ORIGINAL

COUR DE JUSTICE TRIBUNAL DE JUSTIÇA

COMESA

COURT OF JUSTICE

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

APPEAL NO. 1 OF 2016

GOVERNMENT OF THE REPUBLIC OF MALAWI.....APPELLANT

VERSUS

MALAWI MOBILE LIMITED.....RESPONDENT

Coram:
Hon. Lombe P. Chibesakunda – Judge President}
Hon. Justice Abdalla E. El Bashir }
Hon. Justice Michael C. Mtambo }
Hon. Justice David Chan Kan Cheong } JJA
Hon. Justice Wael M. H. Y. Rady }

Registrar: Hon. Nyambura L. Mbatia
Assistant Registrar: Hon. Nemaduthsingh Juddoo

Counsel for the Appellant:
Hon. Mr. Kalekeni Kaphale, SC – Attorney General of Malawi
Ms. Apoche Itimu – State Attorney – for the Appellant

Counsel for the Respondent - Mr. David Kanyenda

COMESA COURT OF JUSTICE REGISTRAR 23 APR 2017 P.O. Box 12222 KHARTOUM, SUDAN

Certified true copy

JUDGMENT

23/04/17

I. BACKROUND

1. This is an appeal by the Government of the Republic of Malawi (the Appellant) against the decision of the First Instance Division (the FID) on a preliminary point that was filed in the FID under Rule 82 of this Court's Rules of Procedure (the Rules). The FID dismissed the appellant's preliminary application and held that it had jurisdiction to entertain the reference by Malawi Mobile Company Ltd (the Respondent) under Article 26 of the COMESA Treaty (the Treaty) in respect of an alleged violation of the municipal law of Malawi in the context of Article 6(f) and (g) of the Treaty.

2. The Respondent's case in the FID was that the Appellant's organ, the Malawi Communications Regulatory Authority (MACRA), committed an unlawful act and/or an infringement of a provision of the Treaty by violating Malawi's municipal law of contract in wrongfully terminating a licence agreement for the provision of cellular phone (cell phone) services by the Respondent to customers in Malawi. The Appellant also committed an unlawful act and/or infringement of a Treaty provision by committing a tort of inducing a breach of that contract through the Attorney General of the Republic of Malawi (the Attorney General) by unlawfully directing MACRA to revoke the Respondent's licence.

3. Apart from the issue of lack of jurisdiction, the Appellant contended before the FID that the Respondent had not exhausted local remedies as required by Article 26 of the Treaty as no Treaty issue was litigated in the courts of Malawi, *to wit* Article 6(f), be it expressly or in substance; that the word "unlawful" in Article 26 of the Treaty does not cover breaches of municipal law as alleged by the Respondent but community law; and that article 6(f) which was pleaded in the FID by the Respondent and Article 6(g) which was not pleaded but was relied on by the FID in its ruling, are high principles which do not confer to a legal or natural person an enforceable right

against Member States. They merely create Member State obligations *inter se*.

4. As indicated above, prior to the filing of the Reference in the FID, the Respondent brought an action for breach of contract and inducement to commit a breach of contract in the Commercial Division of the High Court of Malawi (the High Court) where it succeeded. It was awarded US$66,850,000.00 damages with respect to loss of profit arising from the alleged contractual and tortuous wrongs. The award was reversed by the Supreme Court of Appeal in Malawi (the Supreme Court), the apex court in Malawi, on the ground that although the appellant did not offer evidence in defence in the High Court, the burden of proof that the Respondent had a valid licence, that it was unlawfully revoked and that the damages claimed and awarded were suffered was on the Respondent. The Supreme Court found that the Respondent had failed to discharge that onus.

5. With respect to the subject matter of this appeal, the FID held:

   (a) At paragraph 47 of the ruling, agreeing with Counsel for the Respondent, that entertaining the term "unlawful" in section 26 of the Treaty as covering breaches of domestic law promotes the aims and objectives of the Treaty. A restrictive approach curtails access to the COMESA Court of Justice (CCJ) and in fact precludes the CCJ from examining a Member State's adherence to the aims and objectives, and it may promote Member State's impunity or trash democratic systems of governance;

   (b) At paragraph 49 of the ruling, agreeing with the East African Court of Justice (EACJ) in ***Samuel Mukira Mohochi v The Attorney General of The Republic of Uganda, Reference No. 5 of 2011***, that the fundamental principles in Article 6 of the Treaty are rules that must be followed or adhered to by Member States. They are foundational, core and indispensable to the success of the integration agenda and were intended to be strictly adhered to;

LPC

(c) At paragraphs 54 and 55 of the ruling, that a restrictive view of the jurisdiction of the Court is contrary to the very Treaty which allows the Court to go into municipal law to decide whether the Treaty has been breached, for example, whether the State has observed the Rule of Law;

(d) At paragraph 56 of the ruling, citing with approval an article by Peter Watson BA, LLB, SSC entitled ***"The Rule of Law and Economic Prosperity'*** sourced at ***www.lemac.co.uk/resources/publication files/speech rule of law.pdf***, that 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; and

(e) At paragraph 78 of the ruling, that the Respondent did exhaust the local remedies as the case was taken to the highest court of Malawi. It fulfilled the requirements of Article 26. More than what was required by the drafters of the Treaty should not be read in Article 26.

6. It should be noted that another issue relating to the dismissal of the Respondent's preliminary application in the FID was not appealed to this Division. This was in respect of an application to annul the decision of the Supreme Court on the ground that it was not quorate when it sat to deliver its judgment with Justice Mzikamanda who did not take part in the hearing and deliberations. According to the preliminary remarks of the Supreme Court judgment, it was stated that the Court was sitting with Justice Mzikamanda because the judge who participated in the hearing and deliberations, Justice Chinangwa, was out of the jurisdiction. The application was based on the provision of the Constitution of the Republic of Malawi which imposes the requirement that the Supreme Court sits with an odd number of judges. The FID reasoned that determining this issue at the preliminary stage would be contrary to Rule 82 of the Rules as it would require delving into the substance of the matter. Thus, at this point in time, that issue remains unresolved in the FID and as such, in the closing oral submissions, Counsel for the Respondent

has implored this Court that whichever way we decide in the appeal before us, the matter will need to be referred back to the FID to adjudicate on that outstanding issue.

II. PRELIMINARY POINT RAISED BY THE RESPONDENT

7. In response to the appeal, the Respondent raised a preliminary point to the effect that the present appeal is clearly inadmissible or clearly unfounded and therefore liable for dismissal under Rule 100 of the Rules for non-compliance with the provisions of Rule 93(1)(c) and (d) in that:-

   (a) the Notice of Appeal does not contain the pleas in law and legal arguments relied on contrary to Rule 93(1)(c); and

   (b) the Notice of Appeal does not contain the form of order sought by the Appellant contrary to Rule 93(1)(d) as read with Rule 94.

8. In an oral ruling, we held that we would admit this appeal and hear it on merit in the interests of justice mainly on the ground that the present situation was caused by an ambiguity in our own Rules. We now proceed to give the *full* reasons.

9. Part XIX of the Rules, which consist of Rules 91 to 103 inclusive, provides for the procedure governing appeals against decisions of the FID. It is appropriate and useful to set out the following extracts of the Rules for the purpose of determining this preliminary issue:

"Rule 92
Appeal and withdrawal thereof

1. A party wishing to appeal against a decision of the First Instance Division to the Appellate Division shall-

(a) within two months of the date of the judgment which he wishes to appeal against, file a notice of appeal in conformity with Form C with the Registrar together with sufficient copies for service to all the parties involved in that judgment; and

(b) Within two months of the date of the filing of the notice of appeal, lodge an application at the Court registry setting out the appeal together with sufficient copies for service to all the parties involved in the judgment appealed against.

2. (a) The time limits laid down in sub rule (1) may be extended by the President on a reasoned application by the Appellant; and

(c) The Registrar shall not accept any notice of appeal after the expiration of the time limits laid down in sub rule (1) unless the Appellant has obtained an extension of time from the President.

Rule 93
Contents of appeal and appeal record

1. An appeal shall contain-

(a) the name and address of the appellant;
(b) the names of the other parties to the proceedings before the First Instance Division;
(c) the pleas in law and legal arguments relied on; and
(d) the form of order sought by the appellant.

Rule 94
Relief sought on appeal

1. An appeal may seek-

(a) to set aside, in whole or in part, the decision of the First Instance Division;

(b) the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.

Rule 96
Response to appeal

1. Any party to the proceedings before the First Instance Division may lodge a response to an appeal within a month of the date of service on him of the notice of the appeal. The time-limit for lodging a response shall not be extended.

2. A response shall contain-

(a) the name and address of the party lodging it;
(b) the date on which the notice of appeal was served on him;
(c) the pleas in law and legal arguments relied on; and
(d) the form of order sought by the Respondent.

Rule 100
Inadmissible or unfounded appeals

Where the appeal is, in whole or in part, clearly inadmissible or clearly unfounded, the Appellate Division may, at any time, by reasoned order dismiss the appeal in whole or in part."

The Respondent's Submissions

10. The following submissions were made on behalf of the Respondent. Part XIX of the Rules must be read as a whole and considered in its entirety. The use of the word "*shall*" in Rules 92 and 93 denotes that they contain mandatory requirements. Rule 92(1)(a) should be read together with Rule 93(1) so that the Notice of Appeal filed by the Appellant on 13 January 2016 should have contained the appellant's pleas in law and legal arguments and the reliefs sought. This proposition is supported by the wording and tenor of Rule 96 which requires a party to lodge a **response** to an appeal within a month of the date of service on him of the **notice of the appeal**. Rule 96 further provides that the response shall contain the Respondent's pleas in law and legal arguments and the reliefs sought by him. A notice of appeal must therefore already contain the appellant's pleas in law and legal arguments and relief sought so that a Respondent is aware of them and is able to comply with the requirements of Rule 96 by replying to them.

11. In the present case, the Notice of Appeal failed to contain the appellant's pleas in law and legal arguments and the reliefs sought. The absence of these peremptory requirements is a fatal and incurable non-compliance with the requirements under the law. Rules of court are there to be observed and litigants who fail to comply do so at their own peril. The Notice of Appeal is fundamentally defective. It follows that this appeal is clearly inadmissible and clearly unfounded. There is in fact no valid or competent appeal before this Court. The purported appeal is not an appeal within the meaning of the Rules.

12. The Appellant also failed to lodge a valid appeal within the prescribed time frame of 2 months under Rule 92(1)(a). It was only on 10 March 2016 that the Appellant stealthily introduced its grounds of appeal in its response.

The Appellant's Submissions

13. It was contended on behalf of the Appellant that it has complied with the requirements of the law. Rule 92(1) sets out a two-stage process. Rule 92(1)(a) requires a prospective appellant to file a notice of appeal in conformity with Form C within 2 months of the date of the judgment of the FID. Rule 92(1)(b) then requires an appellant to lodge an application setting out **the appeal** within 2 months of the date of the filing of the notice of appeal. It is at this second stage that an appellant should file his pleas in law and legal arguments and the reliefs sought. These requirements have been complied with by the Appellant within the prescribed time limits.

14. Even assuming that the appeal is defective, the Respondent did not suffer any prejudice as it has been able to respond to all the appellant's pleas in law and legal arguments. In these circumstances, striking out the appeal would not be warranted.

Discussions and Conclusions

15. Counsel for the Respondent referred this Court to various domestic procedural rules and authorities from some Member States. We intend no disrespect to Counsel by our decision not to review the said rules and authorities. But the assistance to be derived from comparison with these rules and authorities is bound to be limited as we are not familiar with these rules. Each jurisdiction has its own rules of procedure and its own approach to this subject matter. Some jurisdictions strictly apply procedural rules and any defect in form is sanctioned as being fatal. Other jurisdictions will use their discretion, whether statutory or inherent, to decide whether to condone a breach of procedure or form. Since this Court has its own specific rules of procedure, we are of the view that the better approach is to turn to these Rules and interpret and apply them to the facts of the present case.

16. The ruling of the FID was delivered on 20 November 2015. The Appellant filed a notice of appeal on 13 January 2016. This was within the limit of 2 months provided by Rule 92(1)(a). It is also not disputed that the Notice of Appeal of the Appellant was in conformity with Form C as required under the same Rule. A perusal of Form C shows that nowhere therein is an appellant required to file at that stage his pleas in law and legal arguments and the reliefs sought.

17. The Appellant then filed its response on 10 March 2016 containing its grounds of appeal, its pleas in law and legal arguments and the reliefs sought. This was within 2 months of the date of the filing of the notice of appeal as provided for in Rule 92(1)(b). Interestingly, Rule 92(1)(b) provides that an appellant shall lodge, within 2 months of the date of filing of **the notice of appeal**, an application setting out **the appeal**. And Rule 93 provides that **an appeal** shall contain the pleas in law and legal arguments relied on and the form of order sought by an appellant.

18. It would, therefore, seem that the Appellant has complied with the requirements under Rules 92 and 93 so that there is a valid appeal before this Court.

19. The difficulty with the above resides in the wording and tenor of Rule 96.We agree with learned Counsel for the Respondent that a logical interpretation of this Rule would be that a notice of appeal should already contain the appellant's pleas in law and legal arguments and relief sought. This is so because Rule 96 requires a Respondent to lodge a response to an appeal within a month of the date of service on him of the **notice of the appeal**. And the response should contain the Respondent's pleas in law and legal arguments and the reliefs sought by him. A notice of appeal must therefore already contain the appellant's pleas in law and legal arguments and relief sought so that a Respondent is aware of them and is able to comply with

the requirements of Rule 96 by replying to them in the form of his own pleas in law and legal arguments.

20. We wish to point out that the rules under Part XIX have now been amended removing the ambiguity.

21. As can be seen, the confusion has been caused by an ambiguity in our own Rules. We must lay the blame at our own door for this unfortunate situation. The interpretations by both parties of these Rules are plausible and have merit. It stands to reason that a party should not be penalised by an ambiguity in our Rules. This is the main reason why we have allowed the present appeal to proceed on its merits.

22. Moreover, at the end of the day, as rightly pointed out by the Attorney General, no prejudice has been caused to the Respondent. The Respondent became eventually fully aware of the pleas in law and legal arguments relied upon, and the reliefs sought, by the Appellant. It had the opportunity to respond to them and it did seize the opportunity. It has been able to put forward its case in an unhindered manner and without being embarrassed. It was, therefore, in the interests of justice that this appeal was allowed to proceed. *We rule accordingly.*

III. THE ISSUES FOR DETERMINATION IN THIS APPEAL

23. **The issues to be determined are as follows :**

(a) Whether or not the CCJ has jurisdiction to entertain the Respondent's Reference under Article 26 of the Treaty;

(b) Whether or not, an action under Article 26 of the Treaty can be solely based on the Aims and Objectives and Fundamental Principles in the Treaty as set out in Articles 3 and 6 (f) and (g);

(c) Whether or not, the Respondent satisfied the requirement contained in the proviso to Article 26 of the Treaty by exhausting local remedies before the national courts of Malawi.

IV. ANALYSIS

(a) WHETHER OR NOT THE CCJ HAS JURISDICTION TO ENTERTAIN THE REFERENCE.

The Appellant's Submissions

24. The Appellant maintained that the FID erred in agreeing to assume jurisdiction when it failed to establish any link between the Treaty or community law and the matter before the national courts within the meaning of Article 26 of the Treaty. The CCJ only has jurisdiction to decide matters or questions relating to the Treaty and the community laws. A purposeful and contextual interpretation of the word "unlawful" in article 26 of the Treaty should lead to the result that that word cannot mean or relate to municipal law breaches that are not linked to the Treaty or related community laws.

25. According to article 34 of the Treaty, the CCJ is limited in its jurisdiction to issues around the interpretation and application of the Treaty or the validity of regulations, directions or decisions of the Common Market.

26. The inclusion of the word "unlawful" in Article 26 of the Treaty does not *per se* empower the CCJ to adjudicate on the legality of municipal law

unrelated to the Treaty. What is unlawful can only be unlawful within the context of the Treaty or the community law and not domestic laws that have no relation to the Treaty.

27. The word "unlawful" is not as clear as the Respondent argued and that it needed interpretation. Unlawfulness should be restricted to mean acts which violate community law. The Attorney General distinguished the EACJ decision of ***Mohochi*** (supra). That case being relied upon by the Respondent to illustrate unlawfulness did not in fact deal with unlawfulness. It dealt with infringement of a Treaty provision and a protocol made thereunder prohibiting discrimination with respect to citizens of Partner States which had direct effect in the East African Community, unlike Article 6 of the Treaty which does not have direct effect.

28. Further, the Attorney General made a distinction between the CCJ making reference to domestic law to resolve a Treaty issue, which was the case in ***Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius CCJ Ref.no.1 of 2012*** and making reference solely to domestic law to found an action such as breach of contract and inducing a breach of contract.

The Respondent's submissions

29. In response, it was submitted on behalf of the Respondent as follows: The subject matter or substance of a reference for determination by the CCJ must relate to the legality of any act, regulation, directive or decision of the Council or Member States on the ground that the same is unlawful or an infringement of the Treaty. The municipal law was envisaged by the framers of the Treaty as an applicable source of law, hence the proviso under Article 26 of the Treaty enjoins a litigant to exhaust domestic remedies.

30. Since the provisions of the Treaty are general, and because there are no Treaty provisions enumerating sources of law within the common market, municipal law is bound to play a leading role in the shaping of the COMESA law. If the common market evolves a jurisprudence that is essentially a synthesis of general principles of municipal law of the Member States, such regional law will receive the cooperation of Member States which will enhance its esteem and applicability.

31. Unlawfulness and breach of a Treaty provision are two distinct heads of claim under Article 26 of the Treaty and the Respondent is relying on them in the alternative. According to Article 31 of the Vienna Convention on the interpretation of treaties, words should be given their ordinary and natural meaning unless that would lead to an absurdity. This is what is known as the golden rule. Then there is the teleological approach whereby a word should be given a meaning according to the context. Further, there is the rule that a treaty should be given the meaning which promotes the achievement of the intention of the drafters of the treaty.

32. Black's Law Dictionary, 7th edition, defines unlawfulness as *"That which is contrary to Law"*. "Unlawful" and "illegal" are frequently used synonymously, but, in the proper sense of the word, "unlawful", as applied to promises, agreements, considerations, and the like, denotes that they are ineffectual in law because they involve acts which, although not illegal, i.e., not positively forbidden, are disapproved by law.

33. If the word "unlawful" is given its ordinary and natural meaning, breach of contract and inducing a breach of contract, the subject matter of the litigation in the courts of Malawi, qualifies to found a cause of action in the CCJ. Breach of contract and inducing a breach of contract also amount to an infringement of a Treaty provision, namely, Article 6(f). If the drafters of the Treaty had wanted to exclude domestic law infringements in the interpretation of the word "unlawful" in Article 26 of the Treaty, they could have stated so.

34. In support of the argument that unlawfulness includes violation of domestic law, Counsel for the Respondent asserted that this was the reason why the CCJ applied domestic law. Examples are ***Polytol*** (supra). In this case, the Limitation Act of Mauritius was applied. Another case is the recusal ruling of the Appellate Division in this reference where Malawi's Constitution was applied.

35. The Respondent alternatively relied on article 6 (f) of Treaty, arguing that municipal law is not designed to oust the CCJ's reliance on provisions of the Treaty.

Discussions and Conclusions

36. The determination of this issue entails the interpretation and application of the provisions in the Treaty relating to the jurisdiction of the CCJ. It is, therefore, appropriate to set out first the relevant provisions for the purposes of the present appeal.

37. The CCJ was established as an organ of the Common Market under Article 7 of the Treaty. It is common ground that Articles 19 and 23 of the Treaty spell out the jurisdiction of the CCJ :

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.*
2. ....

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.*
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.*
3. ...

38. It is clear from the above that the jurisdiction of the CCJ is limited to the interpretation and the application of the Treaty and the adjudication upon matters referred to it pursuant to the Treaty.

39. Additionally, in the following provisions, the Common Market legislators took the opportunity to set out the various lawsuits that could be brought before the CCJ by the different entities and/or legal persons under the Treaty and the different conditions of application:

Article 24
Reference by Member States

1. *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.*
2. *A Member State may refer for determination by the Court, the legality of any act, regulation, 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.*

Article 25
Reference by the Secretary-General

1. *Where the Secretary-General considers that a Member State has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, he shall submit his findings to the Member State concerned to enable that Member State to submit its observations on the findings.*
2. *If the Member State concerned does not submit its observations to the Secretary-General within two months, or if the observations submitted are unsatisfactory, the Secretary-General shall refer the matter to the Bureau of the Council which shall decide whether the matter shall be referred by the Secretary-General to the Court immediately or be referred to the Council.*
3. *Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the Court.*

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:

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.

40. As regards to the interpretation and application of the above Articles, we endorse the clear findings of the **FID** in the case of ***Polytol Paints &***

Adhesives Manufacturers Co. Ltd v The Republic of Mauritius CCJ Ref.no.1 of 2012 where the Court stated:

> *"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.....*
>
> *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....*
>
> *The content of this rule* (Article 26) *shows the extent the signatories of the COMESA treaty have committed themselves to give some space in the COMESA Territory not only for the Member States but also for individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between the Member States. It also gives enforceable rights to citizens residing in the Member States".*

41. Certainly, these rights arise not only where they are expressly granted by the Treaty, but also where the Treaty imposes obligations on Member States to confer justiciable rights upon residents in Member States.

42. It must be observed that these rights of a resident of a Member States are mainly protected by Article 26 of the Treaty through a specific legal procedure before the CCJ.

43. Article 26 of the Treaty enables the Court to review the legality of the acts adopted by the Council or a Member State. However, this action may not be brought before the CCJ unless its subject is "*unlawful or an infringement of the provisions of this Treaty*".

44. A perusal of Article 3 of the Treaty as read with Articles 19, 23 and 26, shows that the CCJ is assigned the task of ensuring the respect of the law in the interpretation and application of the Treaty and deciding on disputes submitted to it under the Treaty. Therefore, it constitutes the judicial organ of COMESA, whose jurisdiction is to ensure the respect of law through the interpretation and application of the Treaty.

45. In ***Henry Kyarimpa v the Attorney General of Uganda, Appeal No. 6 of 2014,*** the Appellate Division of the EACJ held at paragraph 70 that:

> "*Why then, it may be asked, all this analysis of Uganda's internal law when the Court's jurisdiction is limited to the interpretation and application of the Treaty? To answer this question, we would adopt the exposition of the law and the reasoning of the Trial Court in paragraphs 45 and 46 of its judgment. The Trial Court delivered itself as follows:*
>
> *'45. It cannot be gainsaid that this Court's jurisdiction is limited to the application and interpretation of the Treaty. In so doing, there may be instances where the Court may have to look to Municipal Law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty. This was why for example, in Rugumba v Attorney General of Rwanda. EACJ Ref.*

No. 8 of 2010, this Court had to invoke the Penal Laws of the Republic of Rwanda to find that where a Partner State does not abide by its own Penal Laws and Procedures, then its conduct amounts to a violation of the rule of law and hence the Treaty.

46. Similarly, in Mohochi Vs The Attorney General of the Republic of Uganda, EACJ Ref No. 5 of 2011, the Court found that where a Partner State had declined to follow its immigration laws in declaring the Applicant a prohibited immigrant, then it was a breach of the Treaty and the Protocol on the Common Market which included the right of free movement of persons with EAC..."

46. In the light of the principles set out in ***Kyarimpa*** (supra), we agree with the submission of the Attorney General that the CCJ can use domestic law to resolve a Treaty issue but not to found a cause of action as propagated by the Respondent unless it has reference to a violation of the Treaty and the right to address such violation against Member States is vested under Article 26 of the Treaty in citizens and residents of Member States. We would, however, not venture to say whether these principles have been rightly applied in the case of ***Rugumba*** and ***Mohochi*** (supra).

47. Thus, this Court has no jurisdiction to entertain a reference by a resident person under Article 26 of the Treaty which is grounded solely on an infringement of a national law. This is not only because it has never been given such a status by the Treaty and the COMESA legal order, but also because, as already stated above, the main role of the CCJ, in the new legal order of COMESA, is to guarantee the respect of national law in accordance with the implementation of the Treaty. Therefore, the CCJ cannot be considered as a general supranational court with a task to control the legality of every national legal act unrelated to the Treaty.

48. However, we hasten to add that the CCJ has a supervisory role over national courts when it comes to the interpretation and application of the Treaty. This is borne out by the provisions of Articles 29 and 30 of the Treaty which read as follows :

"Article 29
Jurisdiction of National Courts

1. Except where the jurisdiction is conferred on the Court by or under the Treaty, disputes to which the Common Market is a party shall not, on that ground alone, be excluded from the jurisdiction of national courts.
2. Decisions of the Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts.

Article 30
National Courts and Preliminary Rulings

1. Where a question is raised before any court or tribunal of a Member State concerning the application or interpretation of this Treaty or the validity of regulations, directives and decisions of the Common Market, such court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give a judgment, request the Court give a preliminary ruling thereon.

2. Where any question as that referred to in paragraph 1 of this Article is raised in a case pending before a court or tribunal of a Member State against whose judgment there is no judicial remedy under the national law of that Member State, that court or tribunal shall refer the matter to the Court".

49. Consequently, while we agree with the FID that the Treaty allows this Court to go to the municipal law of the parties to determine whether the Treaty

has been breached, we, however, bearing in mind the provisions of Article 26 of the Treaty, hold that "unlawful" does not mean and does not include **any** breach of domestic law that is not Treaty related.

50. No relationship between the alleged breach of contract and tort of inducement, the subject matter of the Reference, and alleged unlawfulness under the Treaty has been established. The only mention by the Respondent of a violation of the Treaty was in the prayer in the Reference seeking a declaration that the acts, directives and decisions of the first and second Respondents in purporting to revoke the applicant's license were unlawful and amounted to violation of Article 6 (f) of the Treaty. There was absolutely no link between the facts averred in the Reference and the alleged violation of the above mentioned Article. It is to be noted that Counsel for the Respondent, in his submissions, did not clarify this issue. In fact, he contented himself with merely asserting that the alleged violation of Article 6(f) of the Treaty is unlawful within the meaning of Article 26 of the Treaty.

51. In view of the foregoing, we find that the Respondent has not demonstrated, either in the Reference before the FID, or in its oral or written submissions, what constitutes an alleged violation of the Treaty. We note that the Respondent's Reference was based on an alleged breach of contract and an alleged inducement to commit a breach of contract under Malawi national law.

52. In conclusion, we are unable to agree with the submission of Counsel for the Respondent that the word "unlawful" in Article 26 means **any** unlawful act. It would be an absurd interpretation because it would in effect mean that **any** alleged unlawful act of a Member State, even if it is unrelated to the Treaty, would be amenable to review by the CCJ on a reference by a resident in a Member State. This could not have been the intention of the Common Market legislators since the CCJ could not have been intended to be a supranational court sitting on appeal over all decisions of national courts