COMESA

COURT OF JUSTICE

# IN THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA – FIRST INSTANCE DIVISION

## REFERENCE NO. 1 of 2019

## IN THE MATTER OF

**AGILISS LTD ..... APPLICANT**

**VERSUS**

**THE REPUBLIC OF MAURITIUS ..... RESPONDENT**

**COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA.....CO-RESPONDENT NO.1**

**SECRETARY- GENERAL OF COMMON MARKETFOR EASTERN AND SOUTHER AFRICA.....CO-RESPONDENT NO.2**

**MINISTER OF FOREIGN AFFAIRS, REGIONAL INTEGRATION, AND INTERNATIONAL TRADE OF THE REPUBLIC OF MAURITIUS .....CO-RESPONDENT NO.3**

**MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT OF THE REPUBLIC OF MAURITIUS,..... CO-RESPONDENT NO 4**

**CORAM:**
Hon. Lady Justice Qinisile Mabuza (Presiding Judge)
Hon. Lady Justice Mary N. Kasango
Hon. Dr. Justice Léonard Gacuko
Hon. Lady Justice Clotilde Mukamurera
Hon. Mr. Justice Chinembiri Bhunu

**REGISTRY:**
Hon. Nyambura L. Mbatia – Registrar
Hon. Philippe H. Ruboneza – Assistant Registrar
Mr. Asiimwe Anthony - Clerk of Court

**COUNSEL:**
Razi Daureeawo – Applicant
Yvan Jean-Louis – Respondent & Co-Respondents 3&4
Gabriel M.S. Masuku – Co-Respondent 1&2

# JUDGEMENT

## A. THE PARTIES

1. The Applicant, **Agiliss Ltd.**, is a private company duly incorporated under the laws of the Republic of Mauritius. It is a legal person and resident of the Republic of Mauritius, within the meaning of Article 26 of the COMESA Treaty (herein after the **Treaty**). The Treaty established the **Common Market for Eastern and Southern Africa** (herein after COMESA)

2. The Respondent, The Republic of Mauritius, is a member of COMESA as specified under Article 1(2) of the Treaty.

3. The 1st Co-Respondent is COMESA established under Article 1 of the Treaty.

4. The 2nd Co-Respondent is the Secretary General of The Common Market and is the Chief Executive Officer and in that capacity is an embodiment of its legal personality as provided under Article 17(2) of the Treaty.

5. The 3rd Co-Respondent is the Minister of Foreign Affairs, Regional Integration, and International Trade of the Republic of Mauritius.

6. The 4th Co-Respondent is the Minister of Finance and Economic Development of the Republic of Mauritius.

## B. INTRODUCTION

7. This is a Reference filed by the Applicant seeking primarily an order prohibiting the Respondent from imposing any customs duty and other non-tariff barriers on the imports of edible oils into the Republic of Mauritius from COMESA and other ancillary reliefs. The Refence is opposed, and the Respondents have raised a preliminary issue challenging the Court's jurisdiction coupled with one procedural objection.

## C. BACKGROUND

8. On 5th November 1993, the Republic of Mauritius signed the COMESA Treaty and ratified it on 8th December 1994. By the year 2000, all Member States of COMESA were required under Article 46 of the Treaty, to eliminate customs duties and other charges of equivalent effect imposed on goods eligible for Common Market tariff treatment. On 29th October 2000, the COMESA Council of Ministers issued a Legal Notice requiring Member States to issue legal or statutory instruments by 31st October 2000 putting into effect the elimination of customs duties and other charges as required by Article 46 of the Treaty. After the afore stated date, no duties should have been levied by a member state on products originating from other member states of COMESA, unless safeguard measures under Article 61 of the Treaty are applicable. The Republic of Egypt and the Republic of Mauritius are member states of COMESA.

9. In its Reference filed in this Court, the Applicant alleges that it is principally an importer and distributor of staple food in the Republic of Mauritius with the edible oil segment representing 30% of its business turnover. The Applicant further pleaded that since March 2012 it imported pure refined edible oil namely, pure soya bean oil under H.S. Code 1507.90.00, pure sunflower oil under H.S. Code 1512.19.00 and blended vegetable oil under H.S. Code 1517.90.10 originating from the Republic of Egypt covered by a valid Certificate of Origin issued in accordance with Article 48 of the Treaty and Rule 10 of the COMESA Protocol on Rules of Origin.

10. By letter dated 14 November 2018 the Respondent notified the Secretary General of COMESA of its intention to impose a Safeguard Measure on imports of edible oils originating from the COMESA region, pursuant to the provisions of Article 61 of the Treaty.

11. On 28 January 2019, the Applicant initiated a meeting with the representatives of the Respondent, 3rd, and 4th Co- Respondents, whereby the Applicant was given notice of the fact that:

a) *the Respondent had taken the decision to impose customs duty subject to a quota on the import of edible oil from COMESA countries; and*

b) *the Respondent had taken the decision to invoke Article 61 of the Treaty for the imposition of customs duty on the import of edible oil from COMESA; and*

c) *on or about 15 November 2018 notice had been given by the Respondent to 1st Co-Respondent and 2nd Co- Respondent under Article 61 for the imposition of customs duty on the import of edible oil from COMESA.*

12. Being aggrieved by the decision of the Respondent, 3rd, and 4th Co-Respondents, to apply the Safeguard Measure, the Applicant engaged the Respondent by correspondence protesting the said decision and ultimately filed in this Court, COMESA Court of Justice (CCJ), the present Reference seeking various reliefs against the Safeguard Measure sought to be imposed by the Respondent, 3rd and 4th Co-Respondents.

13. The Applicant contends in the Reference that the decision by the Respondent, 3rd and 4th Co-Respondents falls short of the requirements of the COMESA law and cites provisions of the Treaty which it alleges have been infringed by the decision of the Respondent, 3rd, and 4th Co-Respondents.

14. The Applicant's prayers in the Reference are for:

a) *"A declaration that (a) the decision of the Respondent to impose customs duty on the import of edible oil from COMESA into the Republic of Mauritius, (b) the decision of the Respondent to notify 1st Co-Respondent and 2nd Co-Respondent of the imposition of customs duty on the import of edible oil from COMESA into the Republic of Mauritius as an alleged safeguard measure under Article 61 of the Treaty and (c) the act of the Respondent of notifying 1st Co-Respondent and 2nd Co-Respondent of the imposition of customs duty on the import of edible oil from COMESA into the Republic of Mauritius as an alleged safeguard measure under Article 61 of the Treaty are in breach of the*

*Treaty and regulations made thereunder and in particular Articles 46, 48, 56, 57 and 61 of the Treaty and the COMESA Regulations on Trade Remedy*

b) *An order prohibiting the Respondent from imposing any customs duty and other non-tariff barriers on the import of edible oil into the Republic of Mauritius from the COMESA;*

c) *An order awarding the Applicant costs of and incidental to this reference."*

15. In their Statement of Defence 1st and 2nd Co-Respondents raised two preliminary objections, namely; that 1st and 2nd Co-Respondents have been incorrectly cited. That, in terms of Article 17(2) of the Treaty, in litigation it is the Secretary General who should be cited as the one who exercises the legal personality of the Common Market. The second objection was that the Applicant as a legal person was under Treaty obligation to first exhaust available local remedies, in the Republic of Mauritius, before approaching the CCJ for relief in terms of Article 26 of the COMESA Treaty.

16. The Respondent, 3rd and 4th Co-Respondents also raised the preliminary objection that the Applicant has not exhausted its local remedies before the courts of Mauritius to the extent that-

i. *the case of Polytol Paint & Adhesive Manufacturers Co. Ltd v The Minister of Finance 2009 SCJ, cannot be res judicata in the present matter; and*

ii. *it was open to the Applicant to apply for an injunction before the domestic courts to prevent the implementation of a decision of Respondent and 3rd and 4th Co-Respondents or to apply for a judicial review of such a decision.*

17. Agiliss Ltd, the Applicant herein, in response by its present Reference pleaded as follows:

*"By virtue of the decision of the Supreme Court of the Republic of Mauritius in Polytol Paints & Adhesive Manufacturers Co. Ltd. v The Minister of Finance 2009 SCJ 106*

*holding that the Treaty is not enforceable in the domestic courts of [the] Republic of Mauritius, the Applicant has no local remedy before the national courts or tribunal[s] of the Republic of Mauritius."*

18. The above pleading was made in cognisance of the provisions of Article 26 of the Treaty which is in the following terms:

> ***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*. (Underlining ours)

19. The import of the first part of Article 26 is that any Legal or Natural persons, resident in a member state, can challenge, before the CCJ an **act**, a **regulation**, a **directive**, or **decision** of the [COMESA] Council, or a member state they allege infringed the Treaty. The Applicant is a legal person within the meaning of Article 26 of the Treaty. It is therefore bound by this provision.

## D. SUBMISSIONS BY THE PARTIES

### (a) The Respondent, 3rd, and 4th Co-Respondents

20. In response to the Applicant's claim, Mr. Y.C. Jean Louis, Principal State Counsel, of the Republic of Mauritius, acting on behalf of the Respondent, 3rd and 4th Co-Respondents contended that the provisions of Article 26 of the COMESA Treaty captured under paragraph 17 above, have not been complied with.

21. In pleadings the Principal State Counsel submitted that, in light of Article 26, it was imperative that an applicant shall exhaust all local remedies before referring the matter to the CCJ.

22. According to the Principal State Counsel, the Mauritius Supreme Court's case of **Polytol Paints & Adhesive Manufactures Co. Ltd v The Minister of Finance 2009 SCJ 106**, (Polytol Mauritius) on which the Applicant relies in arguing that there are no local remedies to be exhausted, deserves in-depth consideration. In that case it was held:

> *"... we can only take cognizance of the provisions of the COMESA Treaty to the extent that they have been incorporated in our municipal law which for the time being is the First Schedule to the Customs Tariff Act as repealed and replaced by Customs Tariff (Amendment of Schedule) (No. 4) Regulations 2006 [GN No. 251 of 2006] which itself has repealed GN No 143 of 2000. This Court can only consider the validity of the regulations against a backdrop of the Customs Tariff Act and our Constitution. In the absence of any specific legislation to that effect, non-fulfilment by Mauritius as a Member State of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts."*

23. In the opinion of the Principal State Counsel, it is clear that the Polytol Mauritius judgment does not hold the entire Treaty inapplicable by the Mauritian courts.

24. In the same vein, the Principal State Counsel added that even if Polytol Mauritius had so ruled, the Applicant could not use it as if it had the force of *res judicata* in the present case. It would have been necessary for the Applicant to show that it had asserted its rights before the national courts and tribunals and had been unsuccessful.

25. The Principal State Counsel further argued that in the judgment of **Polytol Paints and Adhesive Manufactures Co. Ltd v The Republic of Mauritius**

**[Reference No. 1 of 2012]** (here after **Polytol CCJ**) the CCJ departed from the position taken by the Supreme Court of Mauritius by finding that the Republic of Mauritius had infringed Article 46 of the Treaty by imposing customs duties against COMESA member states outside the prescribed period.

26. In light of the precedence of CCJ's judgments over decisions of national courts, as provided under Article 29, the Principal State Counsel, contended that it was clear that the judgment in Polytol Mauritius cannot be relied upon by Applicant in view of the judgment of Polytol CCJ.

27. Article 29 of the Treaty provides for the jurisdiction of national courts, it reads as follows:-

**Jurisdiction of National Courts**

> *"1. Except where the jurisdiction is conferred on the Court by or under this 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 have precedence over decisions of national courts."*

28. The Principal State Counsel concluded his written submissions by a prayer for the dismissal of the Applicant's reference with costs.

29. In oral argument, the Principal State Counsel reiterated that the Applicant did not exhaust its local remedies before bringing the case before CCJ for the following reasons: -

*(a) Polytol Mauritius, does not state that the Treaty is not binding.*

*(b) The Court did not hold that the Treaty was not applicable in the Republic of Mauritius, instead it stated that Treaty could partially apply to the extent that it had been incorporated into the domestic law of Mauritius.*

30. According to the Principal State Counsel the decision of Polytol Mauritius on which the Applicant relied upon is no longer a binding precedent, in view of the provisions of Article 29 (2) of the Treaty, which prescribe that the CCJ's decisions take precedence over decisions of national courts.

31. Responding to the arguments put forward by the Applicant in its written submissions in which it refers to the case of **The Government of the Republic of Malawi v Malawi Mobile Limited (Appeal Case No. 1 of 2016** ("The MML Case") as at paragraph 96, the Principal State Counsel submitted that the Applicant failed to demonstrate how it had exhausted local remedies. Paragraph 96 of that judgment sets out the mandatory principles to be followed before filing a reference at CCJ. The Court held as follows: -

*"96. ... we hold that, where a resident person wishes to lodge a Reference before the CCJ under Article 26 of the Treaty, the following principles are applicable beforehand in view of the proviso to that Article:*

*(a) the national courts or tribunal should initially be afforded the opportunity to prevent or put right any alleged violation of the Treaty or to determine any Treaty related issue;*

*(b) it follows that any remedy existing at national level, which enables the national courts to address, at least in substance, the alleged violation of the Treaty or Treaty related issue, should first be exhausted;*

*(c) it is not necessary for the alleged Treaty violation or Treaty related issue to be expressly raised in domestic proceedings before the national courts provided that the complaint or issue is raised at least in substance; this means that if an applicant has not relied on the Treaty, he must have raised arguments to the same or like effects on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged violation or determine the issue in the first place;*

*(d) it is not sufficient that an applicant may have, unsuccessfully exercised another remedy on other grounds not connected with the alleged Treaty violation or Treaty related issue; it is the Treaty complaint which must have been aired at national level for there to have been exhaustion of the remedy before the national courts;*

*(e) an applicant is only obliged to exhaust before the national courts remedies which are available and effective; and*

*(f) where the government claims non-exhaustion of domestic remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available."*

32. In light of paragraph 96 (c) of MML it was not necessary that the alleged breach of the Treaty be raised in domestic proceedings before the national courts. This means that if an Applicant has not invoked the Treaty, it must have raised arguments with the same or similar effect on the basis of domestic law, in order to give national courts, the opportunity to remedy the alleged violation or to determine the issue in the first place. The crux of the matter is whether the Applicant had no option or alternative relief in challenging the decision to apply the safeguard measures.

33. In the view of the Principal State Counsel, the Applicant had the option to refer the matter to the Supreme Court of Mauritius to request for a judicial review of the decision of the Respondent, 3rd , and 4th Co-Respondents.

34. In the Principal State Counsel's view, the Applicant had misinterpreted Polytol Mauritius because that judgment did not hold that the Treaty was not enforceable in the courts of Mauritius. What that judgment held was that the Court could apply the Treaty only to the extent that it has been incorporated into the laws of Mauritius. He further submitted that the Applicant failed to understand that this precedent was rendered obsolete and has been overruled by CCJ Polytol. In addition, he submitted that the Applicant also failed to exhaust the local remedies available to it, namely judicial review coupled with a stay of execution or to apply for an injunction if the State had decided to impose a safeguard measure.

## E. SUBMISSIONS BY THE 1ST AND 2ND RESPONDENTS

35. Mr. Gabriel M.S. Masuku, Counsel for 1st and 2nd Co-Respondents submitted that the Applicant had conceded that local remedies had not been fully exhausted, in terms of Article 26 of the Treaty. He further submitted that it was for the Applicant to demonstrate that it had complied with that provision of the Treaty. Otherwise, Counsel aligned himself with and adopted the submissions of the Principal State Counsel.

## F. SUBMISSIONS (REPLY) BY THE APPLICANT

36. In response to the submissions of the Principal State Counsel Mr. Razi Daureeawo Counsel for the Applicant, relying on Article 26 of the Treaty submitted that, pursuant to the decision in Polytol CCJ and MML, it is now settled law that the Court has jurisdiction to hear cases under Article 26 by residents of Member States against the Member State on the basis of an alleged infringement of the Treaty, provided that the Applicant has first exhausted domestic remedies before the national courts of Member States.

37. On the issue of exhaustion of local remedies, Counsel for the Applicant relied on the decision of MML which, in his view, laid down the principles relating to the exhaustion of local remedies rule under Article 26 of the Treaty.

38. Counsel for the Applicant made reference to paragraph 96 of the MML judgment, reproduced in paragraph 30 of this judgment (herein above). On this point, the Applicant submitted that it did not dispute that the exhaustion of local remedies is one of the conditions of admissibility. However, it submitted that the rule of exhaustion of local remedies is not absolute and that it had exhausted local remedies as required by Article 26 on the grounds that the courts and tribunals of the Republic of Mauritius have no jurisdiction to hear and determine any case based on violations of the Treaty. The Applicant further submitted, it had no available and effective remedy before the courts and tribunals of the Republic of Mauritius. Applicant further contended that the Respondent had not discharged its burden of proving that the Applicant had not availed itself of a remedy that was both effective and available.

39. In relation to the lack of an available and effective remedy before the courts and tribunals of Mauritius, Counsel for the Applicant submitted that the Supreme Court of Mauritius had determined in Polytol Mauritius that the courts of the Republic of Mauritius do not have jurisdiction to adjudicate on breaches of the Treaty.

40. Counsel for the Applicant submitted that Mauritius was a dualist state, and that international Conventions were not directly applicable in Mauritius after their ratification. In addition, they have to be incorporated into Mauritius law by an Act of Parliament incorporating part or the entire Convention.

41. Applicant's Counsel cited cases where the Supreme Court had upheld that Mauritius was a dualist system:

I. In the case **Pierce v Pierce [1998 SCJ 397]**, the Supreme Court held that: -

*"Though Mauritius has acceded to that Convention [Convention on the Civil Aspects of International Child Abduction], the provisions of the whole or part of that Convention have not been implemented in our national laws, unlike, for example, the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents Act which gave the force of law in Mauritius to the Convention on that matter signed at the Hague on 5 October1961and published in [GN No. 14 of 1966]. Consequently, [ ... ], suffice it to say that that Convention is not part of our law and that this Court is not bound to give effect to its provisions".*

II. In the case ***Michael Rex Jordan v Marie Martine Jordan [2000 SCJ 57],*** the Supreme Court held that:

*"Whilst the Constitution proclaims that Mauritius shall be a sovereign democratic State, it also establishes the principle of separation of powers. Each of the three arms of Government has a distinct and different role to play and each should confine itself to its specific domain. If our domestic legislation has not been brought into line with the Hague Convention for Mauritius to comply with its international obligations, the Judiciary can only make the relevant observations."*

42. The Applicant's Counsel argued that the Treaty had not been domesticated into Mauritius law; that it was on this very basis that in Polytol Mauritius the Supreme Court held that it could only consider the validity of the Customs Tariff (Amendment of Schedule) (No. 4) Regulations 2006 in the context of the Customs Tariff Act and the Constitution. The Supreme Court held that in the absence of any specific legislation to this effect, *"non-fulfilment by Mauritius as a Member State of its obligations, if any, under the Treaty is not enforceable by the national courts."*

43. According to Counsel for the Applicant, the courts of the Republic of Mauritius do not have jurisdiction to determine applications on causes of action based on infringement of the Treaty. Further, he submitted that the judgment in Polytol Mauritius

remains good, valid, and applicable to date and any action before the courts of the Republic of Mauritius alleging a breach of the Treaty obligations would necessarily fail on the basis of lack of jurisdiction by the courts of the Republic of Mauritius.

44. To demonstrate the alleged unavailability of local remedies, Counsel for the Applicant submitted that the local laws of Mauritius, including the Constitution and the Customs Tariff Act, do not provide the Applicant with any cause of action or remedy to challenge the decisions and acts of the Respondent concerning the imposition of customs duties on edible oil from the Republic of Egypt. Thus, the Applicant has no available and effective remedy before the courts and tribunals of the Republic of Mauritius.

45. To support its claim of unavailability and ineffectiveness of remedies, the Applicant referred to various international instruments and related case law on the exhaustion of local remedies.

46. The Applicant relied on the provisions of Article 56 (5) of the African Charter on Human and People's Rights. The Article sets out the requirement of exhaustion of local remedies before communications can be submitted to the African Commission. It provides that -

> **Article 56**
>
> *"Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they:(...)*
> *5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."*

47. The Applicant submitted that the African Commission, in interpreting the exhaustion of local remedies rule, has limited the exhaustion requirement to those remedies that are available, effective, and sufficient. For example, in the case of **Sir Dawda K. Kawara v Gambia [Communication No. 147/95, 149/96]**, the African Commission on Human and Peoples' rights held in paragraph 31 that: -

*"31. The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort. [FN1] Three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient."*

48. In Communication No. 275.2003 Article 19 against the **State of Eritrea, the African Commission** held in paragraphs 46 and 47 that:-

*"46. The African Commission has held in previous communications that for local remedies to be exhausted, they must be available, effective, and sufficient. In communication Nos. 147/95 and 149/96, the African Commission held that a remedy is considered available if the Complainant can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint. [FN3]*

*47.The African Commission has held in previous communications that for local remedies to be exhausted, they must be available, effective and sufficient. In communication Nos. 147/95 and 149/96, the African Commission held that a remedy is considered available if the Complainant can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint. [FN3].*

49. In light of the above jurisprudence, the Applicant argues, remedies that do not meet the above criterion need not be exhausted. Thus, a remedy may exist in theory, but need not be exhausted if it is unavailable, inadequate or ineffective.

50. Counsel for the Applicant also refered to the American Convention on Human Rights, especially Article 46 (1) (a). According to Counsel, Article 46(1) (a) of the American Convention on Human Rights precludes the admission of a petition unless domestic remedies have been pursued and exhausted in accordance with universally recognized principles of international law.

51. Article 46 (1) (a) of the American Convention reads as follows: -

> *a. "Article 46. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*
>
> *b. That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."*

52. Applicant's Counsel submitted that, the above rule has been interpreted as requiring only that an applicant exercise such remedies under national law as would adequately and effectively respond to the Applicant's complaint. Counsel's further view is that the Inter-American Commission on Human Rights (the "IACHR") has observed that the exhaustion requirement refers only to remedies that are adequate and effective. He further contended that the IACHR considers a domestic remedy to be adequate if when exercised, it is capable of protecting the right allegedly violated and considers a domestic remedy to be effective if it is capable of achieving the result for which it was designed.

53. The Applicant's Counsel buttressed his argument with reference to the decision in the case of **Mossville Environmental Action Now (USA) [Report No. 43/10]**, in which the IACHR held that: -

> *32. Article 31.1 of the IACHR's Rules of Procedure provide that, for a petition to be admissible: the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally*

*recognized principles of international law. These principles do not merely refer to the formal existence of such remedies but also to the requirement that they be adequate and effective. It has been clarified that only those recourses that are suitable for remedying allegedly committed violations must be exhausted. In domestic law systems, there are often multiple remedies, but not all are necessarily applicable or effective in all circumstances. The IACHR has recognized that remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic courts would appear to have no reasonable prospect of success, for example because the State's highest court has recently rejected proceedings in which the underlying issue of a petition had been raised. In order to meet this standard, however, there must be evidence before the IACHR upon which it can effectively evaluate the likely outcome should a claim be pursued by the petitioners at the domestic level.*

54. Counsel for the Applicant further cited the case of **Juvenile Offenders Sentenced to Life Imprisonment without Parole (USA) [Report No. 18/12]**. In that case Counsel for the Applicant, submitted that the IACHR held that defendants sentenced to life imprisonment without parole in the United States were not required to exhaust domestic remedies in light of the consistent jurisprudence of the US courts, including the Supreme Court, which has repeatedly rejected challenges by other juvenile defendants to their sentences. The operative part of the decision, at paragraph 56 and 57, is reproduced below:-

*"56. Based on the above legal and factual analysis and for the purposes of admissibility Commission finds that the main questions raised in petition 160-06 have already been presented to different courts, in particular to the Supreme Court of the State of Michigan and, ultimately, to the Supreme Court of Justice of the United States, both in the context of this petition, as can be noted in the appeals lodged by Matthew Bentley, and in the framework of other cases in which various juvenile offenders have invoked multiple remedies to question*

*and impugn the application of life imprisonment without parole when they breached criminal laws, as well as enforcement of laws that treat minors accused and convicted of committing homicide crimes as adults..*

*57. The Commission concludes from its review that the State has had ample opportunity to examine the questions presented in this petition and several occasions to remedy the situation claimed by the alleged victims, had it seen fit to do so. Furthermore. the Commission finds that for the purposes of admissibility domestic remedies cannot be considered to have had a reasonable prospect of success in light of the consistent case law of the United States courts, including the Supreme Court. Therefore, the Commission concludes that the exception to the rule of exhaustion of domestic remedies contained in Article 31.2 (b) of the IACHR Rules of Procedure is applicable in the cases of the 32 alleged victims."*

55. Based on the above authorities, the Applicant submitted that it is not required to apply to a local court if the case has already been decided in a previous decision by a competent authority as in the present case and in light of the decision in the Polytol Mauritius case.

56. In support of its argument for not approaching the local courts for a remedy, the Applicant also relied on the decision of the Human Rights Committee in the case **Earl Pratt and Ivan Morgan v Jamaica [Communication No. 210/1986 and 225/1987]**. The Committee, in that case, noted that, in the light of previous court decisions, a constitutional remedy would be unsuccessful and therefore held that there was no effective local remedy to be exhausted. Paragraph 12.5 of the Committee's decision reads:-

*" ... In these circumstances, authors' counsel was objectively entitled to take the view that, on the basis of the doctrine of precedent, a constitutional motion in the cases of Mr. Pratt and Mr. Morgan would*

*be bound to fail and that there thus was no effective local remedy still to exhaust."*

57. It was submitted by the Applicant that a party is not required to exhaust a remedy that it knows would be unsuccessful, particularly in the light of the doctrine of precedent.

58. Counsel for the Applicant relied on the European Convention on Human Rights, particularly Article 35(1), which sets out the criteria for admissibility of an application before the Court. The above Article is couched in the following terms:

*"1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."*

59. The Jurisprudence of the European Court of Human Rights (ECHR) establishes that there are limits and exceptions to the rule of exhaustion of domestic remedies as follows:

*(i)when there is in fact no remedy;*

*(ii) when there is a remedy, but it is not accessible to the applicant;*

*(iii) when there is an accessible remedy, but it is ineffective because it cannot be successful; or*

*(iv) where exceptional circumstances make it impossible or useless to exhaust domestic remedies.*

60. Counsel quoted paragraph 75 of the judgment in the case **Paksas v Lithuania [Application No. 34932/04]**: -

*"75. The Court reiterates that the purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. Thus, the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. Nevertheless, the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation (see, among many other authorities, Remli v. France, 23 April 1996, §33, Reports 1996-II). More specifically, the only remedies which Article 35 §1 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient; the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, for example, Selmouni v. France [GC], no. §75, ECHR 1999-V). It falls to the respondent State, if it pleads non-exhaustion of domestic remedies, to establish that these various conditions are satisfied (see, among other authorities, Johnston and Others v. Ireland, 18 December 1986, §45, Series A no. 112, and Selmouni, loc. cit.)."*

61. In summing up Counsel for the Applicant submitted that with regard to the international jurisprudence cited above, the rule of exhaustion of local remedies is not absolute. It is subject to exceptions that an Applicant is not required to resort to local remedies that are unavailable and ineffective, that exist only in theory, or that offer no reasonable prospect of success. Counsel for the Applicant opined that in view of the Polytol Mauritius decision and international case law on the exhaustion of local remedies, the Applicant had no other remedy than to submit the dispute to the CCJ.

62. Counsel for the Applicant further contended that the Respondent and Co-Respondents, have failed to discharge their burden of proof. Relying on the decision in MML, the Applicant submitted that the Respondent and Co-Respondents have the

burden of proving that it had failed to use a remedy that was both effective and available.

63. Counsel argued that this Court had only the bare assertions of the Respondent, 3rd and 4th Co-Respondents in their statement of defence, in which they argue at paragraph 17(b) that:-

> *"17(b) in the event that this Honourable Court holds that there has been a decision by Respondent and Co-Respondents Nos 3 and 4, Applicant has not exhausted its local remedies before the courts of Mauritius to the extent that –*
>
> *I. the case of Polytol Paint & Adhesive Manufacturers Co. Lid v The Minister of Finance 2009 SCJ 106 cannot be res judicata in the present matter; and*
>
> *II. it was open to the Applicant to apply for an injunction before the domestic courts to prevent the implementation of a decision of Respondent and Co-Respondent Nos 3 and 4 or to apply for a Judicial Review of such decision."*

64. In support of its argument, the Applicant refers to the Practical Guide to Admissibility by the European Court of Human Rights (updated 30th April 2020) (reproduced below) which provides guidance on where the burden of proof lies in proving the Applicant had not used a remedy that was both effective and available:-

> *"104 ... The development and availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case-law (Mikolajova v. Slovakia, § 34) ... Even though the Government normally should be able to illustrate the practical effectiveness of a remedy with examples of domestic case-law ...*

*105. Where the Government argues that the applicant could have relied directly on the Convention before the national courts, the degree of certainty of such a remedy will need to be demonstrated by concrete examples (Slavgorodski v. Estonia (dec.)). The same applies to a purported remedy directly based on certain general provisions of the national Constitution (Kornakovs v. Latvia, § 84)."*

65. Applying the above principles, the Applicant contended that the Respondents have failed to discharge their burden of proof. This is because the assertion by the Respondent and Co-Respondents that the Polytol Mauritius decision is not *res judicata* in light of the Court's decision in Polytol CCJ and provision of Article 29(2) of the Treaty. Counsel argued that it is unfounded and devoid of merit simply because the courts and tribunals of the Republic of Mauritius have no jurisdiction on matters of infringement or interpretation of the Treaty by virtue of the Polytol Mauritius decision.

66. In rebuttal, the Applicant submits that it has exhausted all domestic remedies before the courts and tribunals of the Republic of Mauritius as required under Article 26 of the Treaty for the reasons set out in its submissions as follows:-

*(a) the Courts and Tribunals of the Republic of Mauritius do not have jurisdiction on matters relating to the infringement of the Treaty;*

*(b) the Applicant does not have an available and effective remedy before the Courts and Tribunals of the Republic of Mauritius;*

*(c) the Applicant is not required to pursue remedies which have no prospects of success; and*

*(d) the Respondent and Co-Respondents have failed to discharge the burden of proving that the Applicant had not used a remedy that was both effective and available.*

67. Accordingly, the Applicant submits that this Court has jurisdiction to entertain the reference.

68. Applicant prays that the objections raised by the Respondent and Co-Respondents on the lack of the Court's jurisdiction and non-exhaustion of local remedies be dismissed with costs.

## G. DISCUSSION AND ANALYSIS

69. Having laid down the submissions made by the parties, we now turn to consider the merits and demerits of those submissions.

70. The Respondent and all Co-Respondents, as stated before, raised a jurisdictional preliminary objection to this Reference contending that the Applicant did not exhaust its domestic remedies in terms of Article 26 of the treaty.

71. The Applicant however submitted an exception to Rule 26 arguing that it had no obligation to exhaust domestic remedies, in terms of the Treaty because there was no available and effective remedy in the courts in Mauritius, for want of jurisdiction to interpret the Treaty.

72. The Respondent and the Co-Respondents were however of the contrary view arguing that the remedies of judicial review and injunction by the local courts were available and these were effective remedies at the applicant's disposal. The Respondent and the Co-Respondents argued that the Applicant was obliged to pursue and exhaust its remedy in the local courts.

73. The Applicant's afore statement in its pleading, where it admitted, it had not exhausted local remedies because no local remedy was available in Mauritius, stemmed from the decision of the Supreme Court of Mauritius in the case Polytol Mauritius.

82. The Applicant, by this reference, seeks to challenge the decision of the Republic of Mauritius to impose customs duty of 10% on edible oil from COMESA countries which it alleges breach of Treaty provisions, namely, Article 46 (on Customs Duty), Article 48 (on Rules of Origin), Article 49 (Elimination of Non-Tariff -Barriers), Article 56 (Most Favoured Nation), Article 57 (National Treatment), and Article 61 (on Safeguard Measures).

83. It will be recalled that the Applicant in its arguments, on exhaustion of local remedies, cited the "**African Charter**", the "**American Convention on Human Rights"** and the "**European Convention on Human Rights".** It further cited the case **Sir Dawda K Jawara v The Gambia** *(supra)*, where the African Commission held that the requirement of exhaustion of local remedy applies where the remedy is available, effective, and sufficient. The same Commission held in the case of Article **19 v The State of Eritrea** *[supra]*, that a local remedy is deemed available where a complainant can pursue it without impediment and that the remedy is deemed effective if it offers a prospect of success, and that it is sufficient if it can redress the complaint.

84. In the case of **[FN3] Communication 147/95 and 149/96, Jawara v The Gambia** *(supra)*the Commission held that:

> *"47. In terms of Article 56(5) therefore, the law on exhaustion of domestic remedies presupposes: (i) the existence of domestic procedures for dealing with the claim: (ii) the justiciability or otherwise, domestically, of the subject-matter of the complaint; (iii) the existence under the municipal legal order of provisions for redress of the type of wrong being complained of and (iv) available effective local remedies, that is, remedies sufficient or capable of redressing the wrong complained of. "*

85. The Applicant referring to the requirement of exhaustion of local remedies under Article 46 of the **American Convention on Human Rights** submitted that, the Article had been interpreted to only require a party to exhaust such remedies under

*law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

78. The court, in yet another decision on jurisdiction, in the case **County Government of Nyamira v Sigah (Civil Appeal 34 of 2018) [2021] KECA 34 (KLR) (23 September 2021) (Judgment)** said in regard to the court's jurisdiction, that:

*"It cannot be assumed or donated by parties or arrogated by the Court itself. Jurisdiction is everything and if a court does not have it, it downs tools. These are well-established principles."*

## H. ISSUE FOR DETERMINATION

79. The sole issue for determination is, whether or not this court has jurisdiction to hear and determine the reference, in view of the mandatory requirement to exhaust domestic remedies under Article 26 of the Treaty before approaching this court.

## I. THE APPLICABLE LAW

80. Article 26 forms the basis of the Respondent and Co-Respondents' objection. We wish to emphasize the proviso to that section, because of its relevance to our determination, and we reproduce here, as follows:

***"Provided*** *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."*** (Emphasis provided).

81. The import of the first part of Article 26 (paragraph 17 *supra*) is that the Legal or Natural persons can challenge before the CCJ Court an act, regulation, directive, or decision of the [COMESA] Council, or a Member State they allege a breach of the Treaty.

74. In Polytol Mauritius, the Applicant sought from the Supreme Court of Mauritius, leave to apply for judicial review on the grounds that the Minister's act of imposing duty on Egyptian products was unreasonable, unjustifiable, unfair and in breach of the provisions of the COMESA Treaty, and that Mauritius had failed in its obligation under the Treaty.

75. The Supreme Court of Mauritius declined to grant leave to the applicant (Polytol Paints & Adhesive Manufacturers Co. Ltd.) to seek judicial review as sought and one of the grounds for such declination was, as reproduced here below, that:

> *"... we can only take cognizance of the provisions of the COMESA treaty to the extent that they have been incorporated in our municipal law ...."*

76. The Applicant in Polytol Mauritius, on being unsuccessful before the Mauritius Supreme court, filed a Reference before the CCJ First Instance Division, CCJ Polytol. In that Reference the Applicant, in CCJ Polytol, successfully challenged the holding of the Supreme Court of Mauritius.

77. The issue of jurisdiction is central and takes precedence in the determination of any case by the Court. In legal parlance jurisdiction is the power or authority of a court or tribunal to hear and determine a matter before it. Without that power or authority, a Court cannot do anything. Thus, in the event that this Court finds it has no jurisdiction, that finding has the effect of terminating these proceedings without any further ado. In the words of NYARANGI JA in the case, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** stated:

> *"... it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of*

the national law where such remedies are adequate, and effective to address the complaint. In support of that argument the Applicant cited the case of **Mossville Environmental Action Now** *(supra).*

86. Based on the above submissions the Applicant stated it was not required to exhaust local remedies and, in view of the decision in Mauritius Polytol, it could not pursue a local remedy which was bound to fail. The Applicant concluded its submissions by stating that it had exhausted local remedies before courts and tribunals of the Republic of Mauritius for the purpose of Article 26 of the Treaty, because the Supreme Court held that such courts and tribunals do not have jurisdiction on matters relating to the infringement and interpretation of the Treaty.

## J. COURT'S DETERMINATION

87. The CCJ has more than once had the opportunity to interpret Article 26 of the Treaty. One such case is **The Republic of Kenya and The Commissioner of Lands Costal Aquaculture Limited Reference NO. 3/2001** where it held:

> *"[20] Respondent may refer a matter to this Court, and this Court can exercise jurisdiction over such reference, only if the Respondent has exhausted all its remedies in the municipal courts of the particular Member State…."*

88. Another case of the CCJ is **COMESA Court of Justice REF. NO. 1 OF 2009 INTELSOLMAC VERSUS RWANDA CIVIL AVIATION AUTHORITY**. CCJ in that case stated:

*"There is no doubt that the exhaustion of local remedies requirement* prescribed *under Article 26 of the Treaty is an important principle of customary international law(...) the local remedies must take precedence to international remedies unless there has been denial of justice in the local remedies…*

*A party who when challenging the legality of an act of a Member State, seeks to place blame for non compliance with the requirements of Article 26 (which are the pre-condition for engaging the jurisdiction of the court) on alleged conduct of the state party or its agents to prevent him from accessing the local remedies, must produce clear evidence of the step he took in the pursuit of the local remedies and describe the nature of the acts used by the state party or its agents to prevent him from accessing the local remedies. In that way the court would be able to decide whether a reasonable and acceptable explanation for the failure to comply with Article 26 of the Treaty has been given. Bald and unsubstantiated allegations of obstruction by the state party would not meet the standard of proof required."* (emphasis added)

89. By the above holding the CCJ court considered that the exhaustion of local remedies, prescribed in Article 26, was an important principle of customary international law and that the purpose of the rule is to ensure that the state accused of non-compliance with the Treaty has an opportunity to redress the alleged wrong within the framework of its domestic legal system.

90. In this Reference before this court, a determination must be made whether the remedies of judicial review or injunction directed against the imposition of the Safeguard Measure was both available and effective for the Applicant. In determining this question, recourse must be had to the decision by the Appellate Division of this court in the MML case. It is important to note that MML case is a binding authority over this Court. In that case, the court while addressing the question on whether the local remedies had been exhausted, laid down the principles that should be applied when addressing what amounts to exhaustion of local remedies under Article 26 of the Treaty. The holding of Appellate Division of CCJ has been adumbrated here above.

91. It was submitted by the Applicant that considering the case of Polytol Mauritius, the Applicant had no available remedy and could not file any case before the Mauritius court. This, as submitted by the Applicant was because the outcome of a matter filed before Mauritius courts or tribunals was a foregone conclusion.

92. The Applicant however should have noted that this point was taken up in the MML case where the Appellate Division of this court held as follows:

> **"106.** *True it is that there was no need for the Respondent to have expressly raised before the national courts any Treaty issues which it would then seek to raise before the CCJ. It should, however, have ventilated the Treaty issue, at least in substance before the national courts. It failed to do so."*

93. The compliance with Article 26, as seen in the foregoing paragraph, is that a Party need not plead Treaty infringement before a national court. Such infringement can be ventilated before the national court without express reference to the Treaty. In other words, it was open for the Applicant to approach the national courts of Mauritius and challenge the decision by the Mauritius Government to impose a Safeguard Measure without necessarily pleading a Treaty infringement.

94. The effect of a judicial review order before the national courts would be either to quash the decision to apply a safeguard measure (*Certiorari*), prohibit its application (prohibition) or require the Government to undertake certain procedural steps as pre-conditions before applying it (*mandamus)*. These remedies would certainly offer a remedy and relief which is akin to what the Applicant is seeking before this Court in substance; that is to quash the decision to apply the safeguard measure and stop its application. The remedy of judicial review of the decision to apply safeguard measure is, and was, therefore, available and an effective remedy to the Applicant within the national courts. As held in the MML case, the Applicant need not directly cite the provisions of the Treaty before the national courts in the judicial review application.

95. We are of the view that the Applicant erred in arguing that in view of the decision of Mauritius Supreme Court, any action filed in the courts/tribunals in Mauritius would obviously have failed. The Applicant used that argument to justify its stand that it had exhausted local remedies. We hold, as stated above, that the Applicant did have the

right to file for judicial review and/or injunction against the Respondent's decision. It could have done so without necessarily pleading Treaty infringement expressly.

96. In our view the Applicant before us simply made bald and unsubstantiated allegations that the outcome of an application before Mauritius court was a foregone conclusion. The Applicant failed to produce evidence of the steps it took in pursuit of local remedies. The onus of proof in that regard lay on the Applicant.

97. The Respondent, 3rd and 4th Co-Respondents' submissions that judicial review, without raising the issue of the Treaty, was available to the Applicant before the Mauritius courts was not adequately responded to by the Applicant. On our part we are satisfied that it was proved on a balance of probability that the Applicant had available, before the courts of the Republic of Mauritius, remedies, either injunction or judicial review, which remedies were effective and sufficient. We are satisfied that the Applicant could have pursued those remedies without any impediment.

## K. APPLICATION OF ARTICLE 29 OF THE TREATY

98. The Respondent and Co-Respondents have argued that by virtue of Article 29(2) of the Treaty, the decision in Polytol CJJ overruled the judgment in Polytol Mauritius and that, as such the latter is no longer good law in Mauritius and cannot be relied on by the Applicant as the basis for not filing a case in the Republic of Mauritius.

99. Article 29 of the Treaty provides as follows:

> *"1. Except where the jurisdiction is conferred on the Court by or under this 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."*

100. The import of Article 29 (1) is that a party before a national court or tribunal cannot raise a jurisdictional question merely because the Common Market is a Party to the dispute. Conversely, a party before the CCJ cannot justify non-compliance with the proviso to Article 26, on non-exhaustion of local remedies, solely on the ground that the Common Market is a Party. Article 29(2) provides for the supremacy of the CCJ's decisions on interpretation of the Treaty.

101. Thus, for this Court to hold that the decision in Polytol CCJ overruled the Polytol Mauritius, it must be determined whether the latter was a decision on interpretation of the Treaty. The case before the Court in the Polytol Mauritius was an application for leave to apply for judicial review orders against a decision by the Mauritian Government, in 2001, to remove preferential duty on imports from Egypt in breach of its obligations under the Treaty. The Supreme Court of Mauritius on the issue whether it had jurisdiction to interpret and apply the Treaty held in the relevant part as follows:

> *"This court can only consider the validity of the regulations against a backdrop of the Customs Tariff Act and our Constitution. In the absence of any specific legislation to that effect, non-fulfillment by Mauritius as a Member state of its obligations, if any, under COMESA Treaty is not enforceable by national courts."*

102. The issue before the Supreme Court in the Polytol Mauritius was the applicability and enforceability of the Treaty by the national courts of the Republic of Mauritius. The Supreme Court of Mauritius did not interpret any provisions of the Treaty. That court held that the Treaty had not been incorporated into their municipal law and in the absence of any specific legislation to that effect the Treaty was not enforceable by the national courts of Mauritius. Conversely, in the Polytol CCJ, the CCJ specifically interpreted the obligations of Mauritius as a Member State of COMESA under the provisions of Article 46 of the Treaty. In this light therefore, it cannot be said that the Polytol CCJ overruled the Polytol Mauritius. Polytol Mauritius remains a valid decision within the Mauritius jurisdiction unless otherwise set aside, overruled, or departed from.

103. The Supreme Court of the Republic of Mauritius having held that the Treaty was unenforceable in the Republic of Mauritius the Applicant could easily have used that judgment to obtain an injunction to block the government from applying the safeguard measure before the domestication of the Treaty. This was undoubtedly an available and effective domestic remedy.

104. It is common cause that the Applicant did not seek any remedy in the local courts before approaching this Court under this Reference, for relief. The Applicant's conduct, and indeed in its pleadings, in this respect amounts to a tacit admission that it did not exhaust domestic remedies before it approached this Court for relief. It is trite that what is admitted need not be proved. The Court accordingly finds as a matter of fact that the Applicant did not exhaust local remedies before approaching this, Court.

105. It follows that this Reference filed before the CCJ by Agiliss Limited is inadmissible in terms of Article 26 of the Treaty because of failure to exhaust local remedies. Accordingly, the preliminary objection on jurisdiction is upheld and does succeed.

## L. COSTS

106. As regards costs, Rule 74 (12) of the COMESA Court of Justice Rules of Procedure (2016) grants this Court discretion on the award of costs. Given the circumstances of this case, therefore, we do exercise our discretion under the afore stated Rule to decline to grant an adverse award of costs to either party.

## M. CONCLUSION

107. For the reasons set out above this court makes the following conclusions:

a. **Exhaustion of local remedies is a pre-requisite for a Natural or Legal person to invoke the jurisdiction of the CCJ under Article 26 of the Treaty.**

**b. The Polytol CCJ did not and has not overruled the Polytol Mauritius Case.**

**c. The remedies of injunction and judicial review were available and effective to the Applicant within the national courts, but which were not invoked.**

## N. ORDERS

108. We hereby order as follows:

**a. This Court hereby declines jurisdiction over this Reference.**

**b. Each party shall bear its own costs.**

**DATED** this 31st Day of August 2022

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

**HON. LADY JUSTICE QINISILE MABUZA – Principal Judge**

**HON. LADY JUSTICE MARY N. KASANGO – Judge**

**HON. DR. JUSTICE LEONARD GACUKO – Judge**

**HON. LADY JUSTICE CLOTILDE MUKAMURERA – Judge**

**HON. MR. JUSTICE CHINEMBIRI E. BHUNU – Judge**