COUR DE JUSTICE

COMESA

مـــحكمة العـــدل

COMESA

COURT OF JUSTICE

COMESA COURT OF JUSTICE REGISTRAR P.O. Box 1224 KHARTOUM SUDAN

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

INTERIM APPLICATION No.1 of 2022

Arising from

REFERENCE No. 2 of 2022

AGILISS LTD ..... APPLICANT

VERSUS

THE REPUBLIC OF MAURITIUS ..... RESPONDENT

THE MINISTER OF FINANCE, ECONOMIC PLANNING AND DEVELOPMENT OF THE REPUBLIC OF MAURITIUS.....CO-RESPONDENT NO.1

THE MINISTER OF COMMERCE AND CONSUMER PROTECTION OF THE REPUBLIC OF MAURITIUS ..... CO-RESPONDENT NO 2

THE STATE TRADING CORPORATION ..... CO-RESPONDENT NO 3

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. Philippe H. Ruboneza – Assistant Registrar
Mr. Asiimwe Anthony - Clerk of Court

COUNSEL:
Razi Daureeawo – For the Applicant
Y.C Jean-Louis – For the Respondent & Co-Respondents 1,2&3

Court Reporters:
Mutale Mpempa
Kambole Ngandu

RULING

INTRODUCTION

1. The Applicant Agiliss Ltd. brought an urgent motion for interlocutory relief in terms of Rule 41 (4) as read with Rule 46 of the COMESA Court of Justice Rules of Procedure, 2016 (the Rules) seeking the following orders:

i. an order suspending the decision to grant a subsidy only to the Co-Respondent No. 3 or indirectly to MOROIL and ordering Co-Respondent No.1 and/or Co-Respondent No. 3 to grant a similar subsidy to the Applicant;

ii. an order awarding the Applicant costs of and incidental to the Reference; and

iii. such other orders as the honourable Court deems just, fit and proper in the circumstances.

2. The Application is opposed by the Respondents who have raised a preliminary objection to this Court's jurisdiction.

PARTIES

3. 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 **Common Market for Eastern and Southern Africa** (COMESA) Treaty, (the Treaty).

4. The Respondent is the Republic of Mauritius, and a Member of COMESA in terms of Article 1 (2) of the Treaty. Co-Respondent No 1 is the Minister of Finance, Economic Planning and Development. The Minister of Commerce and Consumer Protection is Co-Respondent No. 2. Co-Respondent No. 3, The State

Trading Corporation, is a statutory body corporate duly established in terms of the Mauritius State Trading Corporation Act 1982. Its objects are, *inter alia*:

> *"(a) to negotiate the purchase of goods;*
>
> *(b) to engage in the manufacture or processing of goods and to ensure their marketing;*
>
> *(c) to import goods, with a view to their marketing, distribution or supply by wholesale or retail;*
>
> *(d) to engage in the storage of petroleum products and promotion;*
>
> *(e) development of bunkering and petroleum related activities; and*
>
> *(f) engage in such other activities as may be authorised by the Minister of Commerce and Consumer Protection."*

THE FACTS

5. The Applicant averred that it is principally in the business of importing and distributing staple food including edible oils originating from the Republic of Egypt. Both countries are members of COMESA. That being the case, they have a reciprocal duty to accord each other the benefits flowing from the Treaty under Article 48 and Rule 10 of the COMESA Rules of Origin which provide favourable tariff regimes for COMESA Member States.

6. The Applicant stated it has been importing the oils under favourable tariffs in terms of the Treaty since 2012. That its share in the local edible oil market is about 25%. On 7 June 2022 in the budgetary speech Co-Respondent No. 1 announced the intention to provide Co-Respondent No. 3 with a subsidy on edible oils among other commodities. The announcement was an abandonment

of the previous policy where subsidies were available to all operators in the market.

7. On 28 June 2022 the Applicant wrote to Co-Respondent No. 1 expressing its concerns at the prospect of the subsidy being extended solely to its competitor as this had the effect of distorting the market to its loss and prejudice. There was no response to the Applicant's letter prompting the Applicant to write a follow up letter dated 15 July 2022 urging a return to the original position where subsidies were available to all players in the market.

8. Despite the Applicant's objections senior government officials comprising of the Attorney-General, the Minister of Agro-Industry and Food Security, and Co-Respondents No. 2 and 3 made pronouncements to the effect that Co-Respondent No.3 would be selling oil at the subsidised price of MUR90 down from the previous average price of MUR110. Subsequently Co-Respondent No. 2 wrote a letter dated 22 July 2022 stating that Co-Respondent No.3 would be selling edible oil at a much lower price of MUR75. The Respondent acting through its Cabinet, "agreed to the State Trading Corporation (STC) commercialising its own branded one-litre edible oil, as announced in Budget 2022-2023. It would be sold at a subsidised price of Rs75 per one litre"

9. At a follow up meeting with the Applicant on 2 August 2022, Co-Respondent No. 3 is alleged to have admitted that it was getting a subsidy of MUR35 per litre and was selling edible oil at the subsidised price of Rs75 per litre and still making a profit of MUR2 per litre.

10. This led to the Applicant and the Respondents being embroiled in a dispute concerning the importation and distribution of edible oils under the purview of the Treaty. The Respondent has since granted a subsidy to Co-

Respondent No. 3. In consequence thereof, the Applicant has filed this Reference, No. 2 of 2022, in terms of Article 26 of the Treaty seeking appropriate relief which gave rise to the interlocutory motion for interim relief pending the final determination of the Reference on the merits. The motion application was in terms of Rule 41 (4) as read with Rule 46 of the Rules. The motion sought the prayers captured in paragraph No. 1 (supra).

11. On 28 September 2022 this Court through the learned Presiding Judge granted interim order, as sought in the motion, in terms of Rule 41 (3) as read with Rule 47 (3). The order is couched in the following terms:

> *"(a) That the notice of motion by the Applicant dated 29 August 2022 shall be heard inter parte virtually on 17 October 2022 at 10 AM East African time."*
>
> *(b) That an Interim Order is hereby issued against the Respondents 1 and 2, suspending the decision to grant a subsidy to Co-Respondent 3, pending the hearing and determination of the Notice of Motion.*
>
> *(c) That the Applicant shall, on or before 7 October 2022, file a reply to the Preliminary Objection in respect of the Application for interim measure.*
>
> *(d)That all parties shall file French versions of all pleadings and supporting documents on or before 15 October 2022."*

12. The Presiding Judge in granting the interim order perceived no harm or prejudice to the respondents if the status quo ante is maintained pending the *inter partes* hearing.

13. The motion was heard *inter partes* on 17 October 2022. The application was supported by a founding affidavit of the Applicant's Chief Executive officer, one Sharon Ramdenee. In her affidavit she deposed to a brief resume of a description of the parties and a statement of facts forming the basis of the application.

14. The Applicant's complaint is basically that the decision and the act to grant the subsidy solely to Co-Respondent No. 3 was unfair, illegal and distorts competition among entrepreneurs in the market. The Applicant avers that it has and continues to suffer financial prejudice. Consequently, it filed the motion in this Court.

15. The motion is basically for interim injunction to preserve the status quo ante pending the determination of the Reference. It is trite that all the Applicant need to prove at this stage is the existence of a *prima facie* case as provided under Rule 46 (3) of the Rules.

JURISDICTION

16. In response to the interlocutory application the Respondents filed preliminary objection dated 12 September 2022. The Respondence reserved their right to file affidavit in reply and raised the following preliminary objection to the matter proceeding any further:

> *"Respondent and Co-Respondents pray that the application for interim measure lodged by Applicant under Rule 41(4) and 46 of the COMESA Court of Justice Rules of Procedure 2016, be set aside with costs inasmuch as the COMESA Court of Justice has no jurisdiction to hear and determine the matter, in view of the mandatory requirement for Applicant*

to exhaust domestic remedies under Article 26 of the Treaty establishing the Common Market for Eastern and Southern Africa."

17. The Respondents by the above preliminary objection invited the Court to set aside the motion and the interim order, issued on 28 September 2022. Article 26 of the Treaty relied upon by the Respondents requires exhaustion of local remedies before approaching the Court. That Article is couched 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)"*

18. The Respondents submitted that the Applicant in filing this matter did not comply with the proviso, underlined above, and argued that this Court lacks jurisdiction to entertain the motion. It is on that ground that the preliminary objection was raised. It was further submitted that the interim order issued on 28 September 2022 should be discharged because the motion cannot succeed not having been based on a clear legal right. The Respondents contended that the motion is not founded on a valid cause of action on account of lack of jurisdiction for failure to exhaust local remedies.

19. The Respondents supported that argument by citing the case of **Fourie v Le Roux (2007) UKHL 1087** where a freezing order made in the absence of subsisting proceeding was discharged. That case was in support of the legal position that the granting of an injunction presupposes the existence of a cause of action Lord Diplock in the House of Lords stated, at paragraph 26 (h-j) as follows:

> *"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary / and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."*

20. The Applicant pleaded in the motion herein, that by virtue of the holding in the Republic of Mauritius Supreme Court case of **Polytol Paints & Adhesive Manufacturers Co. Ltd. -v- The Minister of Finance (2009 SCJ 106)** it had exhausted the local remedies of the Republic of Mauritius.

21. The Respondents submitted that the above pleading was reminiscent of paragraph 27 of COMESA Court of Justice **Reference, No. 1 of 2019 Agiliss v Government of Mauritius and 4 others,** filed previously by the Applicant, against some of the Respondents in the present Reference alongside others. In that Reference No.1 of 2019, the Applicant relied on the holding by the Mauritius Supreme Court in the Polytol case (supra) and pleaded that it had no local

remedies available to it in the Republic of Mauritius. In Refence No. 2 of 2022 from where the interlocutory motion arises, in paragraph number 26 the Applicant pleaded as follows:

> *"By virtue of the decision of the Supreme Court of Mauritius in the case of Polytol Paints & Adhesive Manufacturers Co Ltd v The Minister of Finance (2009 SCJ 106), holding that the COMESA Treaty, to the extent that it has not been domesticated in the local law, is not enforceable in the domestic Courts of the Republic of Mauritius, the Applicant has no local remedy before the national Courts or Tribunals of the Republic of Mauritius."*

22. In response to that pleading the Respondents referred to this Court's judgment in Agiliss v Republic of Mauritius & others Reference No. 1 of 2019 where the Court held that the Applicant erred by failing to produce evidence of the steps it took in pursuit of local remedies available in the Republic of Mauritius. On the basis of that holding the Respondents submitted that the Applicant cannot be heard, in this Reference, to argue that it exhausted local remedies in the Republic of Mauritius.

23. It needs to be stated that the Applicant claims to have filed a Notice of Appeal against this court's judgment in Reference No. 1 of 2019 (supra). The Respondents however citing Rule 90 (2) of the Rules stated that such an appeal does not operate as stay of execution of judgment appealed against.

24. In response to the preliminary objection the Applicant commenced by citing the provisions of Article 26 of the Treaty. The Applicant argued that it is trite law, following the holding of Mauritius Supreme Court decision in the Polytol Case (supra), that this Court has jurisdiction to hear a Reference made by a resident of a COMESA Member State under Article 26 of the Treaty, on

allegations of infringement of the Treaty by a Member state. The Applicant relying on the case of COMESA Court, Appellate Division, in **Government of the Republic of Malawi v Malawi Mobile Limited (Appeal No. 1 of 2016)** at paragraph 96:

> *"(d)it is not sufficient that an applicant may have unsuccessfully exercised another remedy in 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."*

25. In light of the above holding the Applicant stated that it does not dispute that exhaustion of local remedies is an admissible criterion, under the Treaty. It argued that the rule on exhaustion of local remedies was not absolute. The Applicant contended that courts in Mauritius do not have jurisdiction to determine the Reference due to the holding in the Polytol case (supra). To buttress its arguments the Applicant relied on the case **Pierce v Pierce (1998 SCJ 397)** where the Mauritius Supreme Court held that the **Convention on the Civil Aspect of International Child Abduction**, not being part of the law of the land, the court was not bound to give effect to its provisions. The Applicant also cited the case of **Michael Rex Jordan v Marie Martine Jordan (2000 SCJ 57)** where the Supreme Court of Mauritius held that because of the principle of separation of powers the Mauritius judiciary cannot comply with its international

28. The Applicant further argued that the Respondents had failed to discharge their burden of proof to the effect that the Applicant had not exhausted local remedies, as held in the case of **Government of the Republic of Malawi** (supra).

29. Finally, the Applicant challenged this Court's judgment in Reference No.1 of 2019 (supra) and submitted that the pronouncement thereof was based on the wrong law and that it has accordingly filed an appeal against it.

DISCUSSION AND DETERMINATION

30. We begin our discussion by making reference to the proviso to Article 26 of the Treaty. It requires a Reference to this Court be made after a resident in a Member State, has exhausted local remedies. The Applicant, while admitting not having exhausted local remedies has cited authorities which show there is an exception to that requirement. We dare say that the Applicant has relied on foreign authorities whereas in the judgment in Reference No. 1 of 2019, this Court cited several cases of the COMESA Court of Justice where the proviso to Article 26 of the Treaty has received interpretation. We shall consider COMESA Court's binding decisions. The one case that captures the jurisprudence of this Court on interpretation of the proviso to Article 26 of the Treaty is the case of **COMESA Court of Justice Ref. No. 1 of 2009 INTELSOLMAC v RWANDA CIVIL AVIATION AUTHORITY** at page 9 where it was held:

> *"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 ...*

obligations which are not domesticated, but it can only make the relevant observation.

26. The Applicant further referred to the interpretation by the **African Commission of African Charter on Human and People's Rights**, on exhaustion of local remedies, where the Commission limited exhaustion of local remedies to include the remedies that are available effective and sufficient and further stated that where the remedies fail to meet the standard set out above, they need not be exhausted. In that regard the Applicant cited the case of **Sir Dawda K Jawara v The Gambia (Communication No. 147/95, 149/96).**

27. The Applicant referred to the case of **Mossville Environment Action Now (United States) (Report No. 43/10)** which interpreted Article 46 of the **American Convention on Human Rights**, that has a requirement for exhaustion of local remedies. In that case it was held that domestic remedies need only be exhausted if there are reasonable prospects of success. That holding was at par with the case of **Earl Pratt and Ivan Morgan v Jamaica (Communication No. 210/1986 and 225/1987).** Another case cited by the Applicant is **Juvenile Offenders Sentence to life Imprisonment Without Parole (United States) (Report No. 18/12)** where the court held that exhaustion of local remedies was not required where the United States courts had repeatedly rejected other juvenile defendants' challenges to their sentences. The rationale in the case of **Paksas v Lithuania (Application No. 34932/04),** which the Applicant relied upon, was to the effect that remedies need only be exhausted if they are available and sufficient and whose existence is sufficiently certain not only in theory but also in practice.

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."

31. Although the Applicant relied on the decision of **Government of the Republic of Malawi** (supra) it failed to note that the COMESA Court, Appellate Division, in that case at paragraph 106 stated thus:

"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."

32. The above quotation clearly responds to the argument of the Applicant where the Applicant submitted that it could not litigate on Treaty issues in the Mauritius courts.

33. Further, the Applicant erred to argue that the Respondents had the burden to prove that it, the Applicant, had not exhausted local remedies. This is because

the Applicant having pleaded in its Reference that it had exhausted local remedies, or that it was exempted from seeking local remedies, it bore the legal burden to prove what it pleaded. The undoubted legal principle is that, "**He who alleges must prove**". The Applicant having made the allegation of exhaustion of local remedies had the burden to prove the same. Further the primary obligation to exhaust domestic remedies is imposed on the Applicant by Article 26 of the Treaty.

34. We are not persuaded by the submissions made by the Applicant that the judgment in Reference No. 1 of 2019 was based on wrong law. That decision is the judgment of this Court, and it remains extant and binding until it is set aside by the Appellate Division.

35. Our finding is that the Applicant failed to exhaust the local remedies. The Applicant failed to produce to this Court clear evidence of the steps it took, if any, in pursuit of local remedies in the Republic of Mauritius. Having so failed we hereby find that the proviso of Article 26 of the Treaty has not been fulfilled by the Applicant and it is on that basis the Respondents succeed in the preliminary objection. Consequently, we are of the view that the Respondents have proved on balance of probabilities that this Court has no jurisdiction to hear and determine the motion.

36. The preliminary objection of the Respondents limited this Court's determination to two issues; that is whether this matter should proceed any further; and whether the interlocutory application and the interim order of 28 September 2022 should not be set aside with costs. Since parties are bound by their pleadings, we shall confine our consideration within the limits of that preliminary objection.

37. For the reasons set out above, we uphold the preliminary objection.

COSTS

38. The Court has discretion on the award of costs under Rule 74 (12). Having due regard to the importance of this case and the jurisprudence of the Court we decline to make an award of costs to either party.

FINAL ORDERS

39. The orders of this Court are as follows:

(i) That this Court hereby declines jurisdiction to hear and determine the motion dated 29 August 2022.

(ii) The motion application dated 29 August 2022 is hereby set aside.

(iii) The interim order issued on 28 September 2022 is hereby set aside.

(iv) Each party shall bear their own cost.

DATED this 21st Day of October 2022

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HON. LADY JUSTICE QINISILE MABUZA – Principal Judge

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HON. LADY JUSTICE MARY N. KASANGO – 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