

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

UEMOA COURT OF JUSTICE

PUBLIC HEARING OF 30 APRIL 2014

**JUDGME
NT NO.
01/2014
OF 30 APRIL 2014**

Liability claims

FANNY Ismaël Kader (SCS CLK Avocats)

Against

CREPMF (SCA N'GOAN, ASMAN & Associés)

Composition of the Court :

- Mr Ousmane DIAKITE, Chairman
- Mr Maty ELHADJI MOUSSA, Judge
- Ms MATTO LOMA CISSE, Judge

- Ms Seynabou NDIAYE DIAKHATE, 1^{er} General Counsel

- Mr Hamidou YAMEOGO, Registrar

The Court of Justice of the WAEMU, meeting in ordinary session on thirty (30) April two thousand and fourteen (2014), in which were seated :

- Mr Ousmane DIAKITE, Deputy President of the Court, Chairman ;
- Mr Maty ELHADJI MOUSSA, and
- Ms. MATTO LOMA CISSE, Judges, Members ;

in the presence of :

- Mrs. Seynabou NDIAYE DIAKHATE, First Advocate General ;

with the assistance of Maître Hamidou YAMEOGO, Deputy Registrar ;

has rendered the following judgment:

BETWEEN :

FANNY Ismaël Kader, born on 21 March 1974, a lawyer of Ivorian nationality, residing at Abidjan Cocody, 09 BP 4075 Abidjan 09, having as counsel the Société Civile d'Avocats "CLK Avocats", lawyers registered with the Côte d'Ivoire Bar, residing at Abidjan II Plateaux, Concession SIDECL, Rue J647-Villa n°5 BP 1976 Abidjan 25, Tel. (00225) 22 52 52 25,

Applicant, on the one hand ;

AND

Le Conseil Régional de l'Epargne Publique et des Marchés Financiers (CREPMF), Siège social Abidjan Plateau, Av Joseph ANOMA 01 BP 1878 Abidjan 01, Tél (00225) 20 21 57 42, Représenté par son Secrétaire Général M. EDOH KOSSI AMENOUVE et ayant pour conseil la Société Civile d'Avocats N'GOAN, ASMAN et ASSOCIES, Avocats inscrits au Barreau de Côte d'Ivoire, demeurant à Abidjan 37 Rue de la Cornière-Cocody, 01 BP 3361 Abidjan 01, Tel (00225) 22 40 47 00/01,

Defendant, on the other

hand ;

THE COURT

HAVING REGARD TO the request by Mr FANNY Ismaël Kader, dated twenty-six (26) October two thousand and ten (2010),

HAVING REGARD TO the statement of defence of the Conseil Régional de l'Epargne Publique et des marchés Publics (CREPMF) dated nineteen (19) May 2011;

HAVING REGARD TO the undated reply of Mr FANNY Ismaël Kader ;

HAVING REGARD TO CREPMF's rejoinder dated fourteen (14) October 2011;

HAVING REGARD TO the parties' subpoenas;

HAVING REGARD TO the other documents produced and attached to the file;

HAVING REGARD TO the WAEMU Treaty ;

HAVING REGARD TO Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

HAVING REGARD TO Additional Act n° 10/96 of ten (10) May one thousand nine hundred and ninety-six (1996) on the Statutes of the WAEMU Court of Justice;

HAVING REGARD TO Regulation n° 01/96/CM of five (05) July one thousand nine hundred and ninety-six (1996) on the Rules of Procedure of the WAEMU Court of Justice;

HAVING REGARD TO Regulation No. 01/2012/CJ of twenty-one (21) December two thousand and twelve (2012) on the Administrative Rules of the Court of Justice of the WAEMU ;

HAVING REGARD TO Order No 11/2014/CJ of seventeen (17) April two thousand and fourteen (2014) appointing the members of the full court to sit at the ordinary public hearing on thirty (30) April two thousand and fourteen (2014);

HEARD Ms MATTO Loma CISSE, Judge - Rapporteur, in her report;

ORDERED the Société civile d'Avocats "CLK Avocats" in its oral observations;

ORDERED the Société civile d'Avocats N'GOAN, ASMAN & Associés in its oral observations ;

WITNESS Ms Seynabou NDIAYE DIAKHATE, First Advocate General, in her Opinion ;

Having deliberated in accordance with Community law :

By application dated twenty-six (26) October two thousand and ten (2010), registered at the Registry of the Court under No. 09/2010 of twenty-six (26) October two thousand and ten (2010), regularised in accordance with the provisions of Article 32 of Additional Act No. 10/96 on the Statute of the WAEMU Court of Justice, Mr FANNY Ismaël Kader, a lawyer of Ivorian nationality, residing at Abidjan Cocody, 09 BP 4075 Abidjan, has through the care of his counsel, SCPA "CLK Avocats" Société d'Avocats à la Cour d'Appel d'Abidjan, located at Deux Plateaux Vallon, 25 BP 1976 Abidjan 25, brought an action before the Court of Appeal seeking an order that the Conseil Régional de l'Epargne Publique et des Marchés Financiers (CREPMF) (Regional Council for Public Savings and Financial Markets) pay him the sum of three hundred million (300,000,000) CFA francs as compensation for the damage he allegedly suffered as a result of his actions during his recruitment as a senior legal officer within the said institution.

I. FACTS

On fifteen (15) June two thousand and seven (2007), the Conseil Régional de l'Epargne Publique et des marchés Publics (CREPMF) published a job advertisement for a senior legal officer in the daily newspaper FRATERNITE MATIN.

Having applied on the sixth (06) of July two thousand and seven (2007), and after having been the subject of two (02) successive selections by the recruitment firm DRH CONSEILS, Mr FANNY Ismaël Kader was selected with other persons to be interviewed by the Secretary General of the CREPMF.

On twelve (12) September two thousand and seven (2007), the claimant was interviewed on the CREPMF's premises by a panel made up of two members.

(02) Directors and the General Secretary of the structure.

On twenty-two (22) April two thousand and eight (2008), the claimant, believing that he had suffered a loss, made a negotiated settlement offer to the CREPMF.

According to Mr FANNY, the prejudice is explained by the fact that, on the strength of the assurance given to him by one of the members of the jury, Ms OBRE Monique, Director of Administration and Accounting at the CREPMF, on the first (1^{er}) of October two thousand and seven (2007), that he had been selected for the position, he resigned from the position he held on the fourth (04) of October two thousand and seven (2007), only to receive a call informing him that his application had not been accepted by the CREPMF.

On four (04) June two thousand and eight (2008), in a letter of reply, the CREPMF rejected the claimant's offer of a negotiated settlement, considering that there was nothing to negotiate with the claimant.

The summons made on ten (10) March two thousand and nine (2009) by Mr FANNY Ismaël Kader remained unanswered. On twenty-six (26) October two thousand and ten (2010), he then brought an action before the Court, seeking an order against the West African Economic and

Monetary Union (UEMOA) to

pay it the sum of three hundred million (300,000,000) CFA francs by way of damages for its liability arising from the loss suffered as a result of CREPMF's wrongful act.

II. PLEAS IN LAW AND CLAIMS OF THE PARTIES

A. PLEAS IN LAW AND CLAIMS OF THE APPLICANT

In support of his action, the applicant demonstrates that the WAEMU Court of Justice has jurisdiction to rule on the liability of the CREPMF as a WAEMU body under the terms of Article 15-5 paragraph 1 of Regulation No. 01/96/CM on the Rules of Procedure of the WAEMU Court of Justice.

The claimant considers his action admissible and in accordance with Article 15-5 paragraph 3 of Regulation No. 01/96/CM on the Rules of Procedure of the WAEMU Court of Justice, which provides that *"liability actions against the Union or against third parties or its agents shall be barred after three (03) years from the date on which the damage occurred"*.

The claimant alleges that less than three (03) years elapsed between the date on which his claim was lodged, on twenty-six (26) October two thousand and ten (2010), and the date on which the damage occurred, on four (04) June two thousand and eight (2008), the date on which the CREPMF refused to allow him to negotiate following his request for an out-of-court settlement.

According to Mr FANNY, the fault of CREPMF, a UEMOA body, lies in *"failing to honour the promise of recruitment"* and even more so in *"failing to fulfil the commitment made"*. Indeed, after having informed him that he had been selected for the post of senior legal officer,

reassured by his Director of Administration and Accounts, and encouraged to take all necessary measures to take up his post on the first (1^{er}) of October two thousand and seven (2007), which for him meant resigning from his post, CREPMF, against all expectations, refused to give a favourable response to his hiring decision. As a result of CREPMF's fault, UEMOA is liable for material and moral damages.

The claimant explained that the loss of his career with the CREPMF deprived him of the material benefits and opportunities to which he would have had access as a senior legal officer within this structure. Furthermore, on the strength of the CREPMF's statements, he resigned from his position. Since then, he has remained unemployed until recently, when he found a new job. Throughout this time, his family has remained in constant need.

In addition to the material damage, Mr FANNY claims to have suffered moral damage in the form of constant humiliation due to his inability to meet his family's basic needs. He explains that he has even cut himself off from society.

It estimates all these losses at a lump sum of three hundred million (300,000,000) CFA francs, which UEMOA will have to make good on the understanding that CREPMF is one of its bodies.

B. PLEAS IN LAW AND CLAIMS OF THE DEFENDANT

According to the defendant, the WAEMU Court of Justice has jurisdiction under Article 15.5 paragraph 1 only when it comes to condemning the Union for the material acts or normative acts of its organs listed in Article 16 of the WAEMU Treaty. The CREPMF, which

is rather an organ of the UMOA, does not belong to it, it could not be subject to the jurisdiction of the aforementioned Court.

The CREPMF also raises the inadmissibility of the action, because Article 15.5 paragraph 1 of Regulation n°01/96/CM on the Rules of Procedure of the WAEMU Court of Justice, the basis of the applicant's action, can only be invoked when the action is directed directly against the WAEMU. As far as the defendant is concerned, Mr Fanny's application is directed against the CREPMF, an organ of the UEMOA, rather than against the Union.

III. DISCUSSION

The rules of procedure of the WAEMU Court of Justice require that the Court first rule on its jurisdiction to hear the action and rule on its admissibility, before examining the various substantive pleas put forward by the parties.

A. THE COURT'S JURISDICTION

The Court's jurisdiction is enshrined in Articles 16 of Additional Protocol No. 1 relating to the supervisory bodies of the WAEMU, 27 of Additional Act No. 10/96 on the Statute of the Court of Justice of the WAEMU and 15.5 of the Rules of Procedure.

Under the terms of Article 15.5 *"The Court of Justice alone shall have jurisdiction to declare that non-contractual liability exists and to order the Union to pay compensation for damage caused either by material acts or by legislative acts of the Union bodies or its servants in the course of or in connection with the performance of their duties..."*.

The question is therefore whether the Conseil Régional de l'Épargne Publique et des marchés Publics (CREPMF) can be considered as an organ of the Union and thus possibly be held liable under the terms of the aforementioned Article 15.5.

According to article 1^{er} of the WAEMU Treaty, "Organ of the Union" means the various organs referred to in article 16, which are: the Conference of Heads of State and Government, the Council of Ministers, the Commission, the Parliament, the Court of Justice and the Court of Auditors. A cross-reading of these articles shows that the CREPMF, a WAMU body, is not one of the WAEMU bodies in the strict sense. However, as these institutions also contribute to the achievement of the Union's objectives, the Union remains accountable for the breaches committed by these institutions. The Court therefore has jurisdiction to hear this case, as it did in similar cases between the Central Bank of West African States-BCEAO (Judgment No. 02/2012 of nineteen (19) December two thousand and twelve (2012) and the Bourse Régionale des Valeurs Mobilières-BRVM (Judgment No. 02/2003 of two (02) July two thousand and three (2003), other specialised institutions of the WAEMU, and their agents.

In addition, in keeping with its principles of rejecting 'areas of *lawlessness*', the Court's case-law has always held that it has jurisdiction to hear disputes involving bodies other than those mentioned by name in Article 16 of the Treaty, namely the specialised autonomous institutions of the Union, in so far as there is no other provision conferring jurisdiction on another court or tribunal.

B. ADMISSIBILITY OF THE APPEAL

To be admissible, the application must comply with the provisions of Articles 31 and 50 of Additional Act 10/96, 15-5 paragraph 3 and 26 of the Rules of Procedure of the Court. The regularisation of the date of the application was carried out in accordance with the provisions of article 32 of the Additional Act No. 10/96 on the Statute of the Court of Justice, which provides that *"If the application does not comply with the provisions of article 31, the Registrar shall invite the applicant to regularise his application within a period which may not exceed two (2) months"*. It therefore follows that the date of receipt of the application was correctly set at twenty-six (26) October two thousand and ten (2010).

In addition to the requirement to include certain particulars in the application, Article 31 of Additional Act No. 10/96 and Article 26 of the Court's Rules of Procedure require the applicant, with the exception of Member States and WAEMU bodies, to pay a security, the amount of which is fixed by decision of the Court.

In the present case, the applicant has fulfilled his obligation to provide security, as evidenced by the receipt sent by him. According to article 50 of the Additional Act n° 10/96 and article 15-5 paragraph 3 of the Rules of Procedure of the Court, the liability action against the Union or that of the Union against third parties or its agents shall be barred after three (03) years as from the occurrence of the damage.

In the present case, the claim for liability was filed by the claimant and registered at the Court Registry on twenty-six (26) October two thousand and ten (2010). The facts as recounted by the applicant show that the damage occurred on the fourth (04) of June two thousand and eight

(2008), the date on which

the CREPMF denied it any right to negotiate in the dispute between them.

The appeal is therefore admissible because it was lodged within the time limit. As the claim for liability is admissible, it is necessary to examine the arguments developed by the claimant.

C. THE EXISTENCE OF A FAULT

Does the fact that the CREPMF did not implement its recruitment decision following the assurance given by its Director of Administration and Accounts to the applicant that he had been chosen for the post of senior legal officer constitute a fault of such a nature as to prejudice Mr FANNY?

It is common ground that the applicant maintains, without substantiating his allegations in writing, that the CREPMF's fault lay in the fact that, after having chosen him for the post by verbally communicating its decision to him through its Director of Administration, the CREPMF went back on its decision not to hire him without any further reason. In other words, the only evidence of misconduct in this case is the statements made by the applicant.

This is implausible in view of the formalism observed in the CREPMF recruitment process. According to the applicant's own submissions, the various stages of the recruitment process were marked in writing. This is evidenced by the CREPMF recruitment notice published in the Ivorian daily newspaper "FRATERNITE MATIN" no. 12780 of fifteen (15) June two thousand and seven (2007), which prompted the

applications, the e-mails from the recruitment firm summoning Mr FANNY to the test and informing him of further tests to be taken after he had been selected at the end of the first test and, finally, the summoning of the selected candidates for a hearing before a panel made up of two (02) directors and the Secretary General of CREPMF, sufficiently demonstrate that the final and definitive designation of the best candidate for the post of senior legal officer in an institution such as CREPMF cannot be made verbally as the applicant maintains.

Consequently, the verbal nature of the promise and undertaking relied on by Mr FANNY does not allow the Court to verify that the CREPMF's final choice for this position was him.

Under these conditions, it is impossible for the Court to assess the non-fulfilment of a promise, a word given, an undertaking, of which there is no proof.

This lack of proof of the applicant's choice of person relegated his arguments aimed at proving CREPMF's fault to the level of mere allegations without any other basis. Consequently, the Court cannot find that CREPMF was at fault in relation to Mr FANNY when he was recruited for the post of senior legal officer.

As the CREPMF's wrongful attitude towards Mr FANNY is not recognised, no compensation for any damage whatsoever can be awarded to him.

FOR THESE REASONS :

THE COURT,

Ruling publicly and adversely in matters of Community law ;

- **As to the form: declares itself competent and accepts Fanny Ismaël Kader's action for damages;**
- **On the merits: Dismisses the applicant's claim and orders him to pay the costs.**

Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.

Signed by the Chairman and the Registrar.

For certified delivery Ouagadougou,
12 May 2014

The Registrar,

Fanvongo SORO