

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

UEMOA COURT OF JUSTICE

PUBLIC HEARING OF 30 APRIL 2014

**STOP N°11
RP 003.20
OF 30 APRIL 2014**

*Reference for a preliminary ruling from
the Cour de cassation du Burkina Faso.*

Parties to the main proceedings :

TRAORE Thierry Michel

A

SYB Léwa Sansan Dieudonné

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 ;

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

in response to the reference for a preliminary ruling made by the **Cour de cassation du Burkina Faso** by judgment No 02 of 06 January two thousand and eleven (2011) in the main proceedings between :

TRAORE Thierry Michel, Avocat à la Cour, BP 2973, Tel (00226) 20 98 21 66 Bobo-Dioulasso

on the one hand ;

A

SYB Léwa Sansan Dieudonné, Medical Delegate based in Bobo-Dioulasso, Tel (+226) 20 97 20 77

on the other hand ;

delivered the following judgment:

THE COURT :

HAVING REGARD TO Preliminary ruling No 02 of six (06) January 2011, by which the Burkina Faso Court of Cassation, pursuant to Article 12 of Additional Protocol No 1, referred the matter to the WAEMU Court of Justice;

HAVING REGARD TO the letters of thirteen (13) June two thousand and eleven (2011) from the Registrar of the Court, notifying the Member States, the organs of WAEMU and the parties to the main proceedings of the preliminary ruling of six (06) January two thousand and eleven (2011);

HAVING REGARD TO the written observations dated the first (1^{er}) of August two thousand and eleven (2011) of the Minister of Economy and Finance of the Republic of Togo;

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 No. 10/96 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation No. 01/96/CM 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);

HEARD Mr Ousmane DIAKITE, Judge-Rapporteur, in his report;

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

Having deliberated in accordance with Community law :

By preliminary ruling No 02 of six (06) January two thousand and eleven (2011), received at the Court of Justice of the WAEMU on twenty-two (22) March of the same year and registered under No 11RP003, the Court of Cassation of Burkina Faso has, pursuant to Article 12 of Additional Protocol No 1, referred the matter to the WAEMU Court of Justice for an opinion on t h e meaning and scope that it intends to give to the indicative scales of costs and lawyers' fees in the light of Article 88 of the WAEMU Treaty of the tenth session of the General Assembly.

(10) January one thousand nine hundred and ninety-four (1994) and Regulation n° 02/2002/CM/UEMOA of twenty-three (23) May two thousand and two (2002) relating to anti-competitive practices within UEMOA.

This opinion is sought in the context of the dispute between Maître TRAORE Thierry Michel and Mr SYB Léwa Sansan Dieudonné, following the appeal to the Supreme Court lodged by Maître TRAORE Thierry Michel against the order made on a fee dispute under No. 07/2007 of nineteen (19) July two thousand and seven (2007) by the First President of the Bobo-Dioulasso Court of Appeal.

By letters dated thirteen (13) June two thousand and eleven (2011), the Registrar of the Court notified the Member States, the WAEMU Commission and the parties to the main proceedings of the preliminary ruling No 01 of six (06) January two thousand and eleven (2011) pursuant to Article 11 of Regulation No 01/2010/CJ on the Administrative Rules of the Court of Justice of the WAEMU.

By letter dated 1 (er) August two thousand and eleven (2011), the Minister of Economy and Finance of the Togolese Republic responded to the said notification.

By separate orders issued on seventeen (17) December two thousand and twelve (2012) under numbers 027/2012/CJ and 028/2012/CJ, the President of the Court appointed the Judge-Rapporteur and noted the end of the written procedure.

I. FACTS RELATING TO THE MAIN DISPUTE

It appears from the file transmitted to the Court, in particular from the report drawn up on twenty-four (24) September two thousand and eight (2008) by the Conseiller-rapporteur of the Cour de cassation of Burkina Faso that Maître TRAORE Thierry Michel managed the interests of Mr SYB Léwa Sansan Dieudonné in civil and commercial proceedings relating to the recovery of his debt against Mr OUEDRAOGO Louis Lesage, On appeal, he obtained confirmation of a judgment ordering the latter to pay his client the sum of two million seven hundred and forty-five thousand (2,745,000) CFA francs, from which he was only able to recover two million six hundred thousand (2,600,000) CFA francs, he deducted the amount of his costs, fees and advances granted to his client before paying him a balance of eight hundred and ninety-nine thousand three hundred and twenty-nine (899,329) CFA francs by letter dated one (1er) July two thousand two (2002).

Against this remittance, Mr SYB Léwa Sansan Dieudonné applied to the President of the Bar Association to contest the fees by letter dated twenty (20) August two thousand and two (2002). This authority, by order n° 2003- 02/BAT of the twenty-first (21st) October two thousand and three (2003) appointed his colleague Maître DABIRE Norbert, Dean of the Bar Council as delegate to deal with this matter, concerning the contestation of fees, costs and disbursements.

By decision no. 2006/038/BAT concerning the settlement of a dispute and the taxation of fees, handed down on twenty-five (25) September two thousand and six (2006), the Dean of the members of the Council fixed the fees, costs and disbursements due to Maître TRAORE Thierry Michel at the sum of one million seven hundred thousand six hundred and seventy-one (1,700,671) CFA francs.

Following notification to him of the said order on twenty-eight (28) September two thousand and six (2006), Mr SYB Léwa Sansan Dieudonné appealed by letter dated thirteen (13) October two thousand and six (2006), received at the Registry of the Court of Appeal on eighteen (18) October two thousand and six (2006), while the lawyer lodged a cross-appeal by notice of appeal drawn up on twenty-one (21) December two thousand and six (2006).

By order no. 07/2007 handed down on twenty-eight (28) June two thousand and seven (2007), the First President of the Bobo-Dioulasso Court of Appeal declared the lawyer's appeal inadmissible on the grounds of foreclosure, upheld that of Mr SYB Léwa Dieudonné and annulled the contested order. Ruling again, the President of the Court of Appeal fixed the amount of the costs and fees of Maître TRAORE Michel at one million ninety thousand nine hundred and ten (1,090,910) CFA francs and ordered the above-mentioned counsel to return to SYB Léwa Dieudonné the sum of two million two hundred thousand (2,200,000) CFA francs.

Thierry Michel TRAORE lodged an appeal against this order, accusing the presidential court of second instance of :

- infringement of Article 29 of the Code of Civil Procedure;
- infringement of Article 70 of Law No 16/2000/AN of twenty-three (23) May two thousand and three (2003) regulating the legal profession;
- and breach of articles 1101 and 1134 of the Civil Code.

II. WRITTEN OBSERVATIONS SUBMITTED TO THE COURT

Only the Togolese Republic responded to the notification sent to the Member States, the WAEMU Commission and the parties to the main dispute, taking the view that the appeal judge had ruled without applying the rules of Community law on which he relied, i.e. Article 88 of the WAEMU Treaty and Article 12 of Additional Protocol No. 1 relating to the supervisory bodies of WAEMU. Accordingly, the Togolese Republic asked the Court to give a proper and strict interpretation of the texts to enable the Burkina Faso Court of Cassation to rule on the law.

III. FRAMEWORK LEGAL IN WHERE IS INSERTS THE QUESTION

According to the preliminary ruling of the Court of Cassation of Burkina Faso, no. 02 of the year two thousand and eleven (2011), it is clear from the statements of the grounds of appeal that Maître TRAORE Thierry Michel criticises the decision of the Bobo-Dioulasso Court of Appeal for having misapplied the law, in that it dismissed the aforementioned appellant's claims, on the grounds that the indicative scales of lawyers' fees and costs cannot be valid in the light of national and Community provisions prohibiting anti-competitive practices in the WAEMU area, even though the said scales are derived from texts regulating the legal profession, the exercise of which is clearly incompatible with commercial activities, which are the prerogative of competition law; There is also a violation of article 29 of the Burkina Code of Civil Procedure.

Thus, the appeal seeks to criticise the interpretation made by the Bobo-Dioulasso appeal judge of Law no. 15/94/ADP of five (05) May nineteen hundred and ninety-four (1994) on the organisation of competition in Burkina Faso, article 88 of the WAEMU Treaty of ten (10) January nineteen hundred and ninety-four (1994) on the organisation of competition in Burkina Faso, article 88 of the WAEMU Treaty of ten (10) January nineteen hundred and ninety-five (1994) on the organisation of competition in Burkina Faso and article 88 of the WAEMU

Treaty of ten (10) January nineteen hundred and ninety-five (1994) on the organisation of competition in Burkina Faso.

ninety-four (1994) and Regulation no. 02/2002/CM/UEMOA of twenty-three (23) May two thousand and two (2002) relating to anti-competitive practices within UEMOA.

Consequently, the Court of Cassation considers that the case in question raises a question of interpretation and application of the Treaty on European Union and of an act adopted by its organs, in this case the Regulation referred to above; Hence the decision of the Court of Cassation of Burkina Faso, in a preliminary ruling, to stay proceedings and to seek the opinion of the Community court on the meaning and scope it intends to give to the indicative scales of legal costs and lawyers' fees in the light of the Community texts referred to above, namely Article 88 of the Treaty and the Regulation on anti-competitive practices of the West African Economic and Monetary Union.

IV. REPLY OF THE COURT TO THE REQUEST OF THE COURT OF CASSATION OF BURKINA FASO

Whereas, pursuant in particular to Article 12 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU, the Cour de Cassation of Burkina Faso, as the court of last instance, was obliged to refer to the Community courts when a problem of interpretation of the Union Treaty or of the legality and interpretation of an act adopted by the organs of the Union is submitted to it;

That even if the Court of Appeal cannot assess the legality or validity of a national regulation, in this case the text fixing the scales of legal costs and lawyers' fees, it remains competent to rule on the question of whether or not the said scales fall within the scope of Community competition law, in particular through the provisions of Article 88 of the Treaty on European Union and Regulation No 02/2002/CM/UEMOA of twenty-three (23) May two thousand and two (2002);

Whereas Article 88 of the Treaty on European Union reads as follows :

"One (1) year after the entry into force of this Treaty, the following shall be prohibited ipso jure :

- a) agreements, associations and concerted practices between undertakings which have as their object or effect the restriction or distortion of competition within the Union ;*
- b) any practices by one or more undertakings which amount to an abuse of a dominant position within the common market or in a significant part of it ;*
- c) public aid likely to distort competition by favouring certain undertakings or the production of certain goods;*

Considering that WAEMU competition law plays a part in the organisation of the Community's common market by creating a climate of healthy competition between public and private companies, not forgetting consumer protection;

Competition law therefore applies primarily to undertakings and secondarily to consumers and to the Member States, particularly with regard to their relations with public undertakings;

Therefore, the question is whether the relationship between a litigant and a lawyer falls within this concept of a business within the meaning of WAEMU Community law;

Considering that a company within the meaning of competition law covers the concepts of commercial activity, economic activity and social activity;

Consequently, the services of a lawyer, which are statutorily excluded from the commercial sphere, do not fall within the scope of an undertaking covered by competition law;

Whereas the Court of Justice of the European Union cannot rule on the validity or otherwise of the scales of court costs and lawyers' fees in so far as they were drawn up on the basis of a national rule of Burkina Faso;

Lastly, as the preliminary ruling is a procedural issue, it is for the Cour de Cassation du Burkina Faso to rule on costs in accordance with the provisions of Article 86 in fine of the Court's Rules of Procedure.

FOR THESE REASONS :

THE COURT,

Ruling on the question referred for a preliminary ruling by the Cour de cassation du Burkina Faso (Burkina Faso Court of Cassation) by judgment no. 02 of six (06) January two thousand and eleven (2011):

- **declares inadmissible the question put on the interpretation of the Ordinance fixing court costs and lawyers' fees and all the national rules raised to that effect ;**
- **states, however, that the provisions of Article 88 of the WAEMU Treaty and of Regulation No. 02/2002/CM/UEMOA of the twenty-third (23) May two thousand and two (2002) relating to anti-competitive practices within the WAEMU, do not apply to indicative scales of lawyers' fees and costs;**

- further states that the Court of Cassation of Burkina Faso shall rule on 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