

**JUDGMENT NO.
04/2021
FROM 09 June 2021**

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

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

PUBLIC HEARING ON 09 JUNE 2021

ACTION FOR ANNULMENT

Mr Mouhamed NDIAYE C/

**Council of Ministers of the West
African Monetary Union (WAMU)**

Composition of the Court :

- **Mr Daniel Amagoïn
TESSOUGUE, Chairman ;**
- **Mr Salifou SAMPINBOGO,
Judge-Rapporteur ;**
- **Mr Euloge AKPO, Judge ;**
- **Victoire Eliane ALLAGBADA
JACOB, 1^{er} Advocate General ;**
- **Me Boubakar TAWEYE MAIDANDA,
Registrar.**

**The Court of Justice of the WAEMU, meeting in
ordinary public session on the ninth (09) of June two
thousand and twenty-one (2021), in which were
seated :**

**Mr Daniel Amagoïn TESSOUGUE, Chairman ;
Mr Salifou SAMPINBOGO, Judge-Rapporteur ;
Mr Euloge AKPO, Judge ;**

**in the presence of Ms Victoire Eliane ALLAGBADA,
First Advocate General;**

**with the assistance of Mr Boubakar TAWEYE
MAIDANDA, Registrar ;**

has rendered the following contradictory judgment:

BETWEEN :

**Mr Mouhamed NDIAYE, former Managing Director
of the Fédération des Caisses du Crédit Mutuel du
Sénégal, residing at Dakar quartier Sacré Cœur 3, villa
n° 9702, represented by the Société Civile
Professionnelle d'Avocats BA & OUMAÏS, located in
Dakar, 5, Avenue Georges Pompidou, Immeuble
Sokhna Anta, 12^{ème} floor, Apartment 123, acting on
behalf of Société Civile Professionnelle d'Avocats BA &
OUMAÏS, located in Dakar, 5, Avenue Georges
Pompidou, Immeuble Sokhna Anta, 12^{ème} floor,
Apartment 123;**

**Applicant, on the one
hand ;**

AND

**The Council of Ministers of the West African
Monetary Union (WAMU), represented by Société
Civile Professionnelle d'Avocats N'GAN, ASMAN &
Associés, Avocats près la Cour d'Appel d'Abidjan, 37
rue de la Canebière, 01 BP 3361, Abidjan 01 - Tel: +225
22 40 47 00/05, assisted by SAWADOGO &
SAWADOGO, Avocats près la Cour d'Appel de
Ouagadougou, constituted for the purposes of the case;**

Defendant, on the other

hand ;

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;

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

VU Minutes No 02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;

VU Minutes No. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the distribution of functions within the Court;

VU Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

VU Order N°021/2019/CJ of 20 November 2019 fixing the days of the Assemblies of the WAEMU Court of Justice;

VU the application dated 16 January 2018, registered at the Registry of the Court of Céans under No 18 R001, by which Mr Mouhamed NDIAYE ;

VU the minutes of the ordinary public hearing held on 11 November 2020 ;

VU the minutes of the ordinary public hearing held on 10 March 2021 ;

VU the minutes of the ordinary public hearing held on 19 May 2021 ;

HAVING REGARD TO Order No 17/2021/CJ of 25 May 2021 on the composition of the plenary session to sit in public hearing on 09 June 2021;

HAVING REGARD TO the documents in the file ;

HAVING REGARD TO the summonses of the parties ;

HEARD the Judge-Rapporteur in his report;

CONSIDERING that the applicant's counsel, duly summoned, did not appear;

WITNESS the Council of Ministers of the West African Monetary Union (WAMU), in its oral observations ;

HEARD the First Advocate General in his Opinion;

Having deliberated in accordance with Community law :

I. FACTS AND PROCEDURE

Whereas by application dated 16/01/2018, registered at the Court under No 18R001 of 16/01/2018, Mr Mouhamed NDIAYE, former Director General of the Fédération des Caisses du Crédit Mutuel du Sénégal, lodged an action for assessment of the legality and annulment of Decision No 022/26/09/CM/UMOA of the WAMU Council of Ministers confirming Decision No 40 of 16 June 2016 of the WAMU Banking Commission banning him from holding any position of responsibility in a financial institution in the WAMU zone;

That during an overall verification mission carried out by the WAMU Banking Commission at the Fédération des Caisses du Crédit Mutuel du Sénégal, in abbreviated form FCCMS, from 3 to 24 August 2015, the inspection mission noted acts of mismanagement against Mr Mouhamed NDIAYE, then General Manager, in particular the payment of his personal expenses using the institution's VISA bank card, the double payment of his accommodation and subsistence expenses during missions, the receipt of productivity bonuses amounting to 26.2 million CFA francs per year in 2013 and 2015, at a time when the institution's situation was a cause for concern, etc. ;

That the Banking Commission, by Decision n°040-06-2016/CB/C of 16 June 2016, ordered the compulsory resignation of Mr Mouhamed NDIAYE from his duties as Managing Director of the FCCMS and prohibited him from exercising administrative, management or supervisory functions in a decentralised financial system or a credit institution in the WAMU;

On 25 July 2016, Mr Mouhamed NDIAYE lodged an appeal with the WAMU Council of Ministers against the decision of the Banking Commission;

That the WAMU Council of Ministers, after ruling on Mr Mouhamed NDIAYE's appeal, declared in its Decision No. 021/26/09/2016/CM/UMOA of 26 September 2016, that:

"Article 2: The WAMU Council of Ministers deems inadmissible, on the merits, the appeal lodged by Mr NDIAYE on 25 July 2016 against decision n°040-06-2016/CB/C of 16 June 2016 of the WAMU Banking Commission.

The aforementioned Decision of the WAMU Banking Commission is well-founded, on the grounds that the FCCMS violated the legal and regulatory provisions applicable to decentralised financial systems in the Republic of Senegal and that Mr Mouhamed NDIAYE is directly and personally liable.

Consequently, the sanction imposed on Mr Mouhamed NDIAYE by the Commission Bancaire de l'UMOA is proportionate to the grievances raised against him.

Article 3: The Council of Ministers confirms, in all its provisions, decision n°040- 06-2016/2016/CB/C of 16 June 2016 of the WAMU Banking Commission." ;

That Mr Mouhamed NDIAYE has therefore brought an action before the WAEMU Court of Justice for assessment of legality and annulment of Decision No 022/26/2016/CM/UMOA of 26 September 2016 of the WAEMU Council of Ministers, and requests the Court to:

- Declare the appeal admissible;
- Annul Decision No 22/26/09/CM of 26 September 2016 of the WAMU Council of Ministers;
- Consequently, annul Decision No. 40 of 16 June 2016 of the WAMU Banking Commission;
- Order the defendant to pay the costs;
- Order the return of the deposit ;

After exchanges between the applicant and the respondent, who filed an application and a statement of defence, supplemented by a reply from the applicant and a rejoinder from the respondent, the President of the Court, in two separate orders, declared the written procedure closed and appointed a judge-rapporteur;

That, in his report, he suggested that the Court order measures of instruction, in particular by requesting the audit report of the Commission Bancaire, which served as the basis for the contested decision;

That the Court overruled by way of a preliminary ruling;

II. CLAIMS AND PLEAS OF THE PARTIES

II.1. In form

Considering that on 16/01/2018 the applicant lodged an appeal for assessment of the legality and annulment of Decision n°022/26/09/2016/CM/UMOA of 26 September 2016 of the Council of Ministers of UMOA ;

That he encloses with his application a receipt for the bond and concludes that his appeal lodged in the form and within the time limits required by law is admissible;

That the defendant raises in limine litis the lack of jurisdiction of the Court of Appeal;

It states that this lack of jurisdiction has a threefold basis;

That it is based on the provisions of Articles 14 and 15 of Regulation 01/96/CM/UEMOA on the Rules of Procedure of the WAEMU Court of Justice, on the provisions of Article 3 of the WAEMU Treaty, and on Article 38 (old or 43 new) of the Annex to the Convention governing the Commission Bancaire; that it maintains that if the Court were to retain jurisdiction, it would not fail to declare Mr Mouhamed NDIAYE's appeal unfounded for the following reasons;

II.2. At the back

Considering that the applicant refers to the recitals cited by the Council of Ministers to justify its decision and replies point by point :

"Considering that the global verification mission carried out from 03 to 24 August 2015, revealed acts of mismanagement against the Director General materialised by the payment of his personal expenses via the Establishment's VISA bank card, the double payment of his accommodation and subsistence expenses on the occasion of missions, the collection of productivity bonuses amounting to 26.2 million FCFA per year in 2013 and 2015 and this, in a context where the financial situation of the Establishment is worrying".

That the applicant states that the expenses generated by the use of the card were all settled in March 2013 and February 2015 respectively and that at the time the mission took place in August 2015, there was no debt linked to the use of the card;

With regard to the possibility of double payment during missions abroad, the claimant states that the sums paid before the arrival of the Banking Commission mission, to regularise additional expenses, were too much and he should receive reimbursement, following his request;

Regarding the productivity bonus, Mr NDIAYE explains that the policy of motivating staff through productivity and performance bonuses dates back more than 10 years, well before his appointment in February 2012;

That the Board of Directors has always approved the payment of bonuses to employees, including those paid to the Director, as evidenced by the minutes of the Board meetings of 08 April 2013, 16 June 2014, 23 February 2015 and June 2016 ;

Under the terms of the company agreement, performance and productivity bonuses have become acquired benefits;

As proof, the 2008 letter of employment addressed to him expressly mentions this;

That bonuses may not be granted in violation of the provisions governing the company agreement, article 12 of which leaves it to the Chairman of the Board of Directors to determine the bonus of the Chief Executive Officer;

That the financial and prudential information presented in the tables taken from the verification report of the Banking Commission of the UMOA on the financial situation of the establishment proves the opposite of that which the decision of the Council of Ministers of the UMOA qualifies as worrying, and that it is very serious to submit inaccurate facts for the signature of the authority;

That, as regards the absence of a system for monitoring the benefits in kind of the Chief Executive Officer, this qualification is excessive since, at the time of the audit, a system for monitoring the benefits in kind of the Chief Executive Officer was in place but, like all human endeavours, there is room for improvement;

That on the failure to reimburse the exceeding of the ceilings of the said benefits, a meticulous analysis of the benefits in kind granted to the Director General shows a saving on the total budget consumed and borne by the Establishment of FCFA 2,627,377 between 2013 and 2015;

The fact that the telephone costs exceeded the operating budget shows that this state of affairs is far from jeopardising the establishment;

That the Chief Executive Officer has ordered the deduction at source of the excess amounts to be reimbursed over six monthly instalments, and that there is no legal provision stipulating that the penalty for exceeding the ceiling for a benefit in kind is dismissal;

That, with regard to the regular increases in the salary of the Chief Executive Officer, without taking into account the deteriorated financial and prudential situation of the establishment, the report on the increase in the salary of the Chief Executive Officer over the last three years is materially inaccurate;

That the report by the Head of Payroll in the Human Resources Department on the matter contradicts the finding of the WAMU Banking Commission: "*The analysis made throughout this report has shown that the salary elements of the General Manager set by the decision-making bodies from July 2012 to November 2015, have not undergone any increase...*" ;

That as regards the legal proof of the exclusion of the productivity bonus from the basis for determining his salary, the memorandum from the Chairman of the Board of Directors setting out the bonuses linked to the duties of Chief Executive Officer, which does not include the productivity bonus, and that it is this productivity bonus that was considered to form part of his salary, by the Commission Bancaire in order to deduct an alleged increase in the said salary on the grounds that he had not provided proof that the productivity bonus did not form part of his salary;

That this approach is contrary to two fundamental principles of law;

That it violates the legal rules governing the burden of proof and the legal impossibility of proving a negative fact;

Either the productivity bonus is included in the salary, in which case it cannot be called a salary increase but rather the collection of undue sums, or it is part of the salary, in which case only the unjustified salary increase can be invoked, but not the two facts, all of which constitute punishable misconduct;

Finally, the contested decision is unlawful because it does not specify which provision of Law 2008-47 of 03 September 2008 on the regulation of decentralised financial systems in Senegal has been infringed and concludes that this failure to specify which provision of the law has been infringed constitutes both a lack of legal basis and a failure to state reasons,

but also constitutes an infringement of his rights of defence, since he was unaware of the provision of the law violated which serves as a basis for the sanctions taken against him;

That as to the materiality of the acts of which Mr Mouhamed NDIAYE is accused, the applicant disputes the materiality of the acts of which he is accused. Mouhamed NDIAYE, the applicant contests the materiality of the acts of which he is accused; that, however, the materiality of the said acts, relating to the payment of the applicant's personal expenses via the FCCMS VISA card, the receipt of productivity bonuses in the amount of 26.2 million FCFA, the regular increase in his salary, is not contested by the applicant; that the latter explicitly recognises the materiality of these facts, since he denies that they are serious enough to justify the sanction taken against him; that he cannot deny the seriousness of the facts because they exist;

Article 28 of the Annex to the Convention governing the Commission Bancaire states that: *"Where the Commission Bancaire finds that there has been an infringement of banking regulations or any other legislation applicable to credit institutions in the territory of a Member State, without prejudice to any criminal or other penalties that may be incurred, it shall impose a fine of or more of the following disciplinary sanctions ..."*; under this provision, the Commission Bancaire has sovereign power to assess the seriousness of the acts noted in the management of the structures under its supervision and to impose the appropriate sanctions;

With regard to the productivity bonus, it is clear from the principles of common law that: *"The terms and amount of the remuneration of the Chief Executive Officer are set by the Board of Directors. Any benefits in kind granted to him shall be determined in the same way as his remuneration"*, cf. article 490 of the Uniform Act relating to Commercial Company Law;

That the applicant received a productivity bonus by decision of the Chairman of the Board of Directors;

That it follows from the aforementioned article that only the Board of Directors has the power to set the remuneration of the Chief Executive Officer and, where applicable, to grant him benefits in kind;

That the decision taken by the Chairman of the Board of Directors to pay the applicant a productivity bonus was therefore unlawful, as the Chairman did not have the power to take such a decision;

That the said Chairman of the Board of Directors received the same sanctions as the applicant;

With regard to the legality of the decision of the Council of Ministers, a careful reading in good faith reveals that the contested decision clearly states that the acts of which the applicant is accused violate Law No. 2008-47 of 03 September 2008;

As regards the complaint relating to the double sanction prohibited by Article 71, it is clear from the combination of Articles 30 and 31 of the aforementioned Act that the principle of the cumulative application of the disciplinary sanction relating to compulsory resignation and the prohibition on the executive concerned exercising functions of administration, management or control of a decentralised financial system of the WAMU is thus unequivocally established and the logic of this measure falls within common sense;

It is intended to prevent a person who has been sanctioned from repeating the same acts of mismanagement in another establishment in another WAMU Member State;

III. DISCUSSION

III.1. Form

a) Jurisdiction of the Court

Whereas article 2 of the amended WAEMU Treaty states: "*By the present Treaty, the High Contracting Parties complete the West African Monetary Union (WAMU) instituted between them, so as to transform it into the West African Economic and Monetary Union (WAEMU), hereinafter referred to as the Union*"; whereas article 62 of the same Treaty amended by article 40 of the WAEMU Treaty of 20 January 2007 states: "*the monetary policy of the Union shall be governed by the provisions of the Treaty of the West African Monetary Union (WAMU) and subsequent texts. Without prejudice to the objectives assigned to it, it supports the economic integration of the Union*";

Considering that while it is true that there are two Treaties, UMOA and UEMOA, since 20 January 2007 they constitute the same body of rules and the Court of Justice remains a common judicial review body for UMOA and UEMOA, which form the Union known as UEMOA; that consequently, the court of first instance has jurisdiction to hear the present case;

b) Admissibility of the application

Whereas Article 8 of Additional Protocol No 1 on the Union's Supervisory Bodies provides that :

"On an action brought by a Member State, the Council or the Commission, the Court of Justice assesses the legality of regulations, directives and decisions.

Any natural or legal person may also appeal against any act of an Organ of the Union which adversely affects him or her.

The appeals provided for in this article must be lodged within two months of the publication of the act, its notification to the appellant or, failing this, the day on which the appellant became aware of it;

That on 16 /01/2018 the applicant lodged an appeal for assessment of legality and annulment of decision n°022/26/2016/CM/UMOA of 26 September 2016 of the Council of Ministers of UMOA ;

That the decision was notified to him on 16/11/2017 following correspondence dated 13/11/2017 ;

That he attach to his application a receipt for his bond;

That, on analysis, the application must be declared admissible;

III.2. Background

a) The facts and pleas put forward by the applicant

Considering that acts of mismanagement against Mr Mohamed NDIAYE, then General Manager of the Fédération des caisses de crédit Mutuel du Sénégal, abbreviated to FCCMS, were noted during the overall verification mission carried out by the WAMU Banking Commission; This concerns the payment of his personal expenses using the institution's bank card and the double payment of his accommodation and subsistence expenses during missions, the receipt of productivity bonuses at a time when the institution's financial situation is worrying, irregular increases in the General Manager's salary and the benefits in kind granted to him;

That it is clear from the entire file that the materiality of the said facts, in particular that relating to the payment of the applicant's personal expenses via the FCCMS VISA card, to the receipt of a productivity bonus in the amount of 26.2 million CFA francs and to the irregular increase in his salary, is not contested by the applicant;

That the latter explicitly acknowledges the reality of these facts, but denies that they are serious enough to justify the penalty imposed on him;

Old article 28 of the appendix to the convention governing the Commission Bancaire states that: *"when the Commission Bancaire observes an infringement of banking regulations and all other legislation applicable to credit institutions in the territory of a Member State..., without prejudice to any criminal or other penalties incurred, it shall impose one or more of the following disciplinary penalties..."*;

By virtue of this provision, the Banking Commission has the power to assess the seriousness of the acts noted in the management of the structures under its control and to classify them and impose the sanctions it deems appropriate;

It is clear from the presentation of his defence that the applicant is making value judgements about the seriousness of the acts committed by the supervisory body, the Commission Bancaire, which led to his sanction;

In the absence of a manifest error as to the accuracy of the facts, a court may not review the value judgments made by a Union body on the facts recorded when auditing a structure under its supervision;

It follows from all the foregoing that the plea alleging the facts (or irregularities) developed by the applicant is therefore inoperative;

b) On the legality of the decision of the WAMU Council of Ministers

Considering that Mr Mouhamed NDIAYE challenges the legality of the decision of the Council of Ministers taken against him on the grounds :

- firstly, that the decision of the Council of Ministers did not specify the text which the acts of which it was accused were in breach;
- secondly, that the said decision violates the provisions of Article 71 of Law No. 2008-47 of 30 September 2008 regulating decentralised financial systems in the Republic of Senegal;

Despite this allegation, it is important to note that the decision of the Council of Ministers sufficiently specifies that the acts of which the applicant is accused violate Law No. 2008-47 of 3 September 2008 on the regulation of decentralised financial systems in the Republic of Senegal;

It follows that this plea put forward by the applicant must be rejected;

Considering that, furthermore, with regard to the alleged infringement of Article 71 of Law No 2008-47 of 3 September 2008 on the regulation of decentralised financial systems in the Republic of Senegal by the decision under appeal, the applicant maintains that this infringement is the result of a double sanction imposed on him by the Banking Commission, whereas the said Article does not provide for the accumulation of sanctions;

Under the terms of the aforementioned Article 71: *"depending on the nature and seriousness of the offences committed, the Minister, in the case of the decentralised financial systems referred to in Article 44, the Central Bank or the Banking Commission may impose the following disciplinary sanctions: warning, reprimand, suspension or prohibition of all or part of operations; suspension or dismissal of the managers responsible";*

That in the same sense, article 30 of the same law provides that *"no one may be a member of an administrative, management or supervisory body in a decentralised financial system, either directly or through an intermediary, administer, direct, manage or control a decentralised financial system or one of its agencies, propose to the public the creation of a decentralised financial system, or have the power to commit the institution if he has been the subject of a final conviction for offences against property or for crimes under common law";*

From a combined reading of these two articles, it is clear that the disciplinary sanction of compulsory resignation, provided for in article 71, has the consequence, by virtue of article 30, of prohibiting the executive concerned from exercising the functions of administration, management or control of a WAMU Decentralised Financial System or one of its agencies;

That, in the final analysis, the principle of the cumulative application of its provisions is unequivocally established by the law on decentralised financial systems;

That, in any event, the decision of the Council of Ministers, confirming the decision of the Banking Commission, does not violate any provision of the law on decentralised financial systems which would prohibit the double sanction;

That the applicant's plea is inoperative;

That it is therefore appropriate to reject the requests made by the applicant for an assessment of the legality and annulment of Decision No. 022/26/2016/CM/UMOA of 26 September 2016 of the Council of Ministers of WAMU;

III.3. Costs

Considering that, under Article 60 of the Rules of Procedure of the Court, "*Any unsuccessful party shall be ordered to pay the costs*";

Considering that Mouhamed NDIAYE has been unsuccessful in his pleas and claims on the merits ;

He should be ordered to pay the costs;

FOR THESE REASONS

In the matter of Community law, the Court of First Instance, after hearing both parties, has given a judgment in which it

In form

- **Declares itself competent,**
- **Declares the appeal admissible,**

At the back

- **dismisses all Mouhamed NDIAYE's claims,**
- **Orders Mouhamed NDIAYE 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.

Illegible signatures follow.

Ouagadougou, 09 June 2021

**For the Registrar
The Deputy
Registrar**

Hamidou YAMEOGO