that MACRA, through the inducement of the Government wrongly and maliciously revoked, by their letter dated 13<sup>th</sup> and 15<sup>th</sup> April, 2005 the irrevocable agreement.

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11. It needs to be noted that the Attorney General of Malawi had, by a letter dated 24<sup>th</sup> March 2005, suspended the Board of Directors of MACRA.

12. In their defences both the Government and MACRA pleaded that the suspension letter of the Attorney General of Malawi also suspended the resolutions that had been passed by MACRA Board of Directors as at the date of the suspension letter. It is also pleaded in those defences that the suspension of the Board's decisions had the effect of suspending the Board's decision to grant MML extension up to 31<sup>st</sup> October, 2005 to roll out the network.

13. MML sued the Government and MACRA at High Court of Malawi, Commercial Division seeking both special and general damages in respect of the alleged breach of the irrevocable agreement. The judgment before that court was in favour of MML. MML was awarded judgment in respect of loss of profit to the tune of USD 66,850.000 plus costs of the suit.

14. That judgment was the subject of the appeal filed by the Government and MACRA before the Supreme Court of Appeal. That appeal was successful and the Supreme Court of Appeal set aside that judgment of the High Court, Commercial Division. MML has filed this Reference following the judgment of Malawi Supreme Court of Appeal.

15. All Parties have filed Preliminary Applications which are the subject of this Ruling. The Government's Preliminary Application seeks two prayers. Firstly it seeks a finding that this Court does not have jurisdiction to entertain the Reference, and secondly it seeks the removal of MACRA from this Reference.

16. MACRA by its Preliminary Application seeks an order for its removal from this Reference.

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17. MML seeks the setting aside of the judgment of the Malawi Supreme Court of Appeal and the reinstatement with interest, of the judgment of Malawi High Court, Commercial Division, by its Preliminary Application.

#### **A. PRELIMINARY APPLICATION BY THE GOVERNMENT**

18. The Government's Preliminary Application is dated 5<sup>th</sup> June, 2015. It is brought under Rules 82 and 83 of the Rules of the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) and Article 26 of the COMESA Treaty ("the Treaty").

19. By that application, in the first prayer, the Government seeks dismissal of this Reference on the basis that this Court does not have jurisdiction under Article 26 of the Treaty.

20. The second prayer in the Government's Preliminary Application, because in the Court's view, it is similar to the prayer in MACRA's Preliminary Application dated 10<sup>th</sup> June, 2015, the determination of MACRA's said application will also determine that second prayer.

21. The emphasis of the Government's argument in support of the Preliminary Application was the definition of the term "**unlawful**" as stated in Article 26 of the Treaty. According to the Government, that term in Article 26 only refers to breaches of the Treaty or of any community law under the Treaty. That accordingly, the alleged act of the alleged inducement by the Government for MACRA to allegedly breach the irrevocable agreement was not unlawful as stated in Article 26 of the Treaty.

22. The Government through its learned counsel was accordingly emphatic that because that alleged inducement did not fall within the provisions of Article 26 and because the municipal law of Malawi cannot apply to this present Reference, the Reference must fail.

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23. To bolster its argument, the Government submitted that the relationship between MML and MACRA was governed by Clause 29 of the Licence Agreement which clause is in the following terms:

***"This Licence and its performance shall be governed by and in accordance with the Laws of Malawi."***

24. The Government further submitted that References before this Court cannot rely on municipal laws. That, that being so, the alleged breach of irrevocable agreement could not be examined by this Court because this Court, under its jurisdiction, can only entertain matters relating to the Treaty.

25. In the Government's view, MML was also precluded from raising any issue before the Court, which issue had not been the subject of litigation before the Malawi courts. That to allow MML to raise such an issue, according to the Government, would contravene the provision in Article 26 of the Treaty which requires that before filing a Reference before this Court, a party must first exhaust the local remedies.

26. The Government argued that MML had not litigated on the issue of the alleged breach of the Treaty before the Malawi courts and had, therefore, not exhausted the local remedy in respect to those alleged breaches. That Article 26 had not envisaged a party would file a reference in respect of a new claim not litigated before the municipal court.

27. MML through its reply filed in court on 1<sup>st</sup> July, 2015, referred to Rule 82 of the Rules and argued that the Government's Preliminary Application had delved into the substance contrary to the provisions of that Rule. That the Government by its said application was seeking the Court's determination of contentious issues of the case, yet that it ought to have confined itself to procedural issues or defects.

28. In the view of MML, its reference was permitted under Article 26 because MML was a juristic person resident in Malawi and that it had exhausted the local remedies as required under Article 26. MML relied on the case ***"THE REPUBLIC OF KENYA AND***

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**COMMISSIONER OF LANDS =VS= COASTAL AQUACULTURE LIMITED”  
Reference No.3 of 2001.**

29. MML submitted that the Government's alleged inducement of the breach of contract was an unlawful act and was a violation of Article 6 (f) of the Treaty. Further that to determine at this preliminary stage whether the Government's alleged inducement was unlawful would, of necessity involve the Court in the consideration of substantive issues of this Reference, which, as stated before, MML argued, is not permitted under Rule 82 of the Rules.

**COURT'S ANALYSIS AND DETERMINATION**

30. The Republic of Malawi is one of the nineteen Eastern and Southern African States that belong to the Common Market for Eastern and Southern Africa (COMESA). In establishing themselves in that Common Market, those States agreed to be bound by the COMESA TREATY. The aims and objectives of the Common Market are set out in Article 3 of the Treaty. Those aims and objectives are as follows:

**ARTICLE 3**

***Aims and Objectives of the Common Market***

***The aims and objectives of the Common Market shall be:***

***“(a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;***

***(b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;***

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*(c) to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development;*

*(d) to co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;*

*(e) to co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and*

*(f) to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community."*

31. The Member States of the Common Market by Article 6 of the Treaty stated that in order to achieve the aims and objectives in Article 3, above, they would adhere to the principles set out in that Article 6 Sub-Articles (a) to (j). Again for understanding, we shall set out those principles the States bound themselves to adhere to in order to achieve the aims and objectives of Article 3 as follows:

**ARTICLE 6**

***Fundamental Principles***

*"The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991, agree to adhere to the following principles:*

*(a) equality and inter-dependence of the Member States;*

*(b) solidarity and collective self-reliance among the Member States;*

*(c) inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;*

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*(d) non-aggression between the Member States;*

*(e) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;*

*(f) accountability, economic justice and popular participation in development;*

*(g) the recognition and observance of the rule of law;*

*(h) the promotion and sustenance of a democratic system of governance in each Member State;*

*(i) the maintenance of regional peace and stability through the promotion and strengthening of good neighbourliness; and*

*(j) the peaceful settlement of disputes among the Member States, the active co-operation between neighbouring countries and the promotion of a peaceful environment as a pre-requisite for their economic development."*

32. Bearing in mind the provisions of Articles 3 and 6 as set out above, is the Government correct in arguing that MML's reference fails to bring itself within the provisions of the Treaty?

33. The consideration of that argument starts off by looking at part of Article 26 of the Treaty:

**ARTICLE 26**

**Reference by Legal and Natural Persons**

*"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:"*

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34. MML's Reference in regard to its case against the Government is to the effect that the alleged inducement by the Government to MACRA, which inducement allegedly led to MACRA's revocation of the alleged irrevocable agreement was an unlawful act. It is alleged that the Government of Malawi committed the tort of inducement to breach that contract.

35. Several issues arise from the parties' arguments on whether the alleged act of inducement fell within the ambits of the Treaty. It however needs to be understood from the outset that as we are dealing with this issue, we are not examining whether the alleged act of inducement was "unlawful" as stated in Article 26, but rather we shall consider that if MML did prove at the hearing of the present Reference that the alleged act indeed was an unlawful act, whether that proof would bring MML's reference within the provisions of the Treaty. In other words, at this preliminary stage, and bearing in mind Rule 82 of the Rules, we shall not consider whether MML has proved that the said alleged inducement had occurred and if so was it unlawful because to do so would need us to go to the substance of this Reference.

36. As correctly submitted by the Counsel for MML, Rule 82 of the Rules forbids the Court from entering into the realm of substance of the Reference at the hearing of a preliminary application.

37. The jurisdiction of this Court, as well articulated by all Counsels who appeared before us, is as stated in Articles 19 and 23 of the Treaty.

Article 19 provides viz:

**ARTICLE 19**

***Establishment of the Court***

***"1. The Court of Justice established under Article 7 of this Treaty shall ensure the adherence to law in the interpretation and application of this Treaty.*** (Emphasis ours).

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38. Article 23 provides viz:

**ARTICLE 23**

**General Jurisdiction of the Court**

**"1. The Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty.** (Emphasis ours).

**2. The First Instance Division of the Court shall have jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division under paragraph 2, any matter brought before the Court in accordance with this Treaty.** (Emphasis added).

39. The Government's argument is that this Court, when one considers the terms of Article 26 as reproduced above, has no jurisdiction to examine the alleged act of inducement to revoke a contract because to do so would be contrary to Article 26.

40. The Government argued that the "act, directive, decision or regulation" stated in Article 26 only related to acts, directives, decisions or regulations in the Treaty. That accordingly, since the alleged act of inducement did not fall within the provisions of the Treaty, MML cannot invite this Court to consider its claim. Also that accordingly this Reference filed by MML is seeking this Court to apply the municipal law of Malawi which is contrary to the provisions of the Treaty.

41. That to entertain this reference would lead to this Court going beyond its jurisdiction as set out in Articles 19 and 23 of the Treaty. The Government added that this Court could only apply the provisions of the Treaty and of the community law as provided under the Treaty.

42. What we understood to be the argument of the Government in advancing its submissions that the Court was bound to apply the Treaty and community law, was that the community law were those directives and decisions of the various organs of the Common Market. Those organs are set out in Article 7 of the Treaty and are:

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**ORGANS OF THE COMMON MARKET****ARTICLE 7*****Organs of the Common Market***

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

***(a) the Authority;***

***(b) the Council;***

***(c) the Court of Justice;***

***(d) the Committee of Governors of Central Banks;***

***(e) the Intergovernmental Committee;***

***(f) the Technical Committees;***

***(g) the Secretariat; and***

***(h) the Consultative Committee."***

43. The Government submitted that this Court was restricted under Article 26 to examine whether directives and decisions of the above Organs were unlawful or infringing the Treaty by the Council or the Member State.

44. We beg to differ with the restrictive interpretation of Article 26. In the Court's view, the terms of Article 26 are clear, without ambiguity and wider in application. The acts, regulations, directives and decisions referred to in that Article are the acts, regulations, directives and decisions of the Council and the Member States that are amenable to be examined by this Court.

45. That Article does not only refer to the Organs of the Common Market. The unlawful act would also be the act of either the Council (as defined in the Treaty to mean Council of Ministers of the Common Market), and the Member States.

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46. To read anything else in the Article 26, as the Government attempts, would be incorrect. Article 26 does not in the Court's view restrict parties approaching this Court to only rely on infringement by the Organs of the Common Market as argued by the Government. It does, however, provide that any alleged infringement of the Treaty would afford this Court jurisdiction.

47. Indeed we wish to refer to the submissions of Counsel for MML which submissions in our view, fully encapsulate the Court's understanding of that Article 26 viz:

***“Entertaining the term “unlawful” promotes the aims and objectives of the Treaty, I think a restrictive approach ....curtails access to this Court and infact it precludes the Court from examining a Member State’s adherence to the aims and objectives, and it may promote Member States’ impunity or trash democratic systems of governance...”***

48. We earlier in this Ruling set out the aims and objectives of the Common Market, Article 3, and the fundamental principles of the Member States of the Common Market, Article 6. In other words the Member States set the aims and objectives that the Common Market desire to attain and provided the fundamental principles that will lead to such attainment.

49. The East African Court of Justice at Arusha in the case of **SAMUEL MUKIRA MOHOCHI =VS= THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA**, Reference No. 5 of 2011 had an opportunity to consider fundamental principles in the Treaty for the Establishment of the East African Community, and we shall quote the relevant part of that judgment, thus:

***“The Respondent submitted that the provisions of Article 6 (d) of the Treaty are aspirations and broad policy provisions which are futuristic and progressive in application and that they raise political questions which cannot be answered by this Court. Further, that they are not capable of***

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*being breached and, therefore, are not justiciable. We find this stance erroneous for the following reasons:*

- (i) *Article 6 provides six fundamental principles of the Community. Black's Law Dictionary defines "Principle" as "a basic rule, law or doctrine." (9<sup>th</sup> Edition at P.1313). Our understanding of "Fundamental Principles" as used in this Article, aided by the above definition, is that these are Rules that must be followed or adhered to by the Partner States in order that the objectives of the Community are achieved."*

50. The Court would wholly agree and adopt that finding by the East African Court of Justice. That Court, in the above case, went on to state:

*"These principles are foundational, core and indispensable to the success of the integration agenda and were intended to be strictly adhered to."*

51. Amongst the principles of the COMESA Treaty are those which the Court can only determine whether they have been breached by examination of the municipal law of the parties.

52. Examples of where municipal law would have to be resorted to but not restricted would be Article 6 (f) (g) and (h), that is accountability, economic justice and popular participation of development; the recognition and observance of the rule of law; and the promotion and sustenance of a democratic system of governance in each Member State. Application of the municipal law in any Reference, we hasten to add, would always depend on the facts of each case.

53. This was the clear finding of the Court in the case of *POLYTOL PAINTS & ADHESIVES MANUFACTURERS CO. LTD =VS= THE REPUBLIC OF MAURITIUS* – COMESA Court of Justice Ref. No. 1 of 2012 where the Judges entertained the argument that the applicants claim was statute barred by the provisions of Mauritius law. The Court found that the Republic of Mauritius had continually breached the Treaty

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and accordingly, the Court found that the period of limitation set by the statute of Mauritius began to run from the year 2005.

54. It is because of the above finding that the court is of the view that the Government's restrictive view of the jurisdiction of the Court is contrary to the very Treaty it relies upon because the same Treaty allows this Court to go to municipal law of the parties to determine whether the Treaty has been breached.

55. Indeed there is no other way that this Court can determine if a Member State has breached the Treaty when considering, for example, whether that State has observed the Rule of Law.

56. The Member States, in agreeing to set up the Preferential Trade Area for Eastern and Southern African States were, as stated in the Treaty's preamble, seeking to **"strengthen and achieve convergence of their economies through the attainment of a full market integration"** and in so doing, had regard that this would not be achieved unless there was observance of **"the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law"**.

57. In this regard, the Court wishes to make reference to an article by Peter Watson BA, LLB, SSC entitled **"THE RULE OF LAW AND ECONOMIC PROSPERITY"** whereby he begins by boldly making the statement:

***"The Rule of Law and Economic Prosperity are indivisible. No one will disagree with the proposition that economic growth is a starting point for encouraging investment, whether internal or external, and for achieving wealth and prosperity of any nation state and the better provision for its population"***.

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58. That statement must have rung true to the Member States when they set out the fundamental principles in Article 6 which the Member States are to adhere to.

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