

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

UEMOA COURT OF JUSTICE

PUBLIC HEARING OF 30 APRIL 2014

**STOP NO.
13 RP 001.36
OF 30 APRIL 2014**

*Preliminary ruling
by the Lomé Court of Appeal (Togo).*

Parties to the main proceedings :

BOAD (Me LAWSON-BANKU N. Rustico)

A

SOUMAHORO Youssouf (Mr AMEGADJI
Georges Komlanvi, Me OLYMPIO Bebi)

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

- Mrs MATTO LOMA CISSE, Judge
s, Members;

in the presence of :

- Ms Seynabou NDIAYE DIAKHATE, First Advocate General;

with the assistance of Maître Hamidou YAMEOGO, Deputy Registrar ;

in response to the reference for a preliminary ruling made by the **Cour d'appel de Lomé (Togo)** by judgment No 44/11 of six (06) October 2011 in the main proceedings between :

The Banque Ouest Africaine de Développement (BOAD), represented by Maître LAWSON- BANKU N. Rustico, Attorney at Law at the Togolese Bar, BP 1629, Rue de France (Rue 18 Doulassamé), Tel. 222 86 44, Lomé (Togo),

**on the one
hand ;**

A

SOUMAHORO Youssouf, with Maître AMEGADJI Georges Komlanvi (Avocat domiciliataire) and Maître OLYMPIO Bebi (Avocats inscrits au Barreau du Togo), BP 2186, Rue des ORMES (Ancienne Rue Anipa DOSSOU),
Tel. 222 09 97, Lomé (Togo),

on the other hand ;

delivered the following judgment:

THE COURT :

HAVING REGARD to the preliminary ruling No. 44/11 of six (06) October two thousand and eleven (2011), by which the Lomé Court of Appeal, pursuant to Article 12 of Additional Protocol No. 1, referred the matter to the WAEMU Court of Justice for a ruling as to whether or not the West African Development Bank (BOAD) is subject to jurisdiction before the Togolese courts in the dispute between it and its former employee SOUMAHORO Youssouf;

HAVING REGARD TO the letters of 05 March 2013 from the Registrar of the Court, notifying the Member States, the organs of the WAEMU and the parties to the main proceedings of the preliminary ruling No 44/11 of six (06) October two thousand and eleven (2011);

HAVING REGARD TO Togo's written observations submitted on five (05) April two thousand and thirteen (2013);

HAVING REGARD TO the written observations of SOUMAHORO Youssouf's counsel, filed on eight (08) May two thousand and thirteen (2013);

HAVING REGARD TO the written observations of Burkina Faso dated fourteen (14) May two thousand and thirteen (2013);

HAVING REGARD TO the written observations of the Banque Centrale des Etats de l'Afrique de l'Ouest (BCEAO) dated seventeen (17) May two thousand and thirteen (2013);

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

HAVING REGARD TO the WAEMU Treaty, in particular Article 38 ;

HAVING REGARD TO Additional Protocol No. 1 on the supervisory bodies of the WAEMU, in particular Articles 1, 12, 13 and 20 ;

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 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);

YES Mr Maty ELHADJI MOUSSA, Judge - Rapporteur, in his report;

YES Maitre LAWSON-BANKU N. Rustico, Counsel for BOAD in his oral observations;

YES Mrs Seynabou Ndiaye DIAKHATE, First Advocate General, in her Opinion ;

Having deliberated in accordance with Community law :

By preliminary ruling No 44/11 of six (06) October two thousand and eleven (2011), received at the WAEMU Court of Justice on four (04) January two thousand and thirteen (2013) and registered under No 13RP001, the Lomé Court of Appeal has, pursuant to Article 12 of Additional Protocol No. 1, referred the matter to the WAEMU Court of Justice for a ruling on whether or not the West African Development Bank (WADB) is subject to the jurisdiction of the Togolese courts.

This preliminary question was raised in the context of the dispute between BOAD and its former employee SOUMAHORO Youssouf, which was resubmitted to it following the cassation of Judgment No. 52/1999 of four (04)

November nineteen hundred and ninety-nine (1999).

I. LEGAL FRAMEWORK

Article 2 of the WAEMU Treaty states that *"by the present Treaty, the High Contracting Parties have completed the West African Monetary Union (WAMU) established between them, so as to transform it into the West African Economic and Monetary Union (WAEMU), hereinafter referred to as the Union"*.

Title II of the WAEMU Treaty entitled "On the institutional system of the Union" Articles 16 and 41 of Chapter II of the Constitution, entitled "Organs of the Union", provide for the BOAD.

Article 16 states that *"... An Interparliamentary Committee, consultative bodies and autonomous specialised institutions shall also contribute to the realisation of the objectives of the Union"*, while by virtue of article 41, the Central Bank of West African States (BCEAO) and the West African Development Bank (BOAD) are autonomous specialised institutions of the Union which, without prejudice to the objectives assigned to them by the WAMU Treaty, contribute independently to the realisation of the objectives of the WAMU Treaty.

Under the terms of Article 16 of Additional Protocol No. 1 relating to the supervisory bodies of WAEMU, *"the Court of Justice shall hear disputes between the Union and its agents"*.

II. FACTS OF THE MAIN PROCEEDINGS

It emerges from the preliminary ruling No. 44/11 of six (06) October two thousand and eleven (2011) before the Community Court that under a contract of seventeen (17) July one thousand nine hundred and ninety-four (1994), the West African Development Bank (BOAD) took on Mr SOUMAHORO Youssouf as a financial analyst for a period of two years converted before

It will expire for an indefinite period on the tenth (10th) of January one thousand nine hundred and ninety-six (1996).

On his return from an absence of six (6) days, for which authorisation had been requested and obtained from his employer, he was sent a letter in which BOAD considered that his contract had ended and that he was no longer a BOAD employee.

Surprised by his employer's attitude, Mr SOUMAHORO Youssouf brought an action before the Lomé Labour Court to have his dismissal declared unfair and, consequently, to have the BOAD ordered to pay him his legal rights as well as damages, even though, as far as the BOAD was concerned, the Togolese national judge was clearly incompetent since, as an organ of the WAEMU, it could only be sued before the Court of Justice of this Union and not before the Togolese national courts.

The Lomé Labour Court rejected the plea of lack of jurisdiction, declared the dismissal unfair and ordered BOAD to pay various sums of money to Mr SOUMAHORO Youssouf.

BOAD appealed against this judgement, maintaining its plea of lack of jurisdiction, but by judgement no. 52/1999 of four (04) November one thousand nine hundred and ninety-nine (1999), the Social Division of the Lomé Court of Appeal upheld the judgement of the Lomé Labour Court.

BOAD then appealed against this decision of the Social Division of the Lomé Court of Appeal and by decision no. 18/2002 of 21 November 2002, the Judicial Division of the Togolese Supreme Court quashed and set aside the decision referred to and referred the case and the parties to the Lomé Court of Appeal otherwise composed for a decision in accordance with the law.

III. SUMMARY OF WRITTEN OBSERVATIONS SUBMITTED TO THE COURT

The State of Burkina Faso, on the basis of the interpretation of the provisions of articles 16 paragraph 1 and 41 of the WAEMU Treaty, maintained that for the Court of Justice of the Union to hear an appeal by the staff of the Union, the agent must be in service in one of the organs of the Union, whereas the WADB is a distinct, autonomous entity of the WAEMU and, as such, can only be brought before the national courts of the Member States of the Union.

Maître AMEGADJIE Georges Komlanvi, counsel for SOUMAHORO Youssouf, argued that the dispute between his client and BOAD fell within the sole jurisdiction of the courts of Togo, the place of recruitment and the place of performance of the employment contract in accordance with the provisions of the Togolese Labour Code, on the grounds that :

- the provisions of article 5 of the headquarters agreement signed between the WADB and the Togolese Republic open up the possibility of suing the WADB before the Togolese courts;
- The jurisprudence of Togolese courts, which reject these objections, has long been based on the immunity from jurisdiction of any body whatsoever;
- the WAEMU Court of Justice, by virtue of its statutes, cannot extend its jurisdiction to persons who, like Mr SOUMAHORO Youssouf, are not agents of the WAEMU, taking into account the provisions of Article 16 of Additional Protocol No. 1.

Togo maintains that it has no objection to this case being heard by the Court of Justice of the European Union in accordance with Article 15 of Additional Protocol No. 1 on the Union's supervisory bodies, but would like the Court to state the law and ensure that the rights of the parties are respected, taking into account the law applicable to the contract in question.

In the BCEAO's view, the WADB is ineligible for the Community judicial system in view of the jurisdiction of the WAEMU Court of Justice and its status as a specialised autonomous institution. Indeed, it considered that in view of article 15, paragraph 4 of its rules of procedure, the Court rules on any dispute between the organs of the Union and their agents under the conditions determined in the staff regulations. However, the BOAD's internal texts do not contain any provisions on the method of settling social disputes or on the competent body to hear them. Thus, for the Court to be able to hear disputes between the BOAD and its staff, the BOAD must have previously granted it such jurisdiction.

The BCEAO also took the view that although the Court might be tempted to declare that it had jurisdiction *ipso jure*, on the basis of Article 16 of Additional Protocol No. 1, by considering the WADB to be an organ of the Union, such a position would have to be qualified or even rejected in view of the fact that, as the WADB is an autonomous specialised institution of the WAEMU, this autonomy must be assessed from the point of view both of the legal framework of its activities and of its operation and the specific legal instruments that it uses.

IV. THE COURT'S REPLY TO THE QUESTION RAISED

The Court must first rule on its jurisdiction in accordance with Article 28 of Regulation No 01/2012/CJ of twenty-one (21) December two thousand and twelve (2012) on the Administrative Rules of the Court of Justice before responding to the request made by the Lomé Court of Appeal.

According to Article 12 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU, "the Court of Justice shall give preliminary rulings on the interpretation of the Treaty of the Union, on the legality and interpretation of acts adopted by the organs of the Union, on the legality and interpretation of the statutes of bodies set up by acts of the Council, when a national court or

tribunal has given such a ruling".

an authority with a judicial function is called upon to deal with it in the course of litigation. The national courts or tribunals adjudicating at last instance shall be bound to refer the matter to the Court of Justice. Referral to the Court of Justice by other national courts or tribunals or by authorities having judicial functions shall be optional.

The jurisdiction of the Court of Justice in the area of preliminary rulings is also mentioned in Article 27 of the Additional Act N°10/90 on the Statute of the Court of Justice of the WAEMU and Article 15.6 of Regulation N°01/96/CM on the Rules of Procedure of the Court of Justice.

It follows from these texts that the WAEMU Court of Justice has jurisdiction. As regards the admissibility of the appeal, it should be recalled that Article 26 of Regulation No 01/2012/CJ of twenty-one (21) December two thousand and twelve (2012) relating to the Administrative Rules of the Court of Justice provides:

"Where the subject-matter of the action is a reference to the Court of Justice by the national court for a preliminary ruling for the purpose of interpretation or assessment of legality, the national court must inform the Court of Justice so as to enable it to give a decision in full knowledge of the facts, by sending it an authenticated copy of the case-file and specifying the circumstances of the case, its legal framework and the relevance of the questions referred and their decisive nature in resolving the dispute".

In this case, by asking the Community Court to rule on whether or not the West African Development Bank (WADB) has jurisdiction before the Togolese courts in the dispute between it and its former employee SOUMAHOUROU Youssouf, The Lomé Court of Appeal wishes to know whether the powers conferred on the WAEMU Court of Justice by Articles 15 and 16 of Additional Protocol No. 1 relating to the WAEMU Supervisory Bodies prevent it, as a national court, from hearing the case submitted to it.

Such a request is relevant in the sense that if, in general, the

The jurisdiction of national courts is governed by national legislation, while
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that of the Community courts is governed exclusively by Community law.

jurisdiction cannot be exercised by the national courts, given the characteristics of Community law. In addition, the answer to be given by the Community Court will enable the Lomé Court of Appeal to rule on the merits or decline jurisdiction.

It follows that the reference for a preliminary ruling from the Cour d'appel de Lomé satisfies the conditions of admissibility and must be declared admissible.

With regard to the answer to the question posed, the Court of Justice has already ruled on this issue at the request of the WADB in Opinion No. 01/2011 of thirty October two thousand and eleven, in which it recognised its jurisdiction. As a reminder, 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.

It is therefore quite logical that Title II of the WAEMU Treaty entitled "*The institutional system of the Union*" provides for the WADB in Chapter II entitled "*The organs of the Union*", in articles 16 and 41.

An analysis of these provisions shows that at institutional level, the WADB is a body of the Union with the status of an Autonomous Specialised Institution which, at functional level, is responsible for financing priority development and economic integration actions.

Article 41 of the WAEMU Treaty states that "*The Central Bank of West African States (BCEAO) and the West African Development Bank (BOAD) are autonomous specialised institutions of the Union.*"

Without prejudice to the objectives assigned to them by the WAMU Treaty, the Central Bank of West African States (BCEAO) and the Bank

Ouest Africaine de Développement (BOAD) shall contribute independently to the achievement of the objectives of this Treaty".

In view of the foregoing and taking into account its status as an autonomous specialised institution of the WAEMU, which makes it an organ of the Union, it should be said that the provisions of Additional Protocol No. 1 relating to the supervisory bodies of the WAEMU, as well as those of Additional Act No. 10/96 on the Statutes of the Court of Justice of the WAEMU and Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU, are applicable to the WADB.

This is the case with those which provide that the Court of Justice shall hear disputes between the Union and its agents, the Union being understood, in the light of Article 1 of the preliminary title of the WAEMU Treaty devoted to definitions, as the West African Economic and Monetary Union in its entirety.

As the UEMOA Court of Justice has jurisdiction, it has exclusive jurisdiction to hear appeals or applications relating to the matters listed exhaustively in Additional Protocol No. 1 relating to the supervisory bodies of the UEMOA (Articles 5 to 17), Additional Act No. 10/96 on the Statutes of the UEMOA Court of Justice (Article 27) and Regulation No. 01/96/CM on the Rules of Procedure of the UEMOA Court of Justice (Article 15). Consequently, the Togolese courts have no jurisdiction whatsoever to hear the dispute which has given rise to the present reference for a preliminary ruling between the BOAD and one of its agents.

Consequently, the WAEMU Court of Justice is the only institution legally empowered to hear such disputes.

V. ON EXPENSES

Since the reference for a preliminary ruling is a procedural issue, it is for the
à the Court d'appel of Lomé of rule on the costs,

in accordance with the provisions of Article 86 in fine of the Court's Rules of Procedure.

FOR THESE REASONS :

THE COURT,

In answer to the question referred for a preliminary ruling by the Lomé Court of Appeal by judgment No 44/11 of six (06) October 2011, hereby rules that :

- the Court shall have jurisdiction to hear and determine references for a preliminary ruling ;
- the said action is admissible;
- the Togolese courts have no jurisdiction to hear the dispute which is the subject of this reference for a preliminary ruling;
- The WAEMU Court of Justice is the only institution legally empowered to hear disputes between the WADB and its staff;
- the Lomé Court of Appeal will have to rule on the costs of the preliminary ruling proceedings.

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