**11 June 2010**

**Case No. SADCT: 14/2008**

**SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL**

**BACH'S TRANSPORT (PTY) LTD**
**v.**
**THE DEMOCRATIC REPUBLIC OF CONGO**

**JUDGMENT**

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| BEFORE: | PRESIDENT: A. G. Pillay |
| Citation: | JUDGES: Dr. L. A. Mondlane; I. J. Mtambo; Dr. R. Kambovo; Dr. O. B. Tshosa<br>Bach's Transport v. Congo, Judgment, Case No. SADCT: 14/2008 (SADC, June 11, 2010) |
| Represented By: | APPLICANTS' AGENTS: R. Josiah<br>RESPONDENT'S AGENTS: L. Katansi and K. K. N. Kambinda |

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JUDGMENT

DELIVERED BY THE PRESIDENT OF THE TRIBUNAL H.E. JUSTICE ARIRANGA G. PILLAY

[1] This is an application for a decision in default brought in terms of Article 25 of the Protocol on Tribunal (the Protocol) read with Rule 68 of the Rules of Procedure of SADC Tribunal (the Rules). The Applicant seeks an order in the following terms:

"That the Government of the Democratic Republic of Congo (DRC) be ordered to pay:
1. Damages to the Applicant in the sum of US$1,988 079.49 per annexure BT19
2. Costs of the suit at Attorney Client scale
3. 10% interest from October 2006 to May 2007
4. Further and/ or any alternative relief."

[2] The application was filed with the Office of the Registrar on 29 August 2008. It was served on the Respondent through its Embassy in Lusaka, Zambia on 2 November 2008. However, the Respondent failed to file a defence to the application as required by Rule 36(1) of the Rules, which provides as follows:

"The respondent shall file a defence within thirty (30) days of service of the application or notification stating:
a) the name and address of the Respondent;
b) the name and address of the Respondent's agent;

c) arguments of facts relied upon;
d) the form of Order sought by the Respondent;
e) the nature of any evidence offered by him or her or it in defence."

[3] As a result of the Respondent's failure to file a defence, the Applicant made an application for a default decision. The hearing of the application was set down for 17 July 2009.

[4] On 17 July 2009 when the application was about to be heard, the Respondent's agent appeared and raised a preliminary objection to the application. He argued that the Respondent had never received the application initiating proceedings. The record, however, shows that the application had been served on the Respondent through its Embassy in Zambia on 2 November 2008. The Tribunal then ordered that the Respondent should be served with the application through its Embassy in Windhoek, Namibia on the same day, that is, 17 July 2009. Service of the application was effected in accordance with Rule 83(1) (a) of the Rules, which states as follows:

"Any notice or other document which is required to be served by these Rules shall be served by registered post with a form for acknowledgment of receipt or by personal delivery of the copy against a receipt."

[5] Moreover, the application was also served personally on the Respondent's Agent at the Tribunal who promised to give a response thereto. However, again, the Respondent failed to respond or file any defence to the application.

[6] The application for a default decision was again set down for hearing on 25 March 2010. Agents for both parties were present at the hearing. Before the Agents made their submissions, the Respondent's Agents raised three preliminary points. Firstly, they argued that the Applicant is not a legal person capable of bringing an application before the Tribunal as provided for in the Protocol. Secondly, the Agents argued that the Applicant had not exhausted local remedies either in the DRC or Botswana. Thirdly, the Respondent's Agents challenged the amount of US$1, 988 079.49 claimed by the Applicant. They argued that the amount is exaggerated and is not commensurate with damages caused to the Applicant.

[7] We wish to note at this stage that it is clear to us that the application has been filed and served on the Respondent by the Applicant in accordance with the Rules. However, the Respondent did not file its defence to the application.

[8] The power of the Tribunal to grant default decisions is provided for under the Protocol and the Rules. In terms of Article 25 of the Protocol:

"1. The Tribunal may give a decision in default.
2. Before giving such a decision the Tribunal shall satisfy itself that it has jurisdiction over the dispute and that the claim is well-founded in fact and law.
3. A party against whom a default decision is made may apply to the Tribunal for the rescission of such decision. The Applicant shall set out the ground for such application."

[9] Further, Rule 68 of the Rules provides as follows:

"1. Where a respondent on whom an application initiating Proceedings has been duly served fails to file a defence to the application in the proper form within the time prescribed in the Rules, the applicant may apply for a decision in default.

2. The application shall be served on the respondent and the President shall fix the date for the hearing of the application.
3. (a) Before granting the application, the Tribunal must be satisfied that the application initiating proceedings is properly before it, discloses a cause of action and that appropriate formalities have been complied with.
(b) ....”

[10] It is clear from both Article 25 of the Protocol and Rule 68 of the Rules that the Tribunal has the power to grant default decisions. Before granting a default decision, however, the Tribunal must satisfy itself of the following: firstly, that it has the jurisdiction over the dispute or that the application is properly before it; secondly, that the claim is well-founded in fact and law or that it discloses a cause of action; thirdly, that the application for a decision in default is in the proper form within the time prescribed in the Rules, and fourthly, that the appropriate formalities have been complied with.

[11] The first issue that the Tribunal should decide is whether it has jurisdiction over the dispute. The issue of jurisdiction is regulated by Article 15 (1) of the Protocol, which provides as follows:

“The Tribunal shall have jurisdiction over disputes between Member States, and between natural and legal persons and Member States.”

[12] The Applicant is not a natural person. It is a legal person incorporated under the Laws of Botswana (Doc.BT3) and has brought an action against the Respondent, which is a Member State of SADC. This application, therefore, concerns a legal person and a Member State and as such falls within the ambit of Article 15(1) of the Protocol.

[13] Furthermore, Article 15(2) of the Protocol provides as follows:

“No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.”

[14] It should be noted that, although we raise the issue of exhaustion of local remedies in so far as it is germane as to whether the Tribunal has jurisdiction to hear the application, the Respondent has also raised it in its preliminary objection.

[15] The Applicant’s representative had stated in paragraph 13 of his Founding Affidavit as follows:

“I aver that all available avenues within DRC legal system were exhausted and nothing fruitful was achieved even diplomatic channels also failed.”

[16] The Applicant’s representative also went on to state that after the Applicant’s truck and trailer were impounded by the Congolese Control Officers, he lodged a complaint with the Attorney General at the High Court in DRC. The Attorney General advised him to contact a lawyer for assistance. The Attorney General even called a lawyer for the Applicant by the name of Eric Mumwena Kasongo of Muyabo & Associates. The services of one Mr. Eric Kasongo were hired by the Applicant to get its truck and trailer released from the Congolese Control Officers. However, the truck and trailer were not released but sold at a public auction. Thereafter, the Applicant tried in vain to contact Mr. Eric Kasongo for legal assistance and instructed another lawyer by the name of one Mr. Vital Mbuyo Kinanzula who did nothing.

[17] The Applicant's representative further averred that the problem was compounded by the fact that the legal system of the Respondent uses French as its official language, which he does not speak and every time he needed documents to be translated into English he had to pay, which proved a costly affair.

[18] Further, the Applicant's representative stated in paragraph 12 of his Founding Affidavit that:

"I aver that at one stage I was informed by my lawyer, Eric to pay him some money so that he can in turn pay judges and other judicial officers. I refused to do that and I believe that my case failed to go through the system because of my refusal to pay the authorities."

[19] Finally, the Applicant's representative stated in his Founding Affidavit that he contacted the Ministry of Foreign Affairs in Botswana which in its turn contacted the Embassy of the Respondent in Lusaka and the South African Consulate in the DRC but to no avail.

[20] Clearly, there is evidence supported by documents that the Applicant tried to utilize the legal system of the Respondent to have its truck and trailer released but was unsuccessful. It even tried to use the diplomatic channels available but was equally unsuccessful. It was clearly unable to proceed under the domestic legal system of the Respondent. In Mike Campbell (PVT) Ltd v The Republic of Zimbabwe SADC (T) 2/2007, the Tribunal observed at p. 21:

"However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. ... These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal."

[21] Consequently, the Tribunal considers that the Applicant has tried unsuccessfully to obtain redress under the municipal legal system of the Respondent. The Tribunal, therefore, holds that it has the jurisdiction to entertain the application.

[22] Article 25 of the Protocol and Rule 68 of the Rules also require that the Tribunal should satisfy itself that the claim is well-founded in fact and in law. This means that the application should have both a factual and legal basis.

[23] The application brought against the Respondent is a claim for damages in the sum of US$1, 988 079.49. The damages arose from the unlawful seizure and sale by public auction of the Applicant's truck and trailer by the Respondent's Control Officers in Lubumbashi in the DRC. The circumstances relating to the unlawful seizure and sale of the truck and trailer and the costs incurred by the Applicant relating to such seizure and sale are spelt out in the Founding Affidavit of the Applicant's Representative. The Respondent did not file any defence challenging the unlawful seizure and sale of the Applicant's truck and trailer and the costs incurred by the Applicant relating to such seizure and sale. We consider that the Applicant's claim is well-founded in law and fact, as envisaged by Article 25 of the Protocol as read with Rule 68 of the Rules.

[24] With regard to the issue of formalities for initiating an application as laid down in Rule 32 of the Rules, we are satisfied on the record before us that they have been complied with by the Applicant. Rule 35 deals with service of applications and notifications. It provides in paragraph 1 that the Registrar shall transmit a certified copy of the application to the Respondent. Rule 35 (1) is complemented by Rule 83(1) (a) which provides that service of notice or document required to be served under the Rules shall be served by registered post with a form or acknowledgement of

receipt.

[25] It is abundantly clear, from the record before us that the application was initially served on the Respondent through its Embassy in Zambia on 2 November 2008, as indicated already. The application was also served on the Respondent's Agent at the Tribunal when he appeared to argue the case, on 17 July 2009. The application was subsequently served on the Respondent through its Embassy in Namibia on the same day.

[26] The last issue that remains to be decided is whether the Applicant is entitled to the amount of damages it has claimed. It was argued on behalf of the Respondent that the Applicant's claim was exaggerated and that the true value of the truck and trailer of the Applicant was estimated by an insurance company in April 2007 at US$25,000. It was further contended that the truck and trailer had been in operation since 1996 and there was no basis for the Applicant's claim.

[27] We note, however, that the Respondent did not adduce any evidence to substantiate the argument of its Counsel that the Applicant's claim was exaggerated or to indicate the value of the truck and trailer at the time they were impounded by the agents of the Respondent. We also note that the Applicant had later recovered its truck, which was damaged due to constant use but that its trailer had never been found.

[28] In the circumstances, the Tribunal holds that the Applicant is entitled to a default decision in terms of Article 25 of the Protocol and Rule 68 of the Rules.

[29] We therefore make the following orders:

1) The Respondent shall pay damages to the Applicant in respect of its truck and trailer and such damages are to be assessed by the Registrar.
2) The Respondent shall pay legal interest on such damages.

[30] With regard to costs, we shall first refer to Rule 78 of the Rules. Rule 78 provides as follows:

"1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party."

[31] In terms of Rule 78, each party bears its own costs except where there are exceptional circumstances warranting the grant of costs, in the interests of justice, against a party.

[32] We consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the Applicant in the interests of justice. We have taken into account, in this respect, especially the fact that the Applicant has had to suffer prejudice and material damages when its truck and trailer were unlawfully impounded in October 2006 by the agents of the Respondent and that the Respondent tried all means of delaying tactics to prevent the Applicant from getting a decision from the Tribunal. We accordingly award costs to the Applicant under Rule 78(2) of the Rules. The costs are to be determined by the Registrar in case of disagreement between the parties.
Delivered in open court this 11th day of June 2010, at Windhoek in the Republic of Namibia.

H.E. Justice Ariranga Govindasamy Pillay
PRESIDENT

H. E. Justice Isaac Jamu Mtambo, SC
MEMBER

H.E. Justice Dr Luis Antonio Mondlane
MEMBER

H.E. Justice Dr Rigoberto Kambovo
MEMBER

H.E. Justice Dr. Onkemetse Tshosa
MEMBER