

**JUDGMENT NO.  
04/2013  
OF 18 DECEMBER 2013**

**COURT OF JUSTICE OF THE WEST AFRICAN  
ECONOMIC AND MONETARY UNION (WAEMU)**

**PUBLIC HEARING OF EIGHTEEN (18) DECEMBER  
TWO THOUSAND AND THIRTEEN (2013)**

The Court of Justice of the WAEMU, meeting in ordinary session on eighteen (18) December two thousand and thirteen (2013), in which were seated :

**Action for assessment of legality**

**Mr Daniel Lopes FERREIRA, President of the Court, Chairman;**

**Mr Ousmane DIAKITE and Mr Honorat ADJOVI, Judges, Members;**

**in the presence of Mrs Seynabou NDIAYE DIAKHATE  
First Advocate General;**

**with the assistance of Maître Fanvongo SORO,**

**Registrar; delivered the following judgment:**

**BETWEEN :**

**Mr Toïdi MOUTAIROU, chartered accountant, doctor of economics, company auditor, 06 BP 694 Cotonou (Benin), square no. 15 Missessin, behind Hôtel GL, Tel/Fax: (229) 21-33- 64,**

**Counsel Gabriel DOSSOU, Romain DOSSOU, Guy DOSSOU, Avocats à la Cour, Carrée n°387, immeuble JEHOVAH JIRE, Avenue Mgr STEINMEZ, 01 BP 4959, Cotonou (Benin), with an address for service at the chambers of Maître Fanta SANGARE, Avocat au barreau du Burkina Faso, Immeuble SANA HAROUNA, porte n° 943, Avenue de la Cathédrale, 01 BP 6777 Ouagadougou,**

**Applicant, on the one hand ;**

**AND**

**1. The Council of Ministers of the West African Monetary Union (WAMU),**

**2. The BCEAO Banking Commission,**

**Defendants, on the other hand ;**

**Toïdi MOUTAIROU**

- ( - Gabriel DOSSOU
- Romain DOSSOU
- Guy DOSSOU)

**Against**

- **WAMU Council of Ministers**
- **Commission banking of the BCEAO**

**Composition of the Court :**

- **M. Daniel L. FERREIRA, Chairman**
- **Mr Ousmane DIAKITE, Judge**
- **Mr Honorat ADJOVI, Judge**
  
- **Ms Seynabou NDIAYE DIAKHATE, First Advocate General**
  
- **Fanvongo SORO, Registrar**

## **THE COURT**

**HAVING REGARD TO** Mr Toïdi MOUTAIROU's request, dated four (04) June two thousand and nine (2009)

**HAVING REGARD TO** the documents notified

by the Registrar of the Court; **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°01/95/CM of the first (1<sup>er</sup>) August one thousand nine hundred and ninety-five (1995) on the Staff Regulations of UEMOA Officials;

**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 30/2013/CJ dated eleven (11) November two thousand and thirteen (2013) appointing the members of the full court to sit at the ordinary public hearing;

**HAVING REGARD TO** the summonses sent to the parties;

**HEARD** Mr Honorat ADJOVI, Judge-Rapporteur, in his report;

**HEARD** Maître Fanta SANGARE in her oral observations;

**HAVING** heard the Opinion of Ms Seynabou NDIAYE DIAKHATE, First Advocate General;

Having deliberated in accordance with Community law ;

## **I. FACTS AND PROCEDURE**

### **1.1. THE FACTS**

Whereas the facts of the case as set out by the applicant are as follows :

**That** on the eleventh (11th ) of August two thousand and five (2005), Messrs Toïdi MOUTAIROU and Johannes DAGNON were appointed as Statutory Auditors and Supplementary Auditors respectively by African Investment Bank (A. I. B.) for a term of six

(06) years, after approval by the Banking Commission of the Central Bank of West African States (BCEAO), by decision 133/CB/S ;

**That** by decision N° 213/CB/S dated fifteen (15) December two thousand and eight (2008), notified on twenty-six (26) December two thousand and eight (2008), the Commission Bancaire reported the approval of the appointment of Mr Toïdi MOUTAIROU as Statutory Auditor of African Investment Bank (A. I. B.);

**That** by letter dated nineteen (19) January two thousand and nine (2009), addressed to the Secretary General of the Commission Bancaire, Mr Toïdi MOUTAIROU lodged an ex gratia appeal against the said decision, but the Commission Bancaire took no action on his appeal;

On sixteen (16) February 2009, it referred the matter to the WAMU Council of Ministers with a view to overturning the Commission Bancaire's decision;

**That** by Decision No 1940/MEF/CS-01 of six (06) April two thousand and nine (2009), notified to it on twenty-three (23) April two thousand and nine (2009), the WAMU Council of Ministers confirmed all the provisions of Decision No 213/C/S of the Commission Bancaire;

**That** it was against the latter that the applicant applied to the Court for its annulment;

### **1.2. THE PROCEDURE**

**Considering** that by application dated four (04) June two thousand and nine (2009), registered at the Court Registry under No. 04/09 of four (04) June two thousand and nine (2009), Mr Toïdi MOUTAIROU, through his counsel, Mr Gabriel DOSSOU, Mr Romain DOSSOU, Mr Guy DOSSOU, avocats à la Cour, with an address for service at the chambers of Maître Fanta SANGARE, avocat au barreau du Burkina Faso, brought before the Court an action for assessment of legality directed against Decision n°1940/MEF/CS-01 of the Council of Ministers of the West African Monetary Union (UMOA);

**Considering** that the applicant is asking the Court to annul the decision of the WAMU Council of Ministers confirming decision no 213/CB/S of the Banking Commission;

**Considering** that on fifteen (15) July two thousand and nine (2009), he paid the bond set at fifty (50,000) FCFA by order no. 06/09 of sixteen (16) June two thousand and nine (2009);

**Considering** that on eight (08) October two thousand and nine (2009), his request was served on the President of the WAMU Council of Ministers under cover of the President of the WAMU Commission in Ouagadougou;

The defendants were granted a period of one (01) month plus fifteen (15) days to produce their statements of defence;

**Considering** that on expiry of this time limit, the defendants have not produced any pleadings ;

**That** a reminder letter from the Registry dated eighteen (18) March two thousand and ten (2010) was sent to them granting them an additional period of one (01) month;

On expiry of this new time limit, the defendants had still not filed any submissions;

**Considering** that on the fifteenth (15th ) of October two thousand and eleven (2011), the order noting the end of the written procedure was issued, specifying that proceedings would be taken by default against the WAMU Council of Ministers and the Banking Commission;

**Considering** that by order n°009/2013/CJ of twenty-five (25) June two thousand and thirteen (2013), Mr Honorat ADJOVI was appointed Judge-Rapporteur to replace Mr Konan Jérôme ALLOU who had been appointed by order n° 07/2009/CJ of twenty-three (23) June two thousand and nine (2009);

## **II. SUBMISSIONS OF THE PARTIES**

**Considering** that the applicant is asking the WAEMU Court of Justice "to annul the decision of 06 April 2009 of the Council of Ministers, which it considers illegal in the light of the provisions of the WAEMU Treaty and the acts adopted by its organs, for the following reasons:

1. *"Procedural error based on infringement of Article 25 of the Annex to the Agreement of 24 April 1990 establishing the Commission Bancaire;*
2. *Infringement of Article 47 of Law 90-018 of 27 July 1990 on banking regulations in the Republic of Benin;*
3. *Lack of relevance and reasoning ;*
4. *Inaccuracy of the facts alleged against the applicant ;*
5. *Lack of legal basis due to failure to understand the meaning and scope of the Convention of 24 April 1990 establishing the Commission Bancaire".*

**Considering** that the applicant also requests that the judgment be published in all the banking and financial institutions of the WAEMU and that the Court order the suspension of the decision against him;

**Considering** that the WAMU Council of Ministers and the Banking Commission have not acted on the notices served on them and, as a result, have not brought any claims to the attention of the Court;

### **III. PLEAS AND ARGUMENTS OF THE APPLICANT**

#### **3.1. ON ADMISSIBILITY**

**Considering** that Mr Toïdi MOUTAIROU bases his appeal for assessment of legality on the provisions of Article 15 of Regulation No 01/96/CM laying down the rules of procedure of the WAEMU Court of Justice and considers that his appeal is admissible in the light of the aforementioned provisions;

#### **3.2. AT THE BOTTOM**

**Considering** that Mr Toïdi MOUTAIROU considered that the measure taken against him and referred to the WAEMU Court of Justice for censure was manifestly illegal in both form and substance, but did not provide any legal arguments in support;

### **IV. GROUNDS FOR THE JUDGMENT**

#### **4.1. THE COURT'S JURISDICTION**

Whereas Article 2 of the WAEMU Treaty specifies that by the said Treaty, the High Contracting Parties have completed the WAEMU established between them, so as to transform it into the West African Economic and Monetary Union;

**That** article 112, paragraph 1<sup>er</sup> stipulates, with regard to the revision of the WAMU Treaty, that in due course, the Conference of Heads of State and Government shall adopt a Treaty merging the WAMU Treaty and the WAEMU Treaty;

**That** it results from the coexistence of the two (02) Treaties -UMOA and UEMOA- which constitute the same body of rules governing UEMOA that since the tenth (10) of January one thousand nine hundred and ninety-four (1994), date of entry into force of the UEMOA Treaty, the organs of the Union, notably those of management which are the Conference of Heads of State and Government and the Council of Ministers are at the same time for UMOA and for UEMOA;

**Considering** that decisions taken by the Council of Ministers within the framework of the WAMU Treaty may thus be referred to the Court of Justice, one of whose powers is to hear, by virtue of Article 8 paragraph 2 of Additional Protocol No. 1 on the supervisory organs of the WAMU, appeals for assessment of legality against any act of an organ of the Union which gives rise to a complaint;

**That** the Court has jurisdiction to hear the action for annulment of Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers;

#### **4.2. ADMISSIBILITY OF THE ACTION**

In the main proceedings, the applicant seeks the annulment of the decision of the WAMU Council of Ministers which re-examined his situation and confirmed the decision of the Banking Commission;

**Considering** that in order to be admissible, an appeal to assess legality open to natural or legal persons must :

- be directed against an act adversely affecting the applicant ;
- be lodged within two (02) months of the publication of the act, its notification to the claimant or, failing that, the day on which the claimant became aware of it;
- comply with the provisions of Article 26 of the Court's Rules of Procedure;

**That** the concept of an act adversely affecting an individual has been defined by case law as a measure producing binding legal effects such as to affect the interests of the applicant by bringing about a significant change in his legal position (ECJ, 10 January 2006, Alvarez Moreno v Commission, C-373/04 P, ECR P.I-1, paragraph 42);

**That**, in the present case, the act of the Council of Ministers of the UMOA confirming the decision of the Banking Commission is undeniably prejudicial to Mr Toïdi MOUTAIROU since it removes him from his position as Statutory Auditor of African Investment Bank and, in addition, prohibits him from exercising his profession in banking institutions and financial establishments for three years in the UEMOA area;

**Considering** that, in addition, his application was submitted in accordance with the provisions of Article 26 of the Court's Rules of Procedure and within the two (02) month period prescribed by Article 8, paragraph 2 of Additional Protocol No. 1 relating to the supervisory bodies of WAEMU, since it was submitted on four (04) June 2009 following notification of the act on twenty-three (23) April 2009;

The action must be declared admissible;

### **4.3. ON THE BACKGROUND**

**Considering** that the applicant puts forward the following pleas in law against Decision n°1940/MEF/CS-01 dated six (06) April two thousand and nine (2009), the annulment of which is sought:

1 - Procedural defect alleging infringement of Article 25 of the Annex to the Convention of 24 April 1990 establishing the Commission Bancaire;

2 - Infringement of Article 47 of Law 90-018 of 27 July 1990 on banking regulations in the Republic of Benin;

3 - Lack of relevance and reasoning ;

4 - Inaccuracy of the facts alleged against the applicant ;

5 - Lack of legal basis for failure to have regard to the meaning and scope of the Convention of twenty-four (24) April one thousand nine hundred and ninety (1990) creating the Commission Bancaire.

**Considering** that, in support of his pleas in law, the applicant merely maintains that the contested decision is vitiated by illegality both in form and in substance, without even attempting to discuss it from a legal standpoint;

**That** this attitude reflects a doubt on the part of the applicant as to the relevance of his own arguments;

Considering those pleas, the Court observes as follows :

#### **a) On the procedural defect alleging infringement of Article 25 of the Annex to the Agreement of 24 April 1990 establishing the Commission Bancaire**

**Considering** that article 25 of the appendix to the Convention of twenty-four (24) April nineteen hundred and ninety (1990) creating the Commission Bancaire stipulates: *"No disciplinary sanction may be pronounced by the Commission Bancaire without the interested party, whether a natural person or a legal entity, having been heard or duly summoned or invited to present his observations in writing to the Commission Bancaire. He may be assisted by a representative of the Association Professionnelle des Banques et Etablissements Financiers or any other defender of his choice"*;

**Considering** that the applicant provides no evidence that he was not heard or summoned or invited to submit his observations in writing before the Commission Bancaire ;

**Considering** that none of the documents produced by the applicant make it possible to establish that the failure to comply with the legal formalities provided for in Article 25 of the Annex to the Convention setting up the Commission Bancaire was raised before the Commission Bancaire, still less in its application to the Council of Ministers;

**Considering** that under these conditions, the action for annulment submitted to the WAEMU Court of Justice and concerning Decision No 1940/MEF/CS-01 of six (06) April two thousand and nine (2009) of the Council of Ministers of the West African Monetary Union (WAMU) cannot succeed on the basis of the above plea;

**b) infringement of Article 47 of Law 90-018 of 27 July 1990 on banking regulations in Benin**

**Considering** that Article 47 of Law 90-018 of twenty-seven (27) July 1990 on banking regulations in Benin provides that *"disciplinary sanctions for breaches of banking regulations shall be imposed by the Banking Commission, in accordance with the agreement establishing the said Commission"*;

**Considering** that by stipulating in paragraph 1<sup>er</sup> that *"Within the framework of the West African Monetary Union, a Commission, hereinafter referred to as the Banking Commission, shall be set up, responsible in particular for the organisation and supervision of banks and financial institutions. The Banking Commission shall be governed by the provisions of the Annex to this Convention..."*, the Convention creating the said Commission gives rise to the Banking Commission which, among other powers, has the power to supervise the banks and financial institutions of the Union and to impose sanctions on these banks and financial institutions and their managers;

**Considering** that it was in the exercise of these powers, which are fully in line with Article 47 of Law 90-018 of twenty-seven (27) July nineteen hundred and ninety (1990) on banking regulations in Benin, that the Commission Bancaire issued the decision challenged before the Council of Ministers;

This plea must therefore be rejected;

**c) The plea that the decision is irrelevant and inadequately reasoned**

**Considering** that, contrary to the applicant's assertions, the Commission Bancaire gave proper reasons for its decision, emphasising firstly that the checks carried out at African Investment Bank (A. I. B.) revealed that the implementation of expenditure was marred by irregularities that could be described as the use of the company's assets contrary to its corporate purpose, before observing that the auditors' certification reports helped to conceal these anomalies;

**Considering** that under these conditions, Decision No 1940/MEF/CS-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers, which did no more than confirm it in all its provisions after an appropriate examination of the case in all its aspects, endorsed the same grounds;

It follows that the alleged lack of relevance and reasoning has not been established;

This plea must be rejected;



**d) The plea that the facts of which the applicant is accused are inaccurate**

**Considering** that the applicant merely asserts that the facts of which he is accused are inaccurate without proving that they are false, whereas it is a matter of principle that it is for the person claiming that the facts are inaccurate to prove them;

**Considering** that the applicant has not established to the requisite legal standard the inaccuracy of the facts that justified the penalty imposed on him;

Mere allegations that are not supported by solid and convincing arguments are not sufficient to justify the claim.

**That** this plea is therefore inoperative;

**e) On the lack of a legal basis for the decision on the grounds that it fails to have regard to the meaning and scope of the Convention of 24 April 1990 establishing the Commission Bancaire**

Whereas the meaning and scope of the Convention of twenty-four (24) April one thousand nine hundred and ninety (1990) establishing the Commission Bancaire are to be found in the establishment of the said Commission, which is organised by the Annex to the aforementioned Convention;

It follows that the plea in which the applicant alleges that the decision lacks a legal basis because it fails to have regard to the meaning and scope of the Convention of twenty-four (24) April nineteen hundred and ninety (1990) establishing the Commission Bancaire, without any supporting arguments, is irrelevant because it is imprecise and general;

**That** this plea should therefore be dismissed as unfounded;

**Considering** that, as a result of all the foregoing, the action for annulment of Decision No 1940/MEF/CS-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers should be dismissed;

**V. EXPENSES**

Whereas it is apparent from the provisions of Article 60 of the Rules of Procedure of the Court that any unsuccessful party shall be ordered to pay the costs;

Since the applicant has been unsuccessful in his pleas, it is appropriate, pursuant to the above provisions, to order him to pay all the costs;

## **FOR THESE REASONS**

The Court, ruling publicly, by default against the Council of Ministers of WAMU, defendant and in matters of Community law :

### **In form :**

- declares itself competent to assess the legality of Decision No 1940/MEF/CS-01 of 06 April 2009 of the WAMU Council of Ministers;
- declares Mr Toïdi MOUTAIROU's appeal admissible;

### **Merits:**

- Dismisses Mr Toïdi MOUTAIROU's claim as unfounded;
- order Mr Toïdi MOUTAIROU to pay all the costs.

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

And signed by the Chairman and the Registrar. Illegible signatures follow,  
For a certified copy, Ouagadougou, 19  
December 2014

The Registrar

**Fanvongo SORO**