COUR DE JUSTICE

COMESA

محكمة العدل

COMESA

COURT OF JUSTICE

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

REFERENCE NO. 1 OF 2017

MALAWI MOBILE LIMITED .....APPLICANT

VERSUS

THE COMMON MARKET FOR EASTERN & SOUTHERN AFRICA(COMESA).....RESPONDENT

Coram:	**Hon. Lady Justice Qinisile Mabuza**	**-**	**Principal Judge**
	Hon. Mr. Justice Ali S. Mohamed	**)**	
	Hon. Lady Justice Mary N. Kasango	**)**	
	Hon. Mr. Justice Bernard Georges	**)**	
	Hon. Dr. Justice Leonard Gacuko	**)**	**LLJ**
	Hon. Lady Justice Clotilde Mukamurera	**)**	
	Hon. Mr. Justice Chinembiri E. Bhunu	**)**	

Registry: **Hon. N. Mbatia – Registrar and A. Asiimwe – Clerk of Court**

Counsel: **Mr. D. Kanyenda – for the Applicant**

Mr. G. Masuku with Mr. B. Chigawa – for the Respondent

JUDGMENT

1. The Applicant, Malawi Mobile Limited ('MML'), is a company duly incorporated in the Republic of Malawi under the Malawi Companies Act, 1984.

2. The Respondent is the Common Market for Eastern and Southern Africa ('COMESA') established under Article 1 of the COMESA Treaty (the 'Treaty').

3. COMESA is herein represented by its Secretary General, the Chief Executive Officer, whose office is established under Article 17(1) of the Treaty.

INTRODUCTION

4. The issue for our determination in this matter is the eligibility for election and subsequent appointment of two serving Judges, amongst others, to the COMESA Court of Justice ('CCJ').

5. The CCJ is one of the Organs of COMESA and, by virtue of Article 20(1) of the Treaty, is composed of 12 Judges, elected as such and appointed by the COMESA Authority, of whom seven are appointed to the First Instance Division ('FID') and five to the Appellate Division ('AD') of the Court. The qualifications for appointment of the Judges are set out in Article 20(2), the proviso to which states that no two or more Judges shall at any time be nationals of the same Member State.

6. The Judges whose election and subsequent appointment is challenged by MML are Judge President Justice Lombe Chibesakunda and Justice Abdalla El Bashir (hereinafter referred to as the 'affected Judges'). They were elected on 4 March 2015.

7. To that end, on 10 August 2017, MML filed Reference No.1 of 2017, subsequently amended, (hereinafter the 'Reference' or 'Amended Reference') seeking the following reliefs:

a) 'An order that, on a true and proper construction of Article 20 of the COMESA Treaty, Judge President Lombe Chibesakunda and Judge Abdalla El Bashir were ineligible for election and/or appointment to the COMESA Court of Justice;

b) That the appointment of the impugned Judges was void ab initio;

c) An order that all or any proceedings including Appeal No. 1 of 2016 in which the impugned Judges participated are a nullity and be set aside entirely;

d) An order awarding the Applicant compensation, damages and costs occasioned by litigation before the impugned ineligible Judges or in the alternative;

e) An order that the Council of Ministers requests the Court to give an Advisory Opinion regarding the eligibility of the impugned Judges in terms of Article 32 provided the current Members of the Appellate Division do not participate in making the Advisory Opinion;

f) Any other order for relief as the Court may deem fit and expedient under the circumstances.'

8. Concurrently, MML filed an *Inter Partes* Notice of Motion (hereinafter the 'Motion'), subsequently amended on 24 January 2018, seeking the suspension of the operation of the election of the affected Judges and a stay of the Revision proceedings pending before the AD of the CCJ. The Court ordered that the Reference and Motion would be heard together.

9. In the Motion MML seeks the following orders:

1) 'An order that the operation of the election and appointment of Judge President Lombe Chibesakunda and Judge El Bashir of the Appellate Division be suspended under Rule 46 until determination of their eligibility to hold their respective judicial offices or in the alternative;

2) An order that Revision Application number 1 of 2017 be stayed under Rule 44 until determination of the eligibility of the impugned Judges to hold their respective judicial offices.

3) The costs of and incidental to this application abide the result of the application.

4) Any other ancillary orders as the Court may deem fit and expedient under the circumstances.'

10. The thrust of the MML's Reference is that the affected Judges, having reached retirement age in their respective countries, were ineligible in terms of Article 20 (2) of the Treaty to be elected and appointed to the CCJ.

11. COMESA, in its response, opposes both the Amended Reference and Motion seeking the suspension of the operation of the election of the two affected Judges and stay of the Revision proceedings.

12. COMESA, in its response to the Motion for the suspension of the election of the two affected Judges and for the stay of Revision of the proceedings, indicated that at the hearing of the Amended Reference and Motion it would make an application in terms of Rule 22(1) of the CCJ Rules of Procedure 2016 (the 'CCJ Court Rules'), seeking the exclusion of learned Counsel for MML from the proceedings on the grounds that he had shown extreme conduct to the AD and to the two affected Judges in referring to them in its pleadings as 'impugned Judges', suggesting that they were false and questionable.

13. Rule 22(1) provides that:

'Any Counsel whose conduct towards the Court, a Judge or the Registrar is not in accordance with the dignity of the Court or proper administration of justice may, at any time be excluded from the proceedings by an order of the Court after having been given an opportunity to explain herself or himself.'

14. COMESA further made a special prayer for security for costs in terms of Rule 75 on the grounds that the application sought by MML was misdirected and the application was an abuse of the Court process.

15. Rule 75 provides as follows;

'Security for Costs

1. The Court may, on application by a party and for sufficient cause shown, require the other party to give security for costs.

2. Whenever a party is ordered to furnish security, the Court shall, by the same order, fix the time within which such security shall be furnished by such party.'

16. On the merits, COMESA denied that the election and appointment of the two affected Judges was unlawful and pleaded that their election was carried out lawfully and in accordance with the Rules of Procedure for the Election of Judges of the CCJ (2005) (the 'Election Rules').

17. COMESA further pleaded that the Motion for suspension was tantamount to an application for the removal of the two affected Judges and would have the effect of usurping the powers vested under the Treaty in the COMESA Authority Heads of State and Government, the only Organ empowered by Article 22(1) to remove a CCJ Judge from office.

18. It was COMESA's further plea that while it may be true that the two affected Judges may have retired in their respective national jurisdictions, they still qualified for judicial appointment to the CCJ in terms of Article 20(2) of the Treaty as they were jurists of recognised competence following their long service on the bench of their respective jurisdictions.

19. Finally, COMESA prayed for the dismissal of MML's Amended Reference and the Motion with costs.

20. We heard the parties on the issue of our jurisdiction to hear the Reference and Motion in Nairobi in January 2018 and on 24th January 2018 made the following Orders:

'77. In result we make the following orders:

a) The Respondents' objection to jurisdiction is dismissed. The FID has jurisdiction to entertain the Reference and the Notice of Motion;

b) The Respondents' objection to the Council being cited as a party is allowed. MML is hereby ordered to amend its pleadings in respect of the citation of the Respondents

c) Notice of the Reference and Notice of Motion shall be given to Judge President Lombe Chibesakunda and Judge Abdalla El Bashir;

d) The Notice of Motion and the Reference shall be heard together by the FID.

78. Costs will be in the cause.'

21. The order to notify the two affected Judges was premised on certain considerations in the Ruling by the FID as set out in the following paragraphs:

'70. While considering the issue of the Court's jurisdiction we were alive to the fact that one consequence of determining that the Court had jurisdiction to entertain the Reference and Notice of Motion was that the Judges, who

are directly affected by the prayers sought in both the Reference and Notice of Motion, had not been alerted to the two matters.

71. Rule 41 (2) of the Court Rules enjoins the Court not to hear motions unless persons affected by them are first notified. This is a rule of good common sense and is at the very basis of the audi alterem partem rule. While the Court is given a discretion in appropriate cases to hear motions without notification to persons affected thereby, and while Rule 41 is limited to motions and not references, we feel that justice would not be served in this matter by proceeding to a hearing of the Notice of Motion or Reference without notifying the two Judges of these two applications.

72. We acknowledge that there will be delay in hearing the Notice of Motion necessarily occasioned by the notice to the Judges. This is unavoidable. The Reference as filed will, however, still stand to be heard in due course. We are of the view that proceeding with both matters without the Judges being notified (in order that they may, should they so wish, take any steps available to them, including on the issue of jurisdiction) would not be a proper exercise of natural justice, particularly since the appointment of the Judges, and their continuation in office as Judges of the CCJ, are in cause.

73. In view of the fact that the substantive issue before us falls to be determined in the Reference, that the prayers in the Notice of Motion and Reference are substantially related, and in view of our decision hereafter to notify the Judges of these applications before proceeding further, we are of the view that justice would be best served if we heard the Notice of Motion and the Reference together.

74. It is therefore necessary to order that the hearing of the Notice of Motion be adjourned while notice of the Reference and Notice of Motion filed herein be given to Judge President Lombe Chibesakunda and Judge Abdalla El Bashir.'

22. Even though service on the two affected Judges was effected as ordered, they did not enter appearance to defend the Amended Reference or the Motion.

23. Following the Ruling on Jurisdiction, an Interlocutory Motion was filed on the 30 April 2018 by MML requiring COMESA to produce and furnish MML with copies of the Curricula Vitae of the two affected Judges within a prescribed time and seeking costs of the application.

24. The Interlocutory Motion was opposed by COMESA on the ground that the CVs of the affected Judges were their personal and private property.

25. The FID heard arguments in respect of the Interlocutory Motion on 2 August and delivered a ruling thereon on 4 August 2018.

26. By that ruling, the Motion was granted, and COMESA was ordered to produce the CVs of the two affected Judges. The costs of the Motion were ordered to be in the cause.

27. COMESA partially complied with the ruling and made available the CV of Judge President Lombe Chibesakunda. COMESA failed to provide the CV of

Judge El Bashir, prompting the Court to order that it be supplied by the Registrar of the CCJ.

28. The arguments pertaining to the Amended Reference and the Motion for the suspension of the operation of the election of the two affected Judges and stay of Revision proceedings pending before the AD were heard on 6th August 2018.

29. Mr. Kanyenda, learned Counsel for MML, informed the Court that MML was abandoning the Motion on Revision and would no longer pursue it. He stated that he would nonetheless pursue the Amended Reference and the Motion for the suspension of the two affected Judges. He indicated further that he was no longer pursuing prayers (d) and (e) of the Reference, save for the prayer for costs.

ELIGIBILITY OF AFFECTED JUDGES FOR APPOINTMENT

30. As mentioned earlier, Article 20(1) and (2) of the Treaty provides for the composition of the CCJ. It further provides for the qualification and eligibility of persons for appointment as Judges of that Court.

31. The question to be answered which is at the heart of this judgment is whether the two affected Judges were eligible for appointment to the CCJ bench as at 4 March 2015.

32. Article 20 (2) of the Treaty provides as follows;

'The Judges of the court shall be chosen from among persons of impartiality and independence who fulfill the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence.'

33. The Article can be divided into two parts regarding the eligibility of persons for appointment to the CCJ bench.

34. The first part deals with the eligibility of Judges for appointment to judicial office in their respective countries of domicile.

35. The second part requires them to be jurists of recognised competence.

36. The question which then arises is whether the two parts are conjunctive or disjunctive. In other words, can each part stand on its own or are the two parts to be read together?

37. In addressing this question, it is convenient to consider the structure of the article first.

38. A reading of the Article, in our view, reveals that to be eligible for appointment as a COMESA Court Judge, a person must:

- Be a person of impartiality and independence AND
- Fulfil the conditions required for the holding of high judicial office in the person's country of domicile OR
- Be a jurist of recognised competence.

'Holding high judicial office'

39. Apart from being persons of impartiality and independence, thus, the Article provides two alternatives for appointment as CCJ Judges. The first is that they *'must fulfill the conditions required for the holding of high judicial office in their respective countries of domicile...'*

40. It is common cause that the two Judges fulfill the test of impartiality and independence for appointment. MML seeks their removal from the bench on the basis that at the time of their appointment they had reached retirement age in their respective countries of domicile.

41. It was learned Counsel Kanyenda's submission that, upon reaching retirement age, both Judges automatically became ineligible for appointment as Judges in their respective countries of domicile by operation of law. By the same token, they ceased to be eligible for appointment to the CCJ bench.

42. Learned Counsel for COMESA, Mr. Masuku, countered that both Judges, despite reaching their respective retirement ages, were still eligible for appointment as Judges in their respective countries of domicile.

43. Given the two diametrically contradictory submissions on this issue, the Court is called upon to determine what the prevailing law was in the two affected Judges' respective countries of domicile at the time of their appointment.

44. Unfortunately, both Counsel, apart from mere speculation and conjecture, have placed no shred of evidence in this regard before us.

45. Considering that this issue falls for determination on the basis of the applicable law in Zambia and Sudan, it was remiss of both Counsel not to place any evidence before the Court as to the conditions for appointment and the retirement ages for Judges in these two countries.

46. Undoubtedly, Counsel for MML, Mr. Kanyenda, bore the onus of proving on a balance of probabilities what he alleged, namely that both Judges were ineligible for appointment at the material time. Instead, he sought to rely on COMESA's failure to rebut his assertions in pleadings. It was therefore his submission that failure to rebut his assertions was tantamount to admission of these assertions.

47. For this proposition of law, he sought to rely on Rule 35 of the CCJ Court Rules. The Rule provides as follows:

> ***'Admissions and Denials***
>
> *1. Any allegation of fact made by a party in a pleading shall be deemed to be admitted unless it is denied by the opposite party in its pleadings.*
>
> *2. A denial may be made either by specific denial or by a statement of non-admission either expressly or by necessary implication.*

3. Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be sufficient.'

48. On a proper reading of that Rule, it is clear that it relates to an admission of facts and not law. What is at stake here is the prevailing law at the time of appointment of the two Judges.

49. Since the Rule does not relate to admissions of law it is of no relevance on those matters. Reliance on Rule 35 was therefore misplaced.

50. In apparent appreciation of the paucity of the evidence proffered before us, Mr. Kanyenda invited us to take judicial notice of the applicable laws in both Zambia and Sudan and to carry out our own investigations and research in that regard.

51. It is trite and a matter of common knowledge that a Court can only take judicial notice of that which is notoriously known to the Court. With respect, this Court has no notorious knowledge of the law in the two countries concerned. That being the case, the Court cannot take judicial notice of the applicable laws at the material time in both countries.

52. As regards the invitation for the Court to carry out its own research, we hesitate and feel uncomfortable to gather evidence on behalf of either party for fear of losing our neutrality.

53. While there is no bar to the Court looking at the respective laws on its own, it is the primary duty of the parties to place sufficient evidence before the Court to enable it to make a just decision one way or the other. The ends of justice can hardly be met by the Court looking for evidence not presented before it and then making a decision based on its own evidence.

54. That procedure tends to offend against the basic principles of natural justice as the Court then ceases to be a neutral arbiter but becomes an active player.

55. In his submissions, Mr. Kanyenda made the valid submission that conditions of service for Judges vary extensively from country to country.

56. Indeed, it emerged from the discussions that ensued at the hearing that in some countries Judges are eligible for reappointment as acting or *ad hoc* Judges after retirement while in others they are not.

57. Considering these wide differences, it was imperative for the parties to place before the Court concrete empirical evidence regarding the applicable laws in Zambia and Sudan. This they did not do. As we have said earlier, it is not the function of the Court to carry out research on behalf of litigants before making a determination.

58. Notwithstanding this, and in light of the fact that there is no bar to the Court looking at the law, the Court took the liberty of taking note, as an example, of the Zambian law applicable as at March 2015, which it was able to access.

59. Article 98 (1) of the Constitution of Zambia (as amended by Act No.18 of 1996) provides as follows:

> *'Subject to the provisions of this article, a person holding the office of a judge of the Supreme Court or the office of a judge of the High Court shall vacate that office on attaining the age of sixty-five years:*
> *Provided that the President-*
>
> *(b) may appoint a Judge of the High Court in accordance with the advice of the Judicial Service Commission or a judge of the Supreme Court who has attained the age of sixty-five years, for such further period not exceeding seven years as the President may determine.'*

60. At first glance, it appears that, in terms of Zambian law, High Court and Supreme Court Judges are eligible for appointment for a further 7 years after retirement.

61. We are however unable to make a concrete determination in this regard because statutory law is a shifting target; in the interim there may have been amendments of which we might not be aware.

62. From the Zambian example, and others, it is clear that Mr. Kanyenda fell into error and misdirected himself by making the simplistic presumption that, once a Judge has attained retirement age, he or she automatically ceases to be eligible for appointment as a Judge in his or her country of domicile.

63. It is pertinent to note that the Electoral College responsible for electing the CCJ bench, including the two affected Judges, was composed of legal luminaries from Member States consisting of Ministers of Justice and Attorneys-General.

64. These eminent persons are undoubtedly presumed to know the law in their respective countries of domicile. It is therefore highly unlikely and not in the least probable that they would have elected persons not eligible for appointment to the CCJ bench. That presumption has not been rebutted by MML.

65. Thus, in the absence of concrete empirical evidence, the Court is handicapped in finding for MML.

66. We note that the affected Judges acquired a vested right to be Judges of the CCJ upon appointment. It is trite that the Courts generally lean in favour of the preservation of vested rights rather than their extinction.

67. Thus, the two affected Judges cannot be stripped of their vested rights to Judgeship of the CCJ in the absence of concrete empirical evidence to the effect that at the time of their election as Judges of the CCJ they were ineligible for appointment.

68. The law is clear that he who alleges must prove what he alleges, failing which he cannot succeed.

69. MML, having failed to establish what it set out to prove, its Amended Reference must fail in respect of the first part of Article 20(2) of the Treaty as to the eligibility for appointment of the affected Judges.

'Jurists of recognised competence'

70. The second alternative of eligibility for appointment to the CCJ bench in Article 20(2) concerns persons who are jurists of recognised competence.

71. Briefly put, the argument of MML on this part is that it is in fact not a second part of Article 20(2) at all, but an extension of the first, a general term which must be read *ejusdem generis* with the first part of the Article, which provides the specific terms to which the general term is subject.

72. Mr Kanyenda made much of the structure of the Article. Invoking in aid the Vienna Convention on the Law of Treaties and several authorities on the *ejusdem generis* rule, he submitted that the only proper way of construing the phrase in Article 20(2) was to read it as an extension of the first part of the Article. If that were done, then the phrase would be seen to be dependent on the first three criteria for election as a COMESA Judge, namely independence, impartiality and eligibility for appointment as a judge in the country of domicile.

73. For Mr Kanyenda, the phrase must be read within the context of the entire provision and in light of the object and purpose of the Article. He was of the view that eligibility for election to the CCJ was predicated in the Article on being able to fulfil the condition of eligibility to hold high judicial office in the Judge's country of domicile. To hold otherwise, he felt, would be '*tantamount to allowing ineligible persons masquerading as 'jurists of recognised competence' to sneak*

onto the COMESA Court Bench through the back door.' In fact, even persons not domiciled in the Common Market would, under this part, be eligible for appointment.

74. We are unable to go along with this interpretation of Article 20(2). In our view the Article is clear and unambiguous. It requires no aid as to its interpretation. We have explained the structure of the Article in paragraph 38 above.

75. In our view, the only common criteria for election are that the person is of impartiality and independence. Those criteria satisfied, the person is only then eligible for election if the person is either (i) eligible for appointment to high judicial office in his or her country of domicile or (ii) a jurist of recognised competence. It may well be that a person fulfils both of the alternative criteria, but fulfilment of one only suffices so long as the common criteria are equally fulfilled.

76. The term '*jurist of recognised competence*' was borrowed from the provision setting up the European Court of Justice, on which the CCJ is modelled, in the Treaty of Rome (1957). There the wording was slightly different, but its Article 167 is clearly the model for Article 20(2):

> '*The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence...*'

77. The phrase '*jurisconsults of recognised competence*' has been widely interpreted by legal scholars as one enabling academics to be appointed to the European Court of Justice. So, too, must this be the original intention behind Article 20(2). Such an interpretation makes good common sense. Many regional and international tribunals (as well as some higher-echelon municipal tribunals) seek to be made up of a combination of career Judges and career academics. The mix is felt to be a good one for dealing with technical or apex issues.

78. The parties before us differed in their respective understanding of the term 'jurist'. The term is not defined in the Treaty.

79. For Mr Kanyenda, the etymology of the word was cardinal. Simply being a judge did not make one a jurist. A jurist is a person who is primarily an academic, steeped in studying, analysing and commenting on the law, as opposed to a lawyer who is a practitioner dealing with the commercial matters of solving problems for remuneration. One can be both lawyer and jurist, but equally one can be the one and not the other.

80. For Mr Masuku, the definition of the word in Merriam-Webster Dictionary, namely that a jurist is an individual having a thorough knowledge of the law, especially a judge, suffices. The affected Judges, according to his pleadings, could be classified as jurists of recognised competence on the basis of their '*long service on the bench of their respective jurisdictions.*' They had both demonstrated knowledge and achievements in the practice of law.

81. We concede that both interpretations are relevant but feel that they are nonetheless inadequate.

82. The term 'jurist' should enjoy a wide and purposive interpretation, encompassing both approaches above, and others. In the final analysis it means nothing more than a person well versed in the law and who has achieved a high degree of competence in the application of the law, whether this competence has been obtained from the practice of law as a lawyer, as an academic or as a judge. In the context of the CCJ it does not mean simply a judge in one of the Member States, or a person eligible to be so appointed there. Were that the case, then there would be no need for the second part to be inserted in Article 20(2).

83. The term must therefore mean more than simply being, or having been, a Judge. If the jurist envisaged by the second part of the Article is to be defined as a judge eligible for appointment, then the judge must be a judge who has achieved a high degree of competence in the law so as to render that judge on par with a non-judicial academic jurist similarly versed in the law. To qualify under the second part, thus, in our view, a judge claiming to be a jurist of recognised competence must be able to point to a lengthy and distinguished career and to the exercise of law at a high or varied level and/or have adjudicated over important decisions recognised as such.

84. Mr Kanyenda made the point that if the criterion of eligibility for appointment as a judge in the country of domicile is removed from the common criteria, it could be that a person not domiciled in any of the Member States could be appointed on the basis of being a jurist of recognised competence as a CCJ Judge. That, he submits, would be absurd.

85. On a strict reading of Article 20(2), based on our interpretation of the Article in paragraph 73 above, Mr Kanyenda is correct. Nowhere in the Article is the domicile of a jurist eligible for appointment to the CCJ restricted to Member States. Mr Kanyenda uses this argument to reinforce his interpretation of the Article as being conjunctive and not disjunctive. Only by using such an interpretation, he submits, can one ensure that persons extraneous to the COMESA countries cannot be elected to the CCJ bench.

86. The argument is an attractive one, but it is based on the misconception that candidates for election to the CCJ are appointed to the bench without either having survived a prior vetting process, or the nomination and support of their respective countries of domicile. Once it is accepted that it is Member States which nominate candidates for election to the CCJ (or at any rate which support these nominations) it will be seen that a person not domiciled in a Member State has no possibility of being elected to the Court unless that is a deliberate choice of the Member State and a deliberate wish of the Electoral College.

87. Having come to the conclusion that jurists of recognised competence can be appointed to the CCJ whether or not they also qualify to be appointed to high judicial office in the countries of their domicile, we must now turn to an examination of the careers of the two Judges and ascertain whether they meet the criterion of '*jurists of recognised competence.*' We repeat what we have said above that, having been nominated as candidates for election, been elected and appointed, and having served as Judges of the Appellate Division of the Court for three years, the Judges benefit from a presumption that they qualify and that their election was valid.

88. Every candidate for election would have been selected as a candidate in his or her respective country of domicile and proposed for election. It is barely conceivable that the local authorities would have proposed candidates unless they felt that the candidates satisfied the requirements of eligibility. The Ministers of Justice and Attorneys-General constituting the Electoral College under the Election Rules would likewise, as we mention earlier, have been alive to any irregularities in any of the proposed candidates.

89. According to Rule 7(2) of the Election Rules, the election of Judges is made solely on the basis of the Curricula Vitae of the proposed Judges. We are thus unable to find that the two affected Judges were selected and elected in the absence of a consideration of their eligibility under Article 20(2). The burden of any proof of this lay on MML, and no evidence in that respect was laid before us.

90. We are also alive to the context in which Judges are eligible for election under Article 20. Judges are selected and elected to serve on the CCJ and no other tribunal. Their eligibility as jurists under the second part of Article 20(2) must thus be considered in the context of intended service on the CCJ.

91. Accordingly, when considering whether the two affected Judges were jurists of recognised competence at the time of their appointment, we must make the consideration of their suitability as being for service on the CCJ and not on any other tribunal.

92. In that context, we can ask who the drafters of the Treaty intended to qualify as CCJ Judges? Clearly, they were of the view that Judges of Member States qualified under the first part and legal academics under the second. But was it their intention to exclude any other suitable candidates who did not rigidly

fit into either of these categories, such as Judges who had retired from active service after long and distinguished careers in the law?

93. We are unable on a purposive reading of the Article to answer that question other than in the negative. We are satisfied that, just as the first part of Article 20(2) does not restrict eligibility to serving Judges but allows non-Judges who qualify for appointment as national Judges to be elected to the CCJ, fairness dictates that the second part must be so interpreted as to enable non-academic persons (such as retired Judges and other lawyers of recognised competence) to qualify.

94. Judge President Lombe Chibesakunda has served in numerous capacities as a lawyer, diplomat and politician. Academically, she holds the degree of Barrister from Gray's Inn and a post-graduate diploma in International Law. Aside from a short period spent in private practice, her professional legal life was spent at the Official Bar and as a Judge – in the High Court, as Judge-in-Charge of four Zambian Provinces, in the Industrial Relations Court and the Supreme Court of Zambia. She culminated her career as Acting Chief Justice of Zambia. She served as Solicitor-General and Deputy Minister of Legal Affairs in the Zambian Government and as Chairperson of the Permanent Human Rights Commission and of the External Examinations of the Zambia Institute of Advanced Legal Education. She served as Judge on the Administrative Tribunal of the African Development Bank, rising to become Vice-President of the Tribunal. Judge Lombe Chibesakunda served a short while as an elected Member of Parliament, and as Zambian Ambassador to Japan and High Commissioner to the UK, with responsibility for the Holy See and the Netherlands.

95. Additionally, to the offices listed above, Judge Lombe Chibesakunda has a history of participation in a number of judicial or legally-related events. These range from leading the Zambian delegation to the Law of the Sea conferences, participating in the Lome III negotiations, the Lancaster House talks on Zimbabwe's independence, the formation of SADC and chairing Nuclear Disarmament talks in Moscow, among others. She has presented numerous papers on varied subjects and been recognised for her work by receiving a number of awards.

96. Judge Abdalla El Bashir has had a long legal career. At the time of his election he had been a lawyer for 55 years. He holds an LLM degree. For 12 years he was attached to the Chambers of the Attorney-General in Khartoum. As a Judge he served 8 years in the High Court and Court of Appeal in Khartoum and for seven years as the President of the Sudanese Constitutional Court. He acted as a private practitioner for the whole of the 1990s and again since 2012. Apart from a short stint as a lecturer at the University of Khartoum, Judge Abdalla El Bashir spent fifteen years as legal advisor to the Kuwaiti Fund for Investment and the Arab Bank for Economic Development in Africa, engaged in development projects Africa-wide.

97. Mr Kanyenda urged us not to restrict ourselves to a possible finding that the two affected Judges were jurists. He urged us not to ignore the qualifier of recognised competence. On a reading of the Curricula Vitae of the two Judges, he submitted, it could not be said that they were jurists of recognised competence. He submitted that neither of the two affected Judges had, for instance, been recognised as jurists by any international organisation.

98. The experience and expertise which both Judges have gathered during their years on the bench and in their other capacities mentioned above do in our view

qualify them as jurists of recognised competence. We must conclude that they were elected on the basis of the experience and expertise which they would bring to the CCJ. In that regard, they both qualify as competent jurists.

99. Having come to the foregoing conclusion, we hold that both affected Judges qualified, at the time of their election, to be elected to the CCJ on the basis that they were each a jurist of recognised competence.

100. Having concluded

- at paragraph 69 above that MML failed to prove that the two affected Judges were ineligible for election by not fulfilling the conditions for holding high judicial office in their respective countries of domicile by reason of their retirement, and

- at paragraph 99 that they qualified as jurists of recognised competence,

we therefore dismiss the prayers of MML in Reference No. 1 of 2017.

101. We find that, on a true construction of Article 20(2) of the Treaty, Judge Lombe Chibesakunda and Judge Abdalla El Bashir were both eligible for election as Judges of the COMESA Court of Justice on 4 March 2015. We therefore refuse the order sought at prayer *a)* of the Amended Reference. The consequence of our finding is that prayers *b), c)* and *d)* of the Amended Reference fail.

102. In view of our findings on eligibility, the issue of suspension of the operation of the election of the affected Judges does not require our determination.

ANCILLARY MATTERS

103. In his Response to the Motion, Mr. Masuku for COMESA applied for the exclusion of learned Counsel for MML, Mr. Kanyenda, on grounds that Mr. Kanyenda had been disrespectful to the two affected Judges by referring to them as the 'Impugned Judges'. In arguments before us Mr Masuku elaborated on his application and urged us to find that the phrase called into question the moral standing of the affected judges.

104. Mr. Kanyenda's counter argument was that the term 'impugned' enjoyed common usage in legal parlance and meant nothing more than that his client was questioning the eligibility of the affected Judges for election. We agree with Mr. Kanyenda's understanding of the usage of the term.

105. Mr. Masuku further made an application for security for costs on grounds that the remedies sought by MML were misdirected and that the Amended Reference filed by MML was an abuse of Court process.

106. Mr. Kanyenda's responses to both applications was that they should have been brought under Rule 41(1), by motion supported by an affidavit stating the grounds of the application.

107. Such application would have given MML an opportunity to respond fully thereto.

108. We agree with Mr. Kanyenda's submission and consequently dismiss both applications made by COMESA.

COSTS

109. As we have pointed out above, after hearing the matter of Jurisdiction in January 2018, we ordered that the costs would be in the cause.

110. In that matter, the FID found in favour of MML on the substantive issue of jurisdiction but for COMESA in respect of the identity of the proper Respondent to the Reference and *Inter Partes* Notice of Motion. This Court is of the view therefore that MML should be awarded two-thirds of its costs. We so order.

111. Equally, in the Interlocutory Application for the production of the CVs of the two affected Judges, MML was the successful party. We accordingly award it costs pertaining to that Application.

112. We are of the view that, since matters of interpretation of the Treaty were raised for our consideration, in the public interest and to guard against discouraging potential and actual litigants from litigating in the CCJ, we should make no orders as to costs in respect of the Amended Reference and the *Inter Partes* Notice of Motion. We so order.

SUMMARY OF FINDINGS

113. In summary these are the orders of this Court:

a. On a true construction of Article 20(2) of the Treaty, Judge President Lombe Chibesakunda and Judge Abdalla El Bashir were eligible for election as Judges of the COMESA Court of Justice.

b. Amended Reference No. 1 of 2017 is dismissed with no order as to costs.

c. The Amended *Inter Partes* Notice of Motion for Suspension of the Operation of the Election of Judge President Lombe Chibesakunda and Judge Abdalla El Bashir does not arise for consideration and is dismissed with no order as to costs.

d. COMESA's application for the exclusion of Mr. Kanyenda from the Reference is dismissed with no order as to costs.

e. COMESA's application for security for costs is dismissed with no order as to costs.

f. MML is awarded two-thirds of its costs incurred in defending the Preliminary Objection to jurisdiction and full costs in its Motion for the production of the Judges' Curricula Vitae.

Dated this ...11th.....day of ...August.....2018.....at Lusaka, Zambia.

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HON. LADY JUSTICE QINISILE MABUZA – Principal Judge

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HON. MR. JUSTICE ALI S. MOHAMMED - Judge

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HON. LADY JUSTICE MARY N. KASANGO - Judge

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HON. MR. JUSTICE BERNARD GEORGES - Judge

.....

HON. DR. JUSTICE LEONARD GACUKO – Judge

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HON. LADY JUSTICE CLOTILDE MUKAMURERA – Judge

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HON. MR. JUSTICE CHINEMBIRI E. BHUNU - Judge

Delivered this ....12th....day of ..August..2018.....at Lusaka, Zambia.

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HON. LADY JUSTICE QINISILE MABUZA – Principal Judge

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HON. MR. JUSTICE ALI S. MOHAMMED - Judge

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HON. LADY JUSTICE MARY N. KASANGO - Judge

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HON. MR. JUSTICE BERNARD GEORGES - Judge

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HON. DR. JUSTICE LEONARD GACUKO – Judge

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HON. LADY JUSTICE CLOTILDE MUKAMURERA – Judge

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HON. MR. JUSTICE CHINEMBIRI E. BHUNU – Judge