

**JUDGMENT NO.
04/2019
FROM 15 MAY 2019**

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

PUBLIC HEARING ON 15 MAY 2019

The Court of Justice of the WAEMU, meeting in ordinary public session on the fifteenth day of May in the year two thousand and nineteen, in which were seated :

Action for damages

**WELLINDE VOYAGES S.A.R.L.
AGENCY**

C/

**The Commission of the West African
Economic and Monetary Union
(WAEMU)**

Madame Joséphine Suzanne EBAH-TOURE, President; Mr Salifou SAMPINBOGO, Judge; Mr Mahawa Sémou DIOUF, Judge-Rapporteur; Mr Euloge AKPO, Judge; Mr Augusto MENDES, Judge;

At presence of Mrs Eliane Victoire ALLAGBADA JACOB, Advocate General;

With the assistance of Mr Hamidou YAMEOGO, Registrar ;

Delivered the following judgment:

BETWEEN

AGENCE WELLINDE VOYAGES S.A.R.L., having its registered office in Ouagadougou at Boulevard France Afrique, Ouaga 2000, 02 BP 5847 Ouagadougou 02, Tel: (226) 25 46 32 32, having as counsel the Société Civile Professionnelle d'Avocats, SCPA-Sissili Conseils sise au 460, Rue 15-606, Avenue du Dialogue, Ouaga 2000, 01 BP 6042 OUAGADOUGOU 01, Avocats inscrits au Barreau du Burkina Faso ;

Plaintiff, on the one hand ;

AND

The Commission of the West African Economic and Monetary Union (UEMOA), represented by the Technical Adviser to the President of the UEMOA Commission in charge of Legal Affairs, assisted by Cabinet Harouna SAWADOGO, Lawyers registered at the Bar of Burkina Faso, 01 BP4091 Ouagadougou 01, Tel (+226) 25 30 69 46, Fax (+226) 25 31 08 52,

Defendant, of the other part ;

Composition of the Court :

- **Mrs Joséphine S. EBAH TOURE, President,**
- **Mr Salifou SAMPINBOGO, Judge**
- **Mr Mahawa S. DIOUF, Judge-Rapporteur ;**
- **Mr Euloge AKPO, Judge ;**
- **Mr Augusto MENDES, Judge ;**

- **Ms Eliane Victoire ALLAGBADA JACOB, Advocate General ;**

- **Mr Hamidou YAMEOGO, Registrar**

THE COURT

VU the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

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

HAVING REGARD TO Additional Act No. 10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation No. 01/96/CM of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU;

HAVING REGARD TO Regulation n°01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU;

HAVING REGARD TO Minutes No. 01/2016/CJ of 25 May 2016 concerning the appointment of the President of the Court and the distribution of functions within the Court;

HAVING REGARD TO the Minutes n°02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;

HAVING REGARD TO Order No 004/2019/CJ of 08 February 2019 on the composition of the plenary session to sit in ordinary public hearing on 13 March 2019;

HAVING REGARD TO Order No. 012/2019/CJ of 09 May 2019 on the composition of the plenary session to sit in ordinary public hearing on 15 May 2019;

HAVING REGARD TO the summonses of the parties ;

HAVING REGARD TO the documents in the file ;

HAVING REGARD TO the application for compensation for damage by WELLINDE VOYAGES S.A.R.L., registered at the Court Registry on 22 November 2017, under number 17 R 004 ;

HEARD the Judge-Rapporteur in his report;

ORDERED Counsel for the plaintiff in its oral observations; **ORİ**

Counsel for the defendant in his oral observations; **ORDERED**

the First Advocate General in his oral submissions;

Having deliberated in accordance with Community law :

I- FACTS AND PROCEDURE

Whereas by application dated 14 November 2017, registered at the Registry of the Court of Justice of the West African Economic and Monetary Union (UEMOA) on 22 November 2017, under number 17 R 004, Agence WELLINDE VOYAGES S.A.R.L., electing domicile in the chambers of SCPA SISSILI Conseils, states that, in the context of the sale of transport tickets for the benefit of agents of the WAEMU Commission, the latter still owed it sums of money in respect of unpaid invoices from 6 July 2012 to 5 April 2013, in the amount of eight hundred and sixty-six million five hundred and fifty-five thousand and seventy-six (866,555,076) CFA francs;

Since it considered that it had been wronged by what it considered to be a failure to pay, it brought an action before the Cour de céans seeking an order that the Commission pay it the said sum and other amounts by way of compensation for the financial loss suffered.

He has therefore referred the matter to the WAEMU Court of

Justice for a preliminary ruling: As to form :

- Declare that it has jurisdiction to rule on the present action;
- Declare that the action was brought within the

time limits; Merits :

- Order the Commission to pay the principal amount of the claim in the sum of eight hundred and sixty-six million five hundred and fifty-five thousand and seventy-six (866,555,076) CFA francs;
- Order the Commission to pay him the sum of three hundred and twenty-two million four hundred and thirty thousand seven hundred and one (322,430,701) CFA francs as compensation for financial loss;
- Order the Commission to pay him the sum of twenty-nine million five hundred (29,000,500) CFA francs as legal costs;
- Order the Commission to pay all the costs;

II- THE PLEAS IN LAW OF THE PARTIES

In support of its action, the applicant alleges wrongful and unjustified retention of its claim;

Considering that the Commission, in its reply, argued that the WAEMU Court of Justice lacked jurisdiction, that the action was time-barred and, in the alternative, that an expert should be appointed to examine the state of their accounts;

It points out that the applicant brought an action before the Court of Justice on the basis of Article 15 of Additional Protocol I relating to supervisory bodies. In that regard, she emphasised that the use of the expression "without prejudice", which she took to mean "without regard to" or "independently of", referred to the idea that the rule of jurisdiction laid down by that text had no bearing on the application of another rule, in this case Article 9 of the EMOA Treaty, which she did not intend to disregard and which would also apply;

It states that Article 9 deals with the contractual liability of WAEMU and the national court having jurisdiction in any dispute relating thereto, which are governed by the law applicable to the contract in question. It adds that the WAEMU Court of Justice has jurisdiction by virtue of the fact that it lists the various actions that may be brought before it and, moreover, Article 27 of Additional Act No. 10/96 on the Statute of the Court of Justice and Article 15.5 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice only govern the Court's jurisdiction to declare the non-contractual liability of the Union to be engaged;

The Commission also submits that the relationships referred to by the applicant are of a commercial nature and are governed by the Uniform Act on General Commercial Law, Article 301 of which provides that 'the limitation period for actions relating to commercial sales is subject to the provisions of Chapter IV of Book I of this Uniform Act, subject to this Book. The limitation period for commercial sales shall be two years unless otherwise provided in this Book";

Thus, it argues that the present action was brought on 22 November 2017 when it should have been brought from 2014 for the alleged 2012 invoices and from 2015 for the allegedly unpaid 2013 invoices;

It also considers that if the Court is to examine the merits of the case, it should first order an expert report to settle the accounts between the parties and charge the costs to the Agency;

Considering that, in its reply, the applicant relies on the non-exclusivity of the jurisdiction of the national courts to rule on the contractual liability of the Union ;

Thus, it states that if the legislature wished to establish an exclusive jurisdiction, it would have done so unequivocally as provided for in Article 15.5 of Regulation No 01/96/CM laying down the Rules of Procedure of the Court of Justice, which states that the

The Court alone has jurisdiction to declare non-contractual liability and to order the Union to pay compensation for the damage caused;

It submits that the Court cannot, at the risk of arrogating to itself the powers of the legislature, hold that the national courts have exclusive jurisdiction in matters of the Union's contractual liability;

It adds that a reading of Article 27 of Additional Act No 10/96 on the Statute of the Court of Justice of the WAEMU does not allow a distinction to be made between contractual and non-contractual liability;

As regards the limitation period raised by the Commission, the applicant relies on the provisions of Article 234 of Book III of the Uniform Act on General Commercial Law, which specify that the text of Article 301 concerns commercial sales, namely contracts for the sale of goods between traders, whether natural or legal persons;

It maintains that, as the Commission is not a trader, the two-year limitation period cannot be applied, but rather those of Article 16 of the same book, which provide for a five-year limitation period;

That it also pleads the suspension of the limitation periods, caused by the signing, on 6 February 2014, of a conciliation agreement at the end of which, it agreed with the Commission to submit to the audit result of an expert and subsequently to that of the WAEMU Court of Auditors; this pursuant to Article 21.2 of the aforementioned Uniform Act.

Finally, it asks the Court to order the Union to make available to the parties and to the Court of First Instance the results of the previous audits in accordance with Article 40 of the Rules of Procedure of the Court of Justice;

Whereas, in its rejoinder, the Commission emphasises that even if the applicant accepts the principle of judicial expertise, the fact remains that the present action does not fall within the jurisdiction of the Court of Justice;

In addition, it argues that the three-year limitation period provided for in Article 15 paragraph 5-2 of the aforementioned Rules of Procedure applies and that the action is inadmissible as it stands in that it was brought without waiting for the result of the Court of Auditors' expert opinion;

Finally, it expresses its intention to make available to the Court all information necessary to establish the truth;

III- OF THE DISCUSSION

Jurisdiction

Considering that the Commission raised the lack of jurisdiction of the court of first instance on the grounds that the rules of jurisdiction are of public order and may be raised at any stage of the proceedings, even of the Court's own motion;

Considering that the Court of Justice benefits from a competence of attribution exhaustively enumerated by the Community texts which are the Additional Protocol n° I relating to the control bodies of the WAEMU, the Additional Act n° 10/96 of 10 May 1996 relating to the Statutes of the Court of Justice of the WAEMU and the Regulation n° 01/96/CM of 05 July 1996 relating to the Rules of Procedure of the Court of Justice of the WAEMU;

Thus, according to Article 27 of the Additional Act to the Statutes of the WAEMU Court of Justice, the Court has jurisdiction to hear in particular: actions for failure to fulfil obligations by Member States; actions for annulment of regulations, directives and decisions of WAEMU bodies; actions for damages, in accordance with Article 15-5 of the Rules of Procedure; disputes between members relating to the WAEMU Treaty; disputes between WAEMU and its agents; and preliminary rulings;

Under the terms of Article 15-5 of the Rules of Procedure, *"The Court of Justice alone shall have jurisdiction to declare non-contractual liability engaged and to order the Union to pay compensation for the damage caused...."*;

In the present case, since the dispute concerns the contractual liability of the WAEMU Commission, the Court must declare that it has no jurisdiction;

FOR THESE REASONS :

Ruling in open court, at first and last instance, in matters of Community law ;

IN THE FORM :

- **Declares itself**

incompetent; ON THE

GROUND :

- **Refers Agence WELLINDE VOYAGES S.A.R.L., the applicant, to appeal;**
- **Orders Agence WELLINDE VOYAGES S.A.R.L. to pay the costs.**

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

And have signed :

The

PresidentThe Registrar

Joséphine Suzanne EBAH TOURE

Hamidou YAMEOGO