

IN THE COMESA COURT OF JUSTICE
LUSAKA, ZAMBIA



**EASTERN AND SOUTHERN AFRICAN TRADE
AND DEVELOPMENT BANK**

- **APPLICANT**

VERSUS

THE REPUBLIC OF ZAMBIA

- **RESPONDENT**

ORDER OF THE COURT

The Order was read by the Lord Principal Judge.

On 1st October, 2010, the Applicant Bank filed the Reference seeking a number of reliefs as follows:

- (i) A declaration that the COMESA Court of Justice is the proper court to determine the extent of immunity and privileges of the institutions established in the Common Market by the COMESA Treaty and the PTA Bank Charter as against each member State.
- (ii) A declaration that the decision of the Respondent herein, offends the provisions of the COMESA Treaty and the Charter of the Applicant.
- (iii) A declaration that the Applicant is entitled to absolute privilege, save for waiver by its President in discharge of its duties or functions and the objects as prescribed in the PTA Bank Charter.
- (iv) A declaration that immunity granted by COMESA Treaty or the PTA Bank Charter is binding on all member States and that each member State has the obligation and the duty to incorporate the provisions thereof into their respective domestic law.
- (v) A declaration that the Applicant as an institution within the COMESA Treaty is entitled to privileges and immunities.
- (vi) An order directing the Respondent to take all necessary action to ensure the Applicant enjoys absolute immunity from suit and legal process in Zambia.
- (vii) Costs of and incidental to this Reference.

SB *Jan* *(M)*

(viii) Such order as this Honourable Court deems just, fit and proper in the circumstances.

On 4th November, 2010, the Respondent filed a preliminary application seeking an order of this Court to strike off the Reference for lack of jurisdiction to entertain the Reference on the ground that a similar matter is pending before the High Court of Zambia at Ndola. On 24th February 2011, after the matter was set down for hearing, Counsel for the Bank informed this Court in writing that the Applicant "wholly discontinues proceedings in this Reference against the Respondent".

In terms of Rule 69 (2) of the Rules of this Court, "If an applicant informs the Court in writing that he wishes to discontinue the proceedings, the President or the Principal Judge as the case may be, shall order the case to be removed from the cause list and shall give a decision as to the costs in accordance with sub-rule 6 of Rule 62". Accordingly, Reference No.1 must be struck off the cause list.

With regard to costs, it was decided to refer the matter to the full Court and to have the Parties address the Court on costs. The relevant part of sub-rule 6 of Rule 62 of the Court Rules states "A party who discontinues or withdraws from proceedings, shall be ordered to pay costs if they have been applied for in the other party's pleadings." The Applicant argued that the Respondent did not ask for costs as no pleadings were filed in defence which could have included a plea for costs. The definition of pleadings states: "Pleadings include any document relating to a reference or any case before the Court". It is the view of the Court that the definition is wide enough to include a preliminary application since the preliminary application relates to a reference or case before the Court. In this case, the Respondent prayed for costs of the Application and should, therefore, be entitled to them. The Applicant can only avoid paying costs if it is shown that the case falls within another part of Rule 62 that permits it not to pay costs or there are special reasons why applicant should not be ordered to pay costs. In this particular case there are no special reasons shown by the Applicant.

Applicant has argued that withdrawing its case at an early stage of the proceedings and therefore not wasting the Court's time should persuade the Court not to grant costs. Nonetheless, the Court finds no merit in this argument.

As regards Applicant's submission that the issue of exhaustion of local remedies is a novel one, the Court cannot agree. This Court has dealt with this issue before, for instance in the case of *Republic of Kenya and Commissioner of Lands v Coastal Acquaculture*, Reference No. 3 of 2001 and in the case of *Eastern and Southern African Trade and Development Bank v Republic of Burundi*, Reference No. 1 of 2006.

Similarly, the Court is unable to agree with the Applicant's prayer not to be condemned in costs on the basis that its withdrawal is in a spirit of reconciliation with



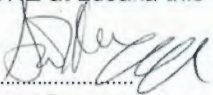
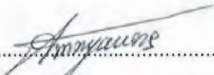
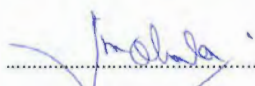
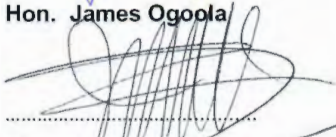
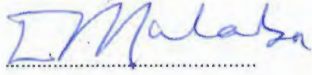

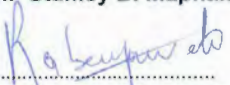
the Respondents. The Applicant never discussed the issue of costs with the Respondent before coming to Court and has not demonstrated to the Court any other steps taken towards reconciliation.

In the circumstances it is hereby ordered that Reference No.1 of 2010 be removed from the cause list. It follows that Preliminary Application No.1 of 2010 also falls away.

It is also ordered that the Applicant pays the costs of the Respondent as taxed by the Registrar.

It is so Ordered.

DONE at Lusaka this 7th day of March, 2011.

	-	Lord Principal Judge
	-	Lord Justice
	-	Lord Justice
	-	Lord Justice
	-	Lord Justice
	-	Lord Justice
	-	Lady Justice