
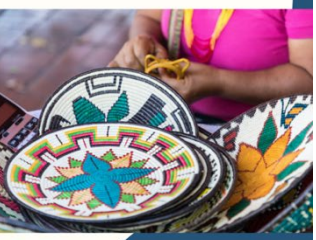

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The COMESA Court of Justice and the exhaustion of domestic remedies

Article 26 of the COMESA Treaty allows a resident of a Member State to approach the COMESA Court of Justice (CCJ) to have 'any act, regulation, directive, or decision of the [COMESA] Council or of a Member State' tested for its lawfulness or possible infringement of the Treaty. This entitlement is subject to a proviso with roots in general principles of international law: before approaching the Court, the 'resident' (that is, a natural or legal person), must exhaust 'local remedies in the national courts or tribunals of the Member State'.

In two recent rulings, the CCJ had occasion to grapple with the application of this requirement. It was not new territory for the Court. Beginning in 2001 with its judgment in *The Republic of Kenya & The Commissioner of Lands v Coastal Aquaculture*, on at least four further occasions the CCJ had to decide whether an applicant had complied with the article 26 proviso. The best-known cases were the celebrated 2012 ruling of the First Instance Division (FID) of the CCJ in *Republic of Mauritius v Polytol Paints & Adhesives Manufacturers* and the 2015 *Malawi Mobile Limited* decision of the FID, overruled by the Appellate Division (AD) in 2017. In paragraph 96 of its judgment, the AD laid down six principles or guidelines for determining whether local or domestic remedies had been exhausted.

As in the case of *Polytol Paints*, the two latest references to the CCJ by a Mauritian company called Agiliss Limited, were based squarely on trade provisions of the COMESA Treaty. In one reference, Agiliss took the Government of Mauritius to the CCJ in 2019 after Mauritius had notified COMESA under article 61 of the Treaty of its intention to impose a safeguard measure in the form of a 10% customs duty on the importation of edible oils (a significant part of Agiliss' business). In the other, Agiliss alleged that in mid-2022 Mauritius had violated article 48 of the COMESA Treaty and the COMESA Rules of Origin by providing a substantial subsidy to the commercial arm of the State Trading Company of Mauritius, to the exclusion of commercial competitors.

In both instances before the FID, Mauritius raised a preliminary objection to Agiliss' right of appearance ('standing') on the basis that Agiliss had not exhausted its remedies in the courts of Mauritius. Agiliss took the view that it did not have an available and effective domestic remedy to exhaust. Its reasoning was based on the ruling of the Supreme Court of Mauritius in *Polytol Paints* and two earlier judgments where the Supreme Court had held that it had no authority to rule on international agreements that had not been incorporated into the domestic law of Mauritius. (Much of the COMESA Treaty is not domesticated in Mauritius.) In effect, Agiliss maintained that to go through the exercise of exhausting domestic remedies would be pointless because the position of the Supreme Court was clear and the result a foregone conclusion.

Mauritius, on the other hand, argued that domestic remedies that were not necessarily based on the COMESA Treaty were available to Agiliss in the form of domestic review proceedings, mandamus and injunction. Mauritius further claimed that Agiliss should have advanced clear proof of its attempts to exhaust its domestic remedies.

The FID delivered its judgment in the 2019 reference in August 2022, and in the 2022 reference in October 2022. In the latter case it merely confirmed its ruling of August in which it agreed with Mauritius that Agiliss had not brought any evidence of its attempts to exhaust domestic remedies, while it had remedies available as suggested by Mauritius.

Agiliss' appeal to the AD was heard in April 2023, and the judgment is awaited.

Interestingly, Agiliss and Mauritius both based their arguments on the six principles formulated by the AD in *Malawi Mobile Limited*. The gist of the principles is that domestic courts or tribunals must have the first opportunity to 'prevent or put right' the alleged Treaty violation, in substance at least; the complaint must in some way relate to the Treaty (it does not have to be explicitly based on the Treaty); and only available and effective remedies need to be exhausted.

The FID's insistence that Agiliss had to produce proof of its attempts to exhaust local remedies veered in the direction of inflexibility. If the development of the domestic remedy requirement in international law is followed, from its links to states' diplomatic protection of their "subjects" to its recurrence in human rights treaties and jurisprudence, it is clear the rule was never intended to be a hard and fast one. As much is recognised in one of the six *Malawi Mobile* principles, namely that a remedy must be available and effective. A careful reading of the *Malawi Mobile* principles suggests that nothing prevented the FID from peering beyond the veil of Mauritius' domestic law to determine whether Agiliss' contention was sustainable that

the Supreme Court of Mauritius was not prepared to hold Mauritius to its obligations under the unincorporated COMESA Treaty.

By refraining from doing so and effectively compelling Agiliss to pursue its claim, expressly based on the COMESA Treaty, with little or no chance of success in the domestic courts of Mauritius, the CCJ undermined or at least diminished its role as the promoter and guardian of COMESA Community Law. The ultimate downside of too rigid an approach to the exhaustion of domestic remedies-requirement is that the real issues – the 'merits' of Agiliss' case about safeguards, rules of origin and other trade issues – would not be heard by the CCJ, while Treaty interpretation and application remain impoverished and potential applicants are inhibited.

Being more flexible in *Agiliss* would not be tantamount to the thin end of the wedge and watering down the requirement of domestic remedy exhaustion. Every case must be dealt with on its own merits. The fact that the Supreme Court of Mauritius took a certain position on its approach to the COMESA Treaty does not mean the domestic courts of any other COMESA Member States will follow suit. An applicant suing another Member State will have to show that the domestic courts of the latter State held a similar view as the Supreme Court of Mauritius. For that, proof may be required that domestic remedies in that particular jurisdiction had been exhausted. Coming from Mauritius, though, Agiliss' reference should have been admitted.

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