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The important role of regional courts in the African Continental Free Trade Area – The Mseto judgment by the East African Court of Justice

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The African Continental Free Trade Area ("**AfCTA**") has raised the prospect of greater trade, investment and economic development between African states. The success of its implementation (and its credibility in the eyes of both local and foreign investors) will depend to a large degree on the establishment and proper functioning of cross border institutions, good governance and respect for the rule of law. This includes ensuring access to justice, the easy enforcement of legal rights, an independent judiciary and effective dispute resolution mechanisms. Efficient and independent regional and local courts may provide an alternative to arbitration in resolving commercial and other disputes. The recent judgment by the East African Court of Justice ("**EACJ**") with regard to the suspension of the Mseto newspaper by the Tanzanian Government indicates the important role that courts may play. The EACJ was established by the Treaty for the Establishment of the East African Community between Kenya, Tanzania, Uganda, South Sudan, Rwanda and Burundi ("**EAC Treaty**").

On 4 August 2016, Mseto published an article alleging that an Assistant Minister had taken bribes to raise funds for President Magufuli's presidential election campaign. On 10 August 2016, the Minister of Information suspended the publication of the newspaper for three years in terms of section 25(1) of the Newspaper Act. Section 25(1) allowed the Minister to suspend the publication of a newspaper if he was "of the opinion that it is in the public interest, or in the interest of peace and good order so to do". Mseto's editor and publisher challenged the suspension before the EACJ (which sits in Arusha, Tanzania). The Tanzanian government initially argued that the applicants had to exhaust all local Tanzanian remedies before applying to the EACJ but subsequently conceded that the EACJ had jurisdiction and that Tanzanian citizens had direct access to the EACJ.

While noting that the rights to freedom of expression and press freedom were not absolute, the EACJ found that restrictions on these rights could only be imposed to protect the rights or reputation of others or for reasons of national security, public order, public health or public morals. The EACJ found that the EAC Treaty protects the right to freedom of expression and that the provisions of the EAC Treaty were "binding and not merely aspirational" and created an obligation on every member State to "respect those sacrosanct principles of good governance and rule of law which include accountability, transparency and the promotion and protection of democracy". The EACJ found that the Minister had not given reasons for his order, had not given Mseto a reasonable opportunity to respond to the allegations made against it (the order was issued less than 36 hours after the initial complaint) and had made the order "whimsically" based on the Minister's "opinion" without establishing how the publication of the newspaper had specifically violated the "public interest, interest of the peace and/or good order" as required by section 25(1).

In its judgement dated 21 June 2018, the EACJ accordingly found that the Minister had acted unlawfully, and this constituted a violation of the Tanzanian Government's obligations under the EAC Treaty. The Minister was ordered to annul the order and allow Mseto to resume publication. Although the Government filed a notice to appeal the judgment on 19 July 2018, it did not prosecute the appeal and on 2 June 2020, the EACJ's Appellate Division rejected an application by the Government for an extension of time and struck out the appeal.

The Mseto case is important as citizens of an African state applied directly to a regional court and successfully obtained an order against an African Government. Respect for and the enforcement of the rule of law by an independent judiciary will be critical to the success of the AfCTA and other Pan-African initiatives. A key challenge will be the willingness of African Governments to submit to the jurisdiction of regional courts and other regional regulatory bodies and Pan African institutions. The fate of the Southern African Development Community

(SADC) Tribunal is instructive of how the process of establishing a regional court can be derailed. In 2008, the SADC Tribunal (based in Windhoek, Namibia) ruled in favour of white Zimbabwean farmers that Zimbabwe had violated the SADC Treaty by expropriating private farms without compensation. The Zimbabwean Government refused to comply with the judgement and SADC member states subsequently decided in 2011 to suspend the SADC Tribunal and in 2014 signed a Protocol to restrict the Tribunal's jurisdiction to disputes between SADC member states only and not allow cases by individuals or companies in SADC member states. A twist in the tale came in December 2018 when the South African Constitutional Court found that the South African President's participation in these decisions was unconstitutional, unlawful and irrational. The Constitutional Court directed the South African President to withdraw his signature from the Protocol and the President did so in August 2019. The SADC Tribunal however remains suspended and SADC Governments have not taken any meaningful steps to resolve this issue.

The key test for the successful implementation of the AfCTA and other Pan-African initiatives will be the willingness of African Governments to limit or give up their national sovereignty in favour of promoting continental free trade, investment, development and good governance. The support and confidence of local and foreign investors will be important and much will depend on African Governments' respect for the rule of law and an independent judiciary including through regional courts like the EACJ, the COMESA Court of Justice, the ECOWAS Community Court of Justice and the African Court on Human and Peoples' Rights.

The EACJ's judgment in the Mseto case is an important precedent, but for the editor and publisher of Mseto, the practical results were mixed. They were ultimately successful in the EACJ and costs were awarded in their favour against the Tanzanian Government. However, Mseto was prevented from publishing for three years from 10 August 2016 until 9 August 2019 (when the Minster's original order expired). The Tanzanian Registrar of Newspapers then denied Mseto a licence on the basis that the Government's appeal was still pending. Although Mseto had initially claimed damages (including lost profits) against the Government in the EACJ proceedings, this claim was subsequently withdrawn as no supporting evidence had been provided. With the Government's appeal against the EACJ's 21 June 2018 judgment finally struck out on 2 June 2020, it is unclear if Mseto will bring a damage claim and whether Mseto will be granted a licence to resume publication.



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