

COUR DE JUSTICE



محكمة العدل

COMESA



COURT OF JUSTICE

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

Coram: Qinisile Mabuza, Acting Principal Judge, Ali S. Mohammed,
Mary N. Kasango, Leonard Gacuko, Clotilde Mukamurera, LJJ

Registrar: Nyambura L. Mbatia

REFERENCE NO. 1 of 2015

MALAWI MOBILE LIMITED (MML).....APPLICANT

Versus

GOVERNMENT OF THE REPUBLIC OF MALAWI1st RESPONDENT


MALAWI COMMUNICATIONS REGULATORY
AUTHORITY (MACRA).....2nd RESPONDENT

For the Applicant: Mr. David Kanyenda

For the 1st Respondent: Hon. Mr. Kalekeni Kaphale, Attorney General of the
Government of the Republic of Malawi with Ms. Apoche
Itimu

For the 2nd Respondent: Mr. Ted Roka

RULING

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The applicant in this reference is **MALAWI MOBILE LIMITED** (hereinafter referred to as "MML"). The First Respondent is **GOVERNMENT OF THE REPUBLIC OF MALAWI** (hereinafter referred to as "the Government"). The Second Respondent is **MALAWI COMMUNICATIONS REGULATORY AUTHORITY** (hereinafter referred to as "MACRA").

BACKGROUND

1. The thread that holds the above parties together is a Licence Agreement dated 19th April, 2002. That agreement was between MML and MACRA. By that agreement MML was required to provide public mobile radio telephone services in the Republic of Malawi for a period of fifteen years.
2. Under that agreement MML was also required to undertake the roll out of its network in Malawi within 12 months from the date of the launch. The Licence Agreement was entered into between MML and MACRA as provided under Section 3.1 of the Communication Act, 1998 of Malawi.
3. By January 2005 MML had not rolled out the mobile telephony network. On or about 27th January 2005 MML sought an extension from MACRA for up to 31st October 2005 to roll out the network.
4. In their response by their letter dated 9th February 2005 MACRA issued a revocation notice to MML. That revocation notice was in terms of clause 21 of the Licence Agreement of 2002. Relying on that clause MACRA demanded from MML Licence fees and penalties. Further MACRA required MML to roll out the mobile telephony network within 90 days. In default of the payment of the Licence, penalties and the roll out of the network, MACRA stated by that response that MML's Licence would stand as revoked.
5. By yet another letter dated 15th March 2005 MACRA informed MML that their request for extension to roll out the network would be placed before the MACRA Board

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of Directors. MACRA also requested by that letter for MML to submit their progress report.

6. By their letter dated 21st March, 2005 MML renewed their request to MACRA for extension for roll out of network and by that letter MML submitted their schedule of that roll out of the network.

7. By this Reference MML pleaded that the Board of Directors of MACRA resolved, on 29th March 2005, to extend the roll out period and following that resolution an irrevocable written agreement was entered into.

8. That by that irrevocable agreement MACRA granted MML an extension as it had sought which extension was granted on the following conditions amongst others:

- That MML would make two payments of annual Licence fee for USD 100,000 for the period of the years 2004 to 2005 and a similar amount for the period of 2005 to 2006;
- In consideration of the above payments MACRA would extend the roll out period up to 31st October 2005;
- That the Licence of MML would be revoked after close of business of 31st October 2005 if MML failed to fulfill the Licence obligation; and
- That the effect of the said agreement was to vary the Licence and superseded any notices, memoranda and or communication that had been between MML and MACRA.

9. By this Reference MML pleaded that it fulfilled its obligation by making two payments to MACRA of the Licence fee each of USD 100,000 on 19th and 20th April, 2005.

10. MML allege in their Reference that MACRA, through the inducement of the Government wrongly and maliciously revoked, by their letter dated 13th and 15th April, 2005 the irrevocable agreement.

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11. It needs to be noted that the Attorney General of Malawi had, by a letter dated 24th March 2005, suspended the Board of Directors of MACRA.

12. In their defences both the Government and MACRA pleaded that the suspension letter of the Attorney General of Malawi also suspended the resolutions that had been passed by MACRA Board of Directors as at the date of the suspension letter. It is also pleaded in those defences that the suspension of the Board's decisions had the effect of suspending the Board's decision to grant MML extension up to 31st October, 2005 to roll out the network.

13. MML sued the Government and MACRA at High Court of Malawi, Commercial Division seeking both special and general damages in respect of the alleged breach of the irrevocable agreement. The judgment before that court was in favour of MML. MML was awarded judgment in respect of loss of profit to the tune of USD 66,850.000 plus costs of the suit.

14. That judgment was the subject of the appeal filed by the Government and MACRA before the Supreme Court of Appeal. That appeal was successful and the Supreme Court of Appeal set aside that judgment of the High Court, Commercial Division. MML has filed this Reference following the judgment of Malawi Supreme Court of Appeal.

15. All Parties have filed Preliminary Applications which are the subject of this Ruling. The Government's Preliminary Application seeks two prayers. Firstly it seeks a finding that this Court does not have jurisdiction to entertain the Reference, and secondly it seeks the removal of MACRA from this Reference.

16. MACRA by its Preliminary Application seeks an order for its removal from this Reference.

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17. MML seeks the setting aside of the judgment of the Malawi Supreme Court of Appeal and the reinstatement with interest, of the judgment of Malawi High Court, Commercial Division, by its Preliminary Application.

A. PRELIMINARY APPLICATION BY THE GOVERNMENT

18. The Government's Preliminary Application is dated 5th June, 2015. It is brought under Rules 82 and 83 of the Rules of the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) and Article 26 of the COMESA Treaty ("the Treaty").

19. By that application, in the first prayer, the Government seeks dismissal of this Reference on the basis that this Court does not have jurisdiction under Article 26 of the Treaty.

20. The second prayer in the Government's Preliminary Application, because in the Court's view, it is similar to the prayer in MACRA's Preliminary Application dated 10th June, 2015, the determination of MACRA's said application will also determine that second prayer.

21. The emphasis of the Government's argument in support of the Preliminary Application was the definition of the term "**unlawful**" as stated in Article 26 of the Treaty. According to the Government, that term in Article 26 only refers to breaches of the Treaty or of any community law under the Treaty. That accordingly, the alleged act of the alleged inducement by the Government for MACRA to allegedly breach the irrevocable agreement was not unlawful as stated in Article 26 of the Treaty.

22. The Government through its learned counsel was accordingly emphatic that because that alleged inducement did not fall within the provisions of Article 26 and because the municipal law of Malawi cannot apply to this present Reference, the Reference must fail.

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23. To bolster its argument, the Government submitted that the relationship between MML and MACRA was governed by Clause 29 of the Licence Agreement which clause is in the following terms:

"This Licence and its performance shall be governed by and in accordance with the Laws of Malawi."

24. The Government further submitted that References before this Court cannot rely on municipal laws. That, that being so, the alleged breach of irrevocable agreement could not be examined by this Court because this Court, under its jurisdiction, can only entertain matters relating to the Treaty.

25. In the Government's view, MML was also precluded from raising any issue before the Court, which issue had not been the subject of litigation before the Malawi courts. That to allow MML to raise such an issue, according to the Government, would contravene the provision in Article 26 of the Treaty which requires that before filing a Reference before this Court, a party must first exhaust the local remedies.

26. The Government argued that MML had not litigated on the issue of the alleged breach of the Treaty before the Malawi courts and had, therefore, not exhausted the local remedy in respect to those alleged breaches. That Article 26 had not envisaged a party would file a reference in respect of a new claim not litigated before the municipal court.

27. MML through its reply filed in court on 1st July, 2015, referred to Rule 82 of the Rules and argued that the Government's Preliminary Application had delved into the substance contrary to the provisions of that Rule. That the Government by its said application was seeking the Court's determination of contentious issues of the case, yet that it ought to have confined itself to procedural issues or defects.

28. In the view of MML, its reference was permitted under Article 26 because MML was a juristic person resident in Malawi and that it had exhausted the local remedies as required under Article 26. MML relied on the case ***"THE REPUBLIC OF KENYA AND***

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COMMISSIONER OF LANDS =VS= COASTAL AQUACULTURE LIMITED"
Reference No.3 of 2001.

29. MML submitted that the Government's alleged inducement of the breach of contract was an unlawful act and was a violation of Article 6 (f) of the Treaty. Further that to determine at this preliminary stage whether the Government's alleged inducement was unlawful would, of necessity involve the Court in the consideration of substantive issues of this Reference, which, as stated before, MML argued, is not permitted under Rule 82 of the Rules.

COURT'S ANALYSIS AND DETERMINATION

30. The Republic of Malawi is one of the nineteen Eastern and Southern African States that belong to the Common Market for Eastern and Southern Africa (COMESA). In establishing themselves in that Common Market, those States agreed to be bound by the COMESA TREATY. The aims and objectives of the Common Market are set out in Article 3 of the Treaty. Those aims and objectives are as follows:

ARTICLE 3

Aims and Objectives of the Common Market

The aims and objectives of the Common Market shall be:

"(a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;

(b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;

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(c) to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development;

(d) to co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;

(e) to co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and

(f) to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community."

31. The Member States of the Common Market by Article 6 of the Treaty stated that in order to achieve the aims and objectives in Article 3, above, they would adhere to the principles set out in that Article 6 Sub-Articles (a) to (j). Again for understanding, we shall set out those principles the States bound themselves to adhere to in order to achieve the aims and objectives of Article 3 as follows:

ARTICLE 6

Fundamental Principles

"The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991, agree to adhere to the following principles:

(a) equality and inter-dependence of the Member States;

(b) solidarity and collective self-reliance among the Member States;

(c) inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;

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(d) non-aggression between the Member States;

(e) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

(f) accountability, economic justice and popular participation in development;

(g) the recognition and observance of the rule of law;

(h) the promotion and sustenance of a democratic system of governance in each Member State;

(i) the maintenance of regional peace and stability through the promotion and strengthening of good neighbourliness; and

(j) the peaceful settlement of disputes among the Member States, the active co-operation between neighbouring countries and the promotion of a peaceful environment as a pre-requisite for their economic development."

32. Bearing in mind the provisions of Articles 3 and 6 as set out above, is the Government correct in arguing that MML's reference fails to bring itself within the provisions of the Treaty?

33. The consideration of that argument starts off by looking at part of Article 26 of the Treaty:

ARTICLE 26

Reference by Legal and Natural Persons

"Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty:"

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34. MML's Reference in regard to its case against the Government is to the effect that the alleged inducement by the Government to MACRA, which inducement allegedly led to MACRA's revocation of the alleged irrevocable agreement was an unlawful act. It is alleged that the Government of Malawi committed the tort of inducement to breach that contract.

35. Several issues arise from the parties' arguments on whether the alleged act of inducement fell within the ambits of the Treaty. It however needs to be understood from the outset that as we are dealing with this issue, we are not examining whether the alleged act of inducement was "unlawful" as stated in Article 26, but rather we shall consider that if MML did prove at the hearing of the present Reference that the alleged act indeed was an unlawful act, whether that proof would bring MML's reference within the provisions of the Treaty. In other words, at this preliminary stage, and bearing in mind Rule 82 of the Rules, we shall not consider whether MML has proved that the said alleged inducement had occurred and if so was it unlawful because to do so would need us to go to the substance of this Reference.

36. As correctly submitted by the Counsel for MML, Rule 82 of the Rules forbids the Court from entering into the realm of substance of the Reference at the hearing of a preliminary application.

37. The jurisdiction of this Court, as well articulated by all Counsels who appeared before us, is as stated in Articles 19 and 23 of the Treaty.

Article 19 provides viz:

ARTICLE 19

Establishment of the Court

"1. The Court of Justice established under Article 7 of this Treaty shall ensure the adherence to law in the interpretation and application of this Treaty. (Emphasis ours).

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38. Article 23 provides viz:

ARTICLE 23

General Jurisdiction of the Court

"1. The Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty. (Emphasis ours).

2. The First Instance Division of the Court shall have jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division under paragraph 2, any matter brought before the Court in accordance with this Treaty. (Emphasis added).

39. The Government's argument is that this Court, when one considers the terms of Article 26 as reproduced above, has no jurisdiction to examine the alleged act of inducement to revoke a contract because to do so would be contrary to Article 26.

40. The Government argued that the "act, directive, decision or regulation" stated in Article 26 only related to acts, directives, decisions or regulations in the Treaty. That accordingly, since the alleged act of inducement did not fall within the provisions of the Treaty, MML cannot invite this Court to consider its claim. Also that accordingly this Reference filed by MML is seeking this Court to apply the municipal law of Malawi which is contrary to the provisions of the Treaty.

41. That to entertain this reference would lead to this Court going beyond its jurisdiction as set out in Articles 19 and 23 of the Treaty. The Government added that this Court could only apply the provisions of the Treaty and of the community law as provided under the Treaty.

42. What we understood to be the argument of the Government in advancing its submissions that the Court was bound to apply the Treaty and community law, was that the community law were those directives and decisions of the various organs of the Common Market. Those organs are set out in Article 7 of the Treaty and are:

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ORGANS OF THE COMMON MARKET**ARTICLE 7*****Organs of the Common Market***

"1. There shall be established as organs of the Common Market:

(a) the Authority;

(b) the Council;

(c) the Court of Justice;

(d) the Committee of Governors of Central Banks;

(e) the Intergovernmental Committee;

(f) the Technical Committees;

(g) the Secretariat; and

(h) the Consultative Committee."

43. The Government submitted that this Court was restricted under Article 26 to examine whether directives and decisions of the above Organs were unlawful or infringed the Treaty by the Council or the Member State.

44. We beg to differ with the restrictive interpretation of Article 26. In the Court's view, the terms of Article 26 are clear, without ambiguity and wider in application. The acts, regulations, directives and decisions referred to in that Article are the acts, regulations, directives and decisions of the Council and the Member States that are amenable to be examined by this Court.

45. That Article does not only refer to the Organs of the Common Market. The unlawful act would also be the act of either the Council (as defined in the Treaty to mean Council of Ministers of the Common Market), and the Member States.

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46. To read anything else in the Article 26, as the Government attempts, would be incorrect. Article 26 does not in the Court's view restrict parties approaching this Court to only rely on infringement by the Organs of the Common Market as argued by the Government. It does, however, provide that any alleged infringement of the Treaty would afford this Court jurisdiction.

47. Indeed we wish to refer to the submissions of Counsel for MML which submissions in our view, fully encapsulate the Court's understanding of that Article 26 viz:

"Entertaining the term "unlawful" promotes the aims and objectives of the Treaty, I think a restrictive approachcurtails access to this Court and infact it precludes the Court from examining a Member State's adherence to the aims and objectives, and it may promote Member States' impunity or trash democratic systems of governance..."

48. We earlier in this Ruling set out the aims and objectives of the Common Market, Article 3, and the fundamental principles of the Member States of the Common Market, Article 6. In other words the Member States set the aims and objectives that the Common Market desire to attain and provided the fundamental principles that will lead to such attainment.

49. The East African Court of Justice at Arusha in the case of **SAMUEL MUKIRA MOHOCHI =VS= THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA**, Reference No. 5 of 2011 had an opportunity to consider fundamental principles in the Treaty for the Establishment of the East African Community, and we shall quote the relevant part of that judgment, thus:

"The Respondent submitted that the provisions of Article 6 (d) of the Treaty are aspirations and broad policy provisions which are futuristic and progressive in application and that they raise political questions which cannot be answered by this Court. Further, that they are not capable of

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being breached and, therefore, are not justiciable. We find this stance erroneous for the following reasons:

- (i) *Article 6 provides six fundamental principles of the Community. Black's Law Dictionary defines "Principle" as "a basic rule, law or doctrine." (9th Edition at P.1313). Our understanding of "Fundamental Principles" as used in this Article, aided by the above definition, is that these are Rules that must be followed or adhered to by the Partner States in order that the objectives of the Community are achieved."*

50. The Court would wholly agree and adopt that finding by the East African Court of Justice. That Court, in the above case, went on to state:

"These principles are foundational, core and indispensable to the success of the integration agenda and were intended to be strictly adhered to."

51. Amongst the principles of the COMESA Treaty are those which the Court can only determine whether they have been breached by examination of the municipal law of the parties.

52. Examples of where municipal law would have to be resorted to but not restricted would be Article 6 (f) (g) and (h), that is accountability, economic justice and popular participation of development; the recognition and observance of the rule of law; and the promotion and sustenance of a democratic system of governance in each Member State. Application of the municipal law in any Reference, we hasten to add, would always depend on the facts of each case.

53. This was the clear finding of the Court in the case of **POLYTOL PAINTS & ADHESIVES MANUFACTURERS CO. LTD =VS= THE REPUBLIC OF MAURITIUS** – COMESA Court of Justice Ref. No. 1 of 2012 where the Judges entertained the argument that the applicants claim was statute barred by the provisions of Mauritius law. The Court found that the Republic of Mauritius had continually breached the Treaty

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and accordingly, the Court found that the period of limitation set by the statute of Mauritius began to run from the year 2005.

54. It is because of the above finding that the court is of the view that the Government's restrictive view of the jurisdiction of the Court is contrary to the very Treaty it relies upon because the same Treaty allows this Court to go to municipal law of the parties to determine whether the Treaty has been breached.

55. Indeed there is no other way that this Court can determine if a Member State has breached the Treaty when considering, for example, whether that State has observed the Rule of Law.

56. The Member States, in agreeing to set up the Preferential Trade Area for Eastern and Southern African States were, as stated in the Treaty's preamble, seeking to ***"strengthen and achieve convergence of their economies through the attainment of a full market integration"*** and in so doing, had regard that this would not be achieved unless there was observance of ***"the principles of international law governing relations between sovereign states, and the principles of liberty, fundamental freedoms and the rule of law"***.

57. In this regard, the Court wishes to make reference to an article by Peter Watson BA, LLB, SSC entitled ***"THE RULE OF LAW AND ECONOMIC PROSPERITY"*** whereby he begins by boldly making the statement:

"The Rule of Law and Economic Prosperity are indivisible. No one will disagree with the proposition that economic growth is a starting point for encouraging investment, whether internal or external, and for achieving wealth and prosperity of any nation state and the better provision for its population".

www.lemac.co.uk/resources/publication_files/speech_rule_of_law.pdf

58. That statement must have rung true to the Member States when they set out the fundamental principles in Article 6 which the Member States are to adhere to.

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59. For the above reason, we find and hold that, bearing in mind the provisions of Article 26, this Court has jurisdiction to examine the acts complained of by the Applicant. In Halsbury's Laws of England, 4th Edition, Re-issue Vol. 10, the learned author defined jurisdiction as:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means."

60. Jurisdiction has often been described as being everything (see the case – ***THE MV LILIAN S (1989) KLR1***). In our case, our limits are the Treaty and it is under that very Treaty that this Court is being invited to examine acts which are alleged to be unlawful and in so examining to determine if they are unlawful in accordance with the municipal laws of the parties. If we did not consider we had jurisdiction in this matter, we would not take any further steps in this matter because as stated in the case ***THE MV LILIAN S*** (supra) without jurisdiction, the Court should not proceed with a matter further. The justices in that case stated viz:

"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 the proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

61. A case decided in the same vein is ***DIANA KETHI KILONZO & ANOTHER =VS= THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 10 OTHERS (2013) eKLR*** where it was stated:

"Jurisdiction is indeed comparable to a driving licence, for no motorist can lawfully embark on a journey without a valid driving licence. Once a judicial body establishes that it has no jurisdiction to handle a dispute, then it has

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no business proceeding further with the matter. What also emanates from the Supreme Court decision is that jurisdiction emanates from express terms of the law."

62. The Government further argued that this Court lacks jurisdiction because MML did not raise before the Malawi courts the issue of breach of the Treaty. The Government therefore argued that MML's claim cannot proceed before this Court because if it did proceed, then it would be contrary to the proviso in Article 26 which states:

"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."

63. The Government in its submissions relied on the case *THE REPUBLIC OF KENYA AND THE COMMISSIONER OF LANDS =VS= COASTAL AQUACULTURE – COMESA Court of Justice Ref. No. 3 of 2001*.

64. The Applicant in that case sought various orders against the Republic of Kenya and the Commissioner of Lands. The COMESA Court of Justice in that case had this to say:

"Much as this Court may sympathize with the Respondent regarding the frustrations of his project on the said parcels of land by the Applicants, and the resultant shyness of the investor funding the projects, the 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 court of the particular Member State." (Emphasis ours).

65. To this argument, MML contended that it had exhausted all the local remedies since its case was the subject of appeal before the Malawi Supreme Court of Appeal which court finally delivered its judgment.

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66. We find, as stated before, that this Court is endowed with jurisdiction to entertain this matter.

67. The next issue that the Court should deal with is whether this Court is an original or appellant Court. The Treaty does define "Reference" as used in Articles 24, 25 and 26 whereby Member States, the Secretary General and legal or natural persons may refer their cases before the COMESA Court of Justice.

68. The Black's Law Dictionary respectively defines "Reference Case" and "Reference" as:

"A Reference is exceptional because the opinion interprets and often resolves...." and as,

"The act of sending or directing to another for information, service, consideration or decision...."

69. In the Court's view, when a Reference is filed in this Court, this Court is mandated under the Treaty to determine the matter as an original court. The party filing the Reference need only satisfy the provision of the Article 26 by ensuring to have exhausted the local remedies before coming to this Court.

70. We are a court of original jurisdiction in so far as the matter satisfies the jurisdictional requirement of Article 19 and 23 of the Treaty.

71. When a court has original jurisdiction it has the power to hear a case for the first time as opposed to hearing it as an appellant court.

72. It follows that this Court does not necessarily sit to review the local court's decision. This Court has been given supremacy to interpret the Treaty by Article 29 (2) of the Treaty which provides:

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ARTICLE 29***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."

73. We, however, hasten to add that, in this case MML has not raised any new issue that was not before the national court, other than the issue of quorate of the Malawi Supreme Court of Appeal. We shall come back to the issue of quorate of that court later.

74. The issues that were before the Malawi court both the High Court, Commercial Division and the Supreme Court of Appeal was the alleged breach of contract by MACRA and the tort of inducement to breach a contract on the part of the Government. Those issues were litigated upon upto the highest court of Malawi and MML cannot be faulted for having raised those issues before this Court, and as stated, our finding is that these issues have relevance to the Treaty.

75. The Government in support of its contention that MML had not exhausted the local remedies submitted that Chapter 3 of the Laws of Malawi that is Supreme Court of Appeal Act provides under Section 29 that the Supreme Court of Appeal has power to review its judgment. It provides:

"The court shall not review any judgment once given and delivered by it save and except in accordance with the practice of the Court of Appeal of England."

76. The relevant Rule under England's jurisdiction is Part 52 of the England Civil Procedure Rules which provides:

52.17

"(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –

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- (a) it is necessary to do so in order to avoid real injustice;*
(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
(c) there is no alternative effective remedy."

The Court having examined the above Rule, we find it has no application to this Reference.

77. The Government submitted that since MML had failed to seek a review before Malawi Supreme Court of Appeal, as stated above, MML had not exhausted its local remedies.

78. In the Court's opinion MML did exhaust the local remedies. Its case was taken to the highest court of Malawi. It fulfilled the requirements of Article 26. In the Court's view, more than what was intended by the drafters of the Treaty should not be read in Article 26. It is for that reason that the Court cannot accept the argument raised by the Government.

79. Finally, the argument raised by the Government that MML's Reference cannot be entertained before this Court because the Licence Agreement, under Clause 29, provided that the applicable law in the performance of it was the Laws of Malawi. The Court cannot agree with that argument because we have made a finding in this Ruling, that the municipal law of the parties is applicable before this Court, so long as it is within the confines of the Treaty.

80. Government Counsel stated that this Court, if it allowed this Reference to proceed, it would lead to opening of floodgates for numerous litigation to be brought to this Court and which would have no relevance to the Treaty. In that regard, he stated that persons with claims on issues of witchcraft, family and chieftaincy would find their way into this Court.

81. Our response is simply this, that if such claims come within the ambits of Article 19 and 23 of the Treaty, this Court will have jurisdiction to entertain such matters. The

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drafter of the Treaty and the Member States must have intended to improve its residents' access to justice when they enacted the Treaty in the format that it is in and in so doing granting all persons (both natural and legal persons) the right to file a Reference before the COMESA Court of Justice.

82. An apt article is written by Toby J. Stern entitled "***Federal Judges Fearing the Floodgates of Litigation***" viz:

"The argument against Judges ruling based on fears that their decision will open the floodgates of litigation in Federal Courts proceeds on two grounds: first, the floodgate argument represents a value caseload-based judicial economy that is simply not considered in the Constitution and thus ruling on its basis should not be assumed to effectuate the purpose of the Judiciary as delineated in Article 111...; secondly, the floodgates argument has a structural problem: it fosters inconsistencies between Judges, usually has no explicit factual basis and is ancillary to the central holding of a case and has high potential of misuse."

<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1346&context=jcl>

83. *This Court finds that in the end, the Preliminary Application filed by the Government dated 5th June, 2015 is dismissed.*

B. PRELIMINARY APPLICATION BY MACRA

84. MACRA's Preliminary Application is dated 10th June, 2015. It is brought under Rules 82 and 83 of the Rules. It seeks one single prayer, that an order be issued removing MACRA as a party in this Reference on the ground of lack of jurisdiction. This is supported by the affidavit of its counsel, Mr. Roka.

The Court shall reproduce some of the paragraphs of that affidavit as follows:







"The Applicant (MML) is a legal person by virtue of being a Limited Liability Company duly incorporated in the Republic of Malawi....."

The second Respondent (MACRA) is a body corporate established under Section 3 of the Communication Act is (sic) Malawi as the sole regular of the telecommunications service industry in Malawi...

The 2nd Respondent (MACRA) has the capacity to sue and be sued in its own corporate name.

The Republic of Malawi is a party to the Common Market for Eastern and Southern Africa (COMESA) Treaty....

Under Article 26 of the COMESA Treaty, both legal (as the Applicant herein) and natural persons can challenge an act, decision, regulation, directive or decision of Council or of a Member State for unlawfulness infringement of the provisions of the Treaty."

85. Mr. Roka proceeded to depone in that affidavit that MACRA in the year 2005 made a decision to revoke the licence it had awarded the MML to provide public mobile telephony services in Malawi.

86. Counsel further deponed that MACRA, having made the foretasted decision, it could not be the subject of this Reference because MACRA was neither Council nor a Member State as stated in Article 26.

87. MACRA, relying on the provisions of Article 26, cited the case of ***POLYTOL PAINTS & ADHESIVES MANUFACTURERS CO. LTD =VS= REPUBLIC OF MAURITIUS*** (supra) where the Court stated:

"The content of this Rule shows the extent to which the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA territory not only to the Member States but also to the individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of residents.

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The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States."

88. MACRA relied on this case to confirm that MML as legal person had a right to bring an action before this Court for an alleged violation of the Treaty.

89. However, MACRA by its submissions stated that Article 26 restricted Reference to be filed against Council and State Members. That, that being so, MACRA being one of the institutions in a Member State, Republic of Malawi, no Reference could be filed against it.

90. It was on that ground that MACRA sought a finding that this Court did not have jurisdiction over this Reference in as far as MACRA was concerned.

91. MACRA's prayer was supported by the Government. The Government's submissions in respect of Article 26 were similar to those of MACRA. That is that MACRA, being neither the Council nor Member State, as provided under Article 26, could not be a party in this Reference.

92. The Government relied on what it termed customary international law and submitted that under that law, internal organizations of sovereign states were protected. The Government cited the principle of attribution set out in International Law Commission's (ILC) Articles on States Responsibility as follows:

Article 4: Conduct of Organs of State

" 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which (sic) has that status in accordance with the internal law of the State." (Emphasis added)

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93. It was submitted on behalf of Government that MACRA:

"It is a Statutory Corporation set up by Parliament in Malawi and charged with the responsibility of regulating the telecommunications sector in Malawi. Regulation of the telecommunications sector is clearly a government function and it so does as an agent of the Government."

(Emphasis added)

94. MML opposed the application and began by drawing the Court's attention to the fact that MACRA was a party during the proceedings before the Malawi courts, and this was because it can sue and be sued as provided under Communication Act (Cap 68:01) of the Laws of Malawi.

95. MML cautioned the Court in regard to MACRA's application and submitted that there was a risk that if the application was allowed, MML faced a risk and dilemma of being left without a remedy.

96. MML also objected to the Attorney General's impropriety to represent MACRA, by pleading the case of MACRA which sought the removal of MACRA in this Reference.

COURTS ANALYSIS AND DETERMINATION

97. We wish to deal, firstly, with the issue raised by MML objecting to the Attorney General of Malawi pleading the case of MACRA when in one of the prayers in the Preliminary Application it sought the removal of MACRA.

Rule 51 of the Rules provides:

"A party may address the Court only through his agent."

Article 33 of the Treaty provides:

"Every party to a reference before the Court shall be represented by Counsel appointed by that party."

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98. Those provisions, in the Court's view, make it clear that it is only counsel who is the "agent" of a party or who has been appointed to represent a party that can appear and plead the case for such a party.

99. The Attorney General of Malawi was appointed, according to the documents in this Reference, to represent the Government of the Republic of Malawi. The Attorney General was in error to seek a prayer on behalf of MACRA, which party was represented by Mr. Roka. The Court therefore upholds the objection raised by MML.

100. The provisions of Article 26 have previously been reproduced in this Ruling. Suffice it to say that a party seeking to file a Reference is required by that Article to seek redress against the Council or the Member State.

101. The Government and MACRA, in the Court's view have correctly stated that MACRA is neither Council nor Member State. The Government in its submission went further to concede that the acts of MACRA were done as an agent of the Government.

102. The Court finds that it is in agreement with the submissions of the Government and MACRA. The Court is also alive to the submissions of MML that it risks being left without a remedy.

103. Although in this case we find that the MACRA should be removed from this Reference, we are aware of this Court's previous decision on such an issue in the case of **STANDARD CHARTERED FINANCIAL SERVICES LTD =VS= COURT OF APPEAL FOR THE REPUBLIC OF KENYA** – COMESA Court Ref No. 1 of 2003. That Reference related to a case that was litigated before the Court of Appeal of the Republic of Kenya.

104. COMESA Court in its Ruling ordered the Kenya Government to be substituted for the Court of Appeal and further ordered the joinder of a Limited Liability Company as a co-respondent, a company that had been involved in the case before the Court of Appeal of the Republic and had obtained judgment before that court and whose litigation was the subject of the Reference before the COMESA Court.

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C. PRELIMINARY APPLICATION BY MALAWI MOBILE LIMITED
(MML)

110. MML by the above application is seeking the nullification of the judgment of the Supreme Court of Appeal of Malawi on the grounds that the aforementioned Court was irregularly constituted. MML also sought this Court for an award of 66,850, 000 USD in damages and 5% interest per annum, from the date of the commencement of the action until the date of full payment, as well as award of legal costs and any other relief as this Court may deem fit and expedient under the circumstances.

111. In order to establish their claim before the Court, MML relied on certain facts notably that the proceedings before the Supreme Court of Appeal of Malawi were null and void by virtue of operation of the law because the Court was not quorate or that the Court was not properly constituted. Equally, according to MML, the Supreme Court of Appeal of Malawi delivered its judgment in open Court on 10th March 2015, reversing the judgment by the Commercial Division of the High Court. During the delivery of the judgment, Justice Rezine Mzikamanda, sat on the panel of judges that delivered the judgment. MML argued that the said judge did not take part in the proceedings, and yet the said judge took part in determining the judgment.

112. MML further argued that in terms of the Constitution of Malawi only an odd number of Appellant judges of at least three are permitted to sit and hear an appeal. The delegation of judicial power is disallowed. MML argues that only the same panel of appellate judges which heard the matter had the power to deliver a judgment. Therefore MML conclude that Justice Mzikamanda, who was never a part of the initial panel did not have the right to sit during the delivery of the judgment or to participate in any proceedings of that case.

113. The Government of Malawi maintained that MML filed an application based on hypothesis, assumptions, and opinions, and not based on facts. In the Government's view this is because MML did not furnish proof that Justice Mzikamanda actually participated in the deliberations which led to the judgment by the Supreme Court of Appeal of Malawi.

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114. The Government maintained that Justice Mzikamanda only completed the quorum during the pronouncement of the judgment and that this was not in dispute. The Government submitted further that MML failed to show proof to the contrary, and seek a review concerning the presence of Justice Mzikamanda, and yet his presence was well explained by the Court in the first paragraph of the judgment.

115. The Government further stated that even if the judgment on this preliminary application was made in favour of MML this did not give MML the right to a ruling from this Court, because the result would be the annulment of the proceedings by the Supreme Court of appeal, which would lead to the re-opening of the case by the Supreme Court of Appeal without which the Applicant will not have exhausted the domestic remedies as required by Article 26 of the COMESA Treaty.

116. The Government further stated that, if this Court decided not to refer this case back to the Supreme Court of Appeal, it will have to examine all evidence submitted before it, to show that there never was any contract and that without a contract, there could not have been a breach of contract and that as a result, there is no need for awarding damages and interest.

117. Mr. Roka for MACRA submitted, as previously submitted by the Government, that MML had an alternative remedy of review of the judgment of the Supreme Court of Appeal and therefore MML's preliminary application did not conform to Rule 82 of the Rules. In support of their submission MACRA referred to Cap 3 Section 29 Supreme Court of Appeal Act which provides as follows:

"The Court shall not review any judgment once given and delivered by it save and except in accordance with the practice in the court of appeal in England"

118. Therefore MACRA submits that preliminary application is premature which makes the application of MML inadmissible before this court.

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119. MACRA further stated that the preliminary application by MML is based on the composition of the Supreme Court of Appeal which ground goes to the essence of the reference and therefore cannot be the basis of the preliminary application. And that if this court granted MML preliminary application it will be as good as determining the Reference.

120. MACRA concluded that the learned judge did not take part in the deliberation and that MML was not able to prove to the contrary.

DETERMINATION

121. The court agrees with the submissions made by the Government and MACRA that a determination of the preliminary application by MML goes to the core of the Reference and in the circumstance is contrary to the provisions of Rule 82 of the Rules.

122. **In the end the Preliminary Application of MML dated 29th June 2015 is dismissed.**

D. COSTS

123. The only remaining issue to be determined is that of costs. To that end Rule 62 (1) provides as follows:

"A decision as to costs shall be given in the final judgment or in the order which closes the proceeding".

124. It is this court's view that this matter has not been finalized nor have the proceedings been closed. In the case of MACRA even though the preliminary application for its removal has succeeded the proceedings against it have not even closed.

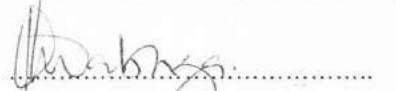
125. **In the end there shall be no order as to costs.**

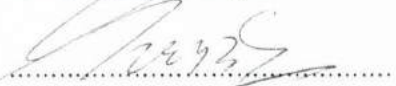
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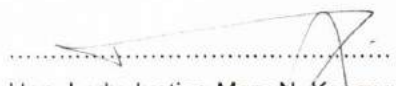
126. The summary of the Court's decision on the three Preliminary Applications filed herein is therefore as hereunder:

- a) *The Preliminary Application filed by the Government dated 5th June, 2015 is dismissed;*
- b) *The Preliminary Application filed by MACRA dated 10th June, 2015 is hereby allowed and MACRA is henceforth removed from this Reference;*
- c) *The Government of Malawi shall henceforth appear on its own behalf and on behalf of its corporate organ known as MACRA;*
- d) *The Preliminary Application by MML dated 29th June 2015 is dismissed; and*
- e) *There shall be no order as to costs.*


DATED at LUSAKA, ZAMBIA this 20th day of November 2015.


 Hon. Lady Justice Qinisile Mabuza
 Acting Principal Judge


 Hon. Mr. Justice Ali Sulaiman Mohammed


 Hon. Lady Justice Mary N. Kasango


 Hon. Dr. Justice Leonard Gacuko


 Hon. Lady Justice Clotilde Mukamurera

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