

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 2024-096838

Reportable: No
Of interest to other Judges: No
Revised: No


SIGNATURE

Date: 18/09/2024

In the matter between:

ENOBOT AGBORAW N.O.	1 st Applicant
THE AFRICAN COMMISSION OF NUCLEAR ENERGY	2 nd Applicant
and	
THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	1 st Respondent
THE DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION	2 nd Respondent
THE DIRECTOR-GENERAL, THE DEPARTMENT OF INTERNATIONAL RELATIONS AND CO-OPERATION	3 rd Respondent
THE CHAIRPERSON, THE AFRICAN UNION COMMISSION	4 th Respondent
<u>THE AFRICAN UNION COMMISSION</u>	<u>5th Respondent</u>

JUDGEMENT

MOOKI J

- 1 The first applicant (Mr. Agboraw) was appointed the Permanent Executive Secretary of the second applicant (“AFCONE”) on 23 June 2022, based at the AFCONE headquarters in Pretoria.
- 2 AFCONE operates in South Africa pursuant to several international instruments, including a Host Agreement between the Government of the Republic of South Africa and the African Union. The person appointed AFCONE’s executive secretary enjoys immunities and privileges pursuant to section 5(3) of the Diplomatic Immunities and Privileges Act, 37 of 2001.
- 3 Mr. Agboraw approached the court for urgent relief following advise to him by the second respondent (“DIRCO”) that his immunity and privileges had been withdrawn. He seeks a stay of the notification pending review and other proceedings.
- 4 Mr. Moussa Faki Mahamat, the Chairman of the African Union Commission, sent Mr. Agboraw a letter dated 30 July 2024, advising Mr. Agboraw that he had been dismissed for misconduct. Mr. Mahamat mentioned that he acted in his capacity as Mr. Agboraw’s appointing authority in terms of the AFCONE Regulations and Rules.
- 5 DIRCO issued a Note Verbale to AFCONE on 22 August 2024. The Note Verbale stated, in part, that: *“In light of the termination of employment of*

Mr. Agboraw, with effect from 31 July 2024, AFCONE is requested to immediately surrender his diplomatic identity card [...] ¹ within 24 hours of receipt of the Note Verbale. AFCONE is further advised that diplomatic immunities and privileges accorded to Mr. Agboraw ceased with effect on 1 August 2024. AFCONE is requested to present Mr. Agboraw African Union Laissez Passer passport [...] ² in order for the Department to issue Mr. Agboraw with an exit visa to depart the Republic by 26 August 2024.”

6 Various exchanges ensued between Mr. Agboraw and officials at DIRCO. Mr. Agboraw protested that his status in South Africa did not arise from the African Union Commission. He conveyed the following to DIRCO, including that: the Conference of State Parties was the highest decision-making authority and the only body that could terminate employment of the AFCONE Executive Secretary or waive his immunity; that there was no employment relationship between the AFCONE Executive Secretary and the chairman of the AU Commission, who was not the appointing authority of the AFCONE Executive Secretary but was limited to designating a person for appointment to that post. Such designation was made at the request of State Parties to the Pelindaba Treaty.

7 Mr. Agboraw referred DIRCO to article 12 (2) of the Host Agreement, which provides that the Conference of State Parties to the Pelindaba Treaty may waive immunities of AFCONE’s Executive Secretary. He mentioned that there was no such waiver. He requested DIRCO on 23 August 2024 to withdraw the Note Verbale by noon on 26 August 2024; failing he would

¹ The details were given

² The details were given

seek relief in the courts. This was not done. DIRCO, instead, issued a further Note Verbale dated 23 August 2024. It was essentially a repeat of the previous Note Verbale. The main difference being that Mr. Agboraw was to be issued with an exit visa to depart South Africa by 12 September 2024. That resulted in Mr. Agboraw instituting the present application.

- 8 Mr. Agboraw seeks interim relief pending various processes including review proceedings. The stated review will address include setting aside both the revocation of the immunities and privileges and the Note Verbales.
- 9 Mr. Agboraw says the decision to revoke his immunities and privileges means that he was being forced to exit South Africa when the underlying basis for the decision by DIRCO was unlawful. He pointed out that the AFCONE Conference of State Parties had not invoked article 12 (2) of the Host Agreement withdrawing his immunities and privileges. He contends that DIRCO conducted itself unlawfully by complying with the instructions of the chairman of the African Union Commission absent a resolution by the Conference of State Parties withdrawing his immunities and privileges.
- 10 Mr. Agboraw contended that there is no legal relationship between him as AFCONE's Executive Secretary and the Chairman of the AU Commission, and that only the AFCONE Conference of State Parties, pursuant to the Treaty of Pelindaba, could terminate his employment. He contended that South Africa was perpetuating unlawful legal action against AFCONE and him as its lawfully appointed executive secretary by assisting the chairman of the AU Commission.

- 11 Mr. Agboraw says he accepts that the court lack jurisdiction over international legal matters arising from the Treaty of Pelindaba, but that the court has jurisdiction over the conduct of the DIRCO respondents against the applicants in South Africa.
- 12 Mr. Agboraw says he seeks to vindicate, among others, his right to fair, lawful and reasonable administrative action; alternatively, that he has been affected by a decision inconsistent with the principle of legality; in that DIRCO acted without taking reasonable steps to ensure that the decision by the chairman of the AU Commission was consistent with the Treaty of Pelindaba and principles of international law. He also says that DIRCO exercised power based on irrelevant considerations and that his rights in terms of section 5 (3) of the Diplomatic Immunities and Privileges Act, 2001 were effectively taken away from him.
- 13 Mr. Agboraw contended that both him and AFCONE stood to suffer harm because AFCONE can only function through its executive secretary and that the Note Verbales barred him from his functions as Executive Secretary. He continued that staff who report to him will face intimidation and threats when receiving lawful instructions from him.
- 14 Mr. Agboraw says the balance of convenience favoured maintaining the status quo pending the review application. That was because the respondent would not suffer harm on the grant of the interdict. He also says he has no other adequate remedy, including that the Note Verbale required him to leave South Africa by 12 September 2024 and that DIRCO had threatened to declare him *persona non grata*.

- 15 He maintains that he has reasonable prospects of success in the review application. The review is based in part on the ground that DIRCO acted beyond the rule of law by giving effect to a decision that is *ultra vires*.
- 16 The fourth and fifth respondents did not participate in the litigation. The DIRCO respondents oppose the application.
- 17 It is contended that Cliffe Dekker Hofmeyr attorneys were not authorised to have instituted proceedings on behalf of AFCONE or to represent Mr. Agboraw in his official capacity as AFCONE's Executive Secretary.
- 18 The DIRCO respondents contend that the relief sought by Mr. Agboraw is incompetent. They raised several grounds in this regard, including that the chairman of the AU Commission designated Mr. Agboraw as the AFCONE executive secretary and later terminated his employment; that DIRCO was implementing section 8 of the Diplomatic Immunities and Privileges Act; that the chairman of the AU Commission could waive immunities and privileges in terms of article 12(2) of the Host Agreement; that DIRCO was implementing a decision by the sending organisation, of which the Court is not competent to adjudicate.
- 19 The DIRCO respondents further maintain that interim relief is not competent for several reasons; including that Mr. Agboraw sought relief pending at least three occurrences outside the power and control of the court. They maintain that the court lacked jurisdiction because the court has no jurisdiction over AFCONE and/or the Conference of State Parties because the decision terminating Mr. Agboraw's employment and the

withdrawal of his immunities and privileges was taken by the sending organisation or the chairman of the AU Commission.

- 20 It was contended that DIRCO had no legal basis to challenge the decision by the chairman of the AU Commission because each of the AFCONE Commission, the AFCONE Bureau, and the CSP Bureau endorsed the termination of Mr. Agboraw's employment.
- 21 DIRCO contends that there is no right which Mr. Agboraw could vindicate in the courts. That is because Mr. Agboraw contends for a right that he could only be dismissed by the Conference of State Parties and that such a dismissal arose from foreign and/or international agreements over which the court lack jurisdiction.
- 22 The DIRCO respondents say the applicants have not shown irreparable harm. There also was no future conduct that could be the subject of an interdict. They contend that the balance of convenience favoured refusing the interdict for several reasons, including that South Africa would have to extend immunities and privileges to two executive secretaries.
- 23 The DIRCO respondents filed a supplementary affidavit. It was stated, with reference to Mr. Agboraw mentioning in his replying affidavit that he had invoked article 15 of the Host Agreement, that he could not invoke the article because he was no longer the AFCONE Executive Secretary.
- 24 The DIRCO respondents say they have no interest in the article 15 process concerning the validity and/or legality of Mr. Agboraw's suspension and termination of his employment. That is because the role of South Africa, as

represented by DIRCO, was merely to implement the waiver of immunities and privileges following the decision of the sending organisation, as confirmed on behalf of the EU, AFCONE and the Conference of State Parties.

- 25 DIRCO further referenced resolution by the AFCONE Commission at an extraordinary meeting on 4 September 2024. The resolution included that AFCONE was not an applicant in the present court application; that AFCONE no longer had any professional relationship with Mr. Agboraw; and that the chairman of the African Union Commission was the appointing authority for the AFCONE Executive Secretary who acted legally throughout, including in terminating Mr. Agboraw's employment and in waving his immunities.

Analysis

- 26 Cliffe Dekker Hofmeyr can institute proceedings on behalf of Mr. Agboraw. Mr. Agboraw is cited by virtue of his office as the AFCONE Executive Secretary. The material relief that he claims, and the substance of his case, pertains to him in his person. He confirms instructing Cliffe Dekker Hofmeyr to be his attorneys.
- 27 There may be scope for the view that Cliffe Dekker Hofmeyr could not institute proceedings on behalf of AFCONE. I do not consider this material. That is because, as debated during the hearing with Mr Katz SC, counsel for the applicants, the substance of averments in support of the case for interim relief was based on the person of Mr. Agboraw; with a passing reference to AFCONE as an applicant. The Court had pointed out that both

applicants are required to establish self-standing claims for the grant of relief being sought. No case was made on behalf of AFCONE (as illustrated below), with the result that it is academic whether Cliffe Dekker Hofmeyr could have instituted proceedings on behalf of AFCONE.

28 I consider the relief sought in paragraphs 3.1 to 3.3 of the notice of motion on the supposition that the applicants made-out a case for interim relief. This finding is for purposes of determining the soundness or otherwise of the relief sought in those paragraphs.

29 The applicants seek an interim interdict pending the final determination of the following process and/or decisions:

29.1 Prayer 3.1 of the notice of motion concerns the resolution of a dispute in accordance with processes contemplated in the Host Agreement “pending the decision of the Conference of the State Parties of Second Applicant.”

29.2 Prayer 3.2 relates to a resolution by the Conference of State Parties of the Second Applicant on 22/23 January 2024 “and their decision on 2 May 2024...”.

29.3 Prayer 3.3 pertains to the resolution of, among others, the interpretation dispute by the AU Administrative Tribunal.

30 The applicants describe the relief sought in the above prayers as “international remedies.”

- 31 The relief sought in prayer 3.1 of the notice of motion is not competent. There is no averment as to the nature of the “dispute” between AFCONE and the respondents. More fundamentally, AFCONE is not competent to participate in the “process contemplated in [the] Host Agreement....” Only a “party” to the Host Agreement may participate in the “process” contemplated in the Host Agreement. AFCONE is not a “party” to the Host Agreement. The African Union and the Government of the Republic of South Africa are the only “parties” to the Host Agreement.³
- 32 The relief sought in prayer 3.2 is equally not competent. This prayer concerns an apparent dispute pertaining to the Conference of State Parties, arising from their resolution on 22/23 January 2024 and their decision on 2 May 2024.
- 33 The resolution on 22/23 January 2024, on the pleadings, arose from the Fourth Session of the Fifth Conference of the State Parties to the African Nuclear-Weapon-Free Zone Treaty.⁴ Nine resolutions are recorded.
- 34 The relief in prayer 3.2 references a “decision” by the Conference of State Parties on 2 May 2024. Members of the Conference of State Parties are recorded to have agreed on 2 May 2024 to hold “informal discussions to try to resolve the internal issues of AFCONE, including the allegations levelled against [Mr. Agboraw] ...”.
- 35 No case has been made out for relief sought in prayer 3.2 to the notice of motion. There is no mention of “a dispute” in the 22/23 January 2024

³ Article 15(1) of the Host Agreement, read with the definition of “party.”

⁴ The Treaty of Pelindaba

resolution. The Conference of State Parties is recorded to have made an informal decision on 2 May 2024. This was clearly an informal undertaking. The applicants do not contend that the Conference of State Parties made any resolution on that date pertaining to the conduct by the chairman of the AU Commission.

- 36 More fundamentally, the Court does not, in any event, have power to make an order that is subject to proceedings by a body over which the court lacks control.
- 37 Prayer 3.3 to the notice of motion states that the applicants seek interim relief pending “The resolution of, amongst others, the interpretation dispute by the AU Administrative Tribunal in relation to the legal authority and power of the Chairperson of the African Union Commission over the First Applicant despite the First Applicant being employed by the Second Applicant.”
- 38 Mr. Agboraw wrote to DIRCO on 5 August 2024, requesting DIRCO not to implement the letter terminating his employment until such time as the Conference of State Parties had pronounced on the matter and/or a decision by, amongst others, the AU Administrative Tribunal. Mr. Agboraw lodged an interpretation dispute with the AU Administrative Tribunal on 30 August 2024, seeking relief only against the Chairman of the AU Commission.
- 39 The court, as stated in paragraph 36, has no control over processes of bodies beyond the reach of the court. The AU Administrative Tribunal is

one such body. The court has no power to grant interim relief pending proceedings before the AU Administrative Tribunal. The relief sought in prayer 3.3 of the notice of motion is equally not competent.

40 The court now considers whether a case is made for interim relief pending review proceedings referenced in Part B of the application.

41 A court considering interim relief does not express a view on the merit or otherwise of the relief sought in pending proceedings. The court enquires only into whether there is a showing of prospects of success.

42 I recite the requirements for interim relief, namely:

42.1 A *prima facie* right, even if it is subject to some doubt;

42.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted;

42.3 The balance of convenience favours the granting of interim relief; and

42.4 The applicant has no alternative remedy.

43 The applicants averred as follows in relation to the *prima facie* right that they seek to protect. It is contended that:

43.1 DIRCO took steps to enforce or implement the termination by the Chairman of the AU Commission, notwithstanding the chairman lacking lawful authority to do so. DIRCO is said to have implemented the decision by issuing the Note Verbales and refusing to withdraw them; despite the purported termination being null and void.

43.2 “[T]here is *prima facie* proof of facts which establish a right in terms of substantive law” and that DIRCO’s decision “directly affects, inter alia, my right to fair, lawful and reasonable administrative action alternatively, I have been affected by a decision which is inconsistent with the principles of legality.”

43.3 His “right to freely choice (sic) my profession and trade is affected by the decision of DIRCO, effectively their decision ensures that I can no longer participate as the Executive Secretary of AFCONE as I will be forced to leave the Republic of South Africa.”

43.4 The rights conferred on him in terms of section 5(3) of the Diplomatic Immunity and Privileges Act, 2001 “have been effectively taken away from me due to the impugned decision of DIRCO.”

43.5 “DIRCO seeks to deny the Applicants their rights to have the dispute resolved in accordance with the Host Government Agreement by enforcing the impugned decision.”

44 Mr. Agboraw concluded as follows with reference to averments as summarised in paragraphs 43.1 to 43.5: “For all the above reasons, I have established a right, alternatively, a clear right, for bringing this matter before this Honourable Court on an urgent basis.”

45 It is impossible to discern what Mr. Agboraw contends is the *prima facie* that he invokes. This is illustrated by his averment that “there is *prima facie* proof of facts which establish a right in terms of substantive law.” A litigant is required to be precise in identifying the *prima facie* right being invoked.

A litigant is not permitted to be at large by making any number of claims and for the court to be expected to discern the particular *prima facie* right being contended for.

46 The applicants' case in their submissions regarding the *prima facie* right being contended for is equally unclear. It is submitted on their behalf that "The First Applicant has a clear and *prima facie* right to the interim relief sought, grounded in his position as Executive Secretary of AFCONE, governed by the Host Agreement and the Treaty of Pelindaba. His right is based on both domestic and international law." It is further submitted that "The First Applicant has established a clear and *prima facie* right to protect his legal standing under the Host Agreement and the Pelindaba Treaty, which govern his appointment, status and the diplomatic immunities and privileges. The Respondents' actions, particularly the dismissal without adherence to proper legal procedures, are unlawful, and the First Applicant is entitled to interim protection."

47 It is unclear what Mr. Agboraw means in saying he has shown "*a clear and prima facie right.*" This does not make sense. The requirement is that a litigant must establish the existence of a *prima facie* right.

48 The substance of Mr. Agboraw's case for the grant of interim relief is that "The Respondents' actions, particularly the dismissal without adherence to proper legal procedures, are unlawful, and the First Applicant is entitled to interim protection." The substance of "the wrongful act giving rise to the injury" complained of by Mr. Agboraw is the termination of his employment as the AFCONE Executive Secretary. The restoration of immunities and

privileges that he enjoyed are linked to the restoration of his employment. Courts in South Africa cannot determine the lawfulness or otherwise of the termination of his employment. His other complaints are incidental to his dismissal.

49 The dismissal of Mr. Agboraw is purported to have been made within the context of his employment under various international instruments. Those instruments do not lay a basis for the existence of a *prima facie* right cognisable before this court. This court is not competent to say that Mr. Agboraw has established a *prima facie* right by virtue of his averments that his termination was unlawful for lack of authorisation by the Conference of State Parties. The lawfulness or otherwise of his termination is a matter for adjudication pursuant to the various international instruments referenced in the application. This is more so given article 12(2) of the Host Government Agreement, which stipulates that the privileges and immunities conferred on the executive secretary of the AFCONE are not for the personal benefit of the person holding the office, but are conferred in the interest of AFCONE.

50 It bears pointing out that there are no submissions, in the applicants' written argument, that AFCONE established a *prima facie* right. All the submissions are made in the name of "the First Applicant."

- 51 The concept of a *prima facie* right for purposes of interim relief is settled. It is a right to which, if not protected by an interdict, irreparable harm would ensue.⁵
- 52 I am not persuaded that Mr. Agboraw has established such a right. It is unnecessary, strictly considered, for the court to enquire whether the other requirements for the grant of interim relief are met. The court does so for the sake of completion.
- 53 It is submitted that Mr. Agboraw's loss of diplomatic privileges causes irreparable harm and that he is exposed to risks including arrest, detention and prosecution. This was coupled with the issue of balance of convenience, in which it is submitted that the balance of convenience favours granting interim relief.
- 54 Mr. Agboraw never had privileges and immunities that attach to his person. Article 12(2) of the Host Agreement states that immunities and privileges are not for the benefit of individuals, but are granted in the interest of AFCONE. It is beyond the powers of this court as to whether the immunities and privileges that attached to him by virtue of his office were removed unlawfully. That determination is to be made with reference to the several international instruments mentioned in the papers. A finding as to whether there is irreparable harm would require this court to enter a domain which the court should not do.

⁵ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC), para 50

- 55 It is submitted that Mr. Agboraw has no adequate alternative remedy. I disagree. The submissions on behalf of Mr. Agboraw do not mention the fact of Mr. Agboraw having filed process with the AU Administration Tribunal, to challenge the legality of the AU Commission's chairman terminating his employment. No submission was made as to why Mr. Agboraw's referral to the AU Administration Tribunal was not an adequate alternative remedy.
- 56 It bears pointing out, as is the case in paragraph 50, that no submission was made in the written argument in relation to balance of convenience and alternative remedy concerning AFCONE. Submissions were made only in relation to Mr. Agboraw.
- 57 A court would grant interim relief to preserve the status quo. In this application, the applicants seek to preserve the status quo pending review proceedings. The substance of the status quo entails Mr. Agboraw being the Executive Secretary of AFCONE. He says he was unlawfully terminated from that office, leading to him losing immunities and privileges conferred on the holder of that office. The intended review proceedings will have no bearing on the status quo. That is because the review proceedings cannot determine the lawfulness or otherwise of Mr. Agboraw's removal as AFCONE executive secretary. That determination can only be made in terms of the various international instruments as detailed in the papers.
- 58 The review proceedings contemplated in Part B have poor prospects of success. That is because the relief sought in the intended review is contingent on a finding of the lawfulness or otherwise of Mr. Agboraw's

removal from office. As indicated, South African courts are not competent to decide on the lawfulness or otherwise of the termination of Mr. Agboraw's employment.

59 I determine that the applicants have not made out a case for the relief sought in the notice of motion. I order as follows:

59.1 The application is urgent.

59.2 The application is dismissed.

59.3 The first applicant, Mr Enobot Agboraw, is ordered to pay costs.

— [REDACTED] —
O MOOKI

JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

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N Loopoo

Instructed by:

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Instructed by:

The State Attorney

Date heard:

9 September 2024

Date of judgment:

18 September 2024