JUDGMENT OF THE COURT (Fifth Chamber)
29 April 1993 *

In Case C-182/91,

Forafrique Burkinabe SA, represented by Ambroise Arnaud, of the Marseilles Bar, and Jacques Buekenhoudt, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Eric Birden, 5 Rue de la Reine,

applicant,

v

Commission of the European Communities, represented by Hans Peter Hartvig, Legal Adviser, and Sean van Raepenbusch, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment pursuant to the second paragraph of Article 173 of the EEC Treaty and for compensation pursuant to Article 178 and the second paragraph of Article 215 of the Treaty, concerning sums owed to the applicant by the Office National des Puits et Forages (National Board for Wells and Drilling) (Burkina Faso) following subcontracting work carried out by the applicant on behalf of the Board as part of the programmes of the European Development Fund,

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, R. Joliet, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: C. O. Lenz,
Registrar: H. von Holstein,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 December 1992,

after hearing the Opinion of the Advocate General at the sitting on 26 January 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 July 1991, Forafrique Burkinabe SA brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission's decision of 14 June 1991 refusing to give effect to the attachment order issued against it on 6 March 1991 and, under Article 178 and the second paragraph of Article 215 of the Treaty, for an order requiring the Commission to make good the damage which the applicant claims to have sustained by reason of the fact that the Commission continued to make payments from the EDF to the State of Burkina Faso after service of the said attachment order and after being informed that the said State had misappropriated funds.

2 The documents before the Court show that on 25 September 1987 the Community decided, pursuant to the first ACP-EEC Convention signed in Lomé on 28 February 1975 (OJ 1976 L 25, p. 1, 'the Lomé Convention'), to finance, from the resources of the Fourth European Development Fund ('the EDF'), a project submitted by Burkina Faso to provide the rural population of the province of Comoe with 240 wells ('the project').

3 On 18 December 1987 an agreement for financing the project was drawn up by the Community, represented by the Commission, and Burkina Faso pursuant to Article 40 of the Lomé Convention.

4 In connection with the project, an invitation to tender was issued in June 1988 by the State of Burkina Faso for drilling 210 boreholes. In August 1989 the contract was awarded to the Office National des Puits et Forages ('the ONPF'). On 15 December 1989 the ONPF concluded a subcontracting agreement with the applicant for the drilling of 60 exploratory holes, 50 of which were to be productive, as part of the project. The total value of the contract awarded to the applicant was estimated at FCFA 88 837 300. It is common ground that a sum equivalent to 10% of the contract was paid by the ONPF to the applicant on account.

5 It is also common ground that the work was carried out by the applicant to the satisfaction of the State of Burkina Faso and of the Commission. Nevertheless, according to the applicant, the ONPF still has not, at the end of these proceedings before the Court, paid the sums outstanding, which total FCFA 85 112 000, despite the demand for payment addressed to the Director-General of the ONPF on 9 October 1990 by the applicant. Neither the latter nor the Minister for Water Supply of Burkina Faso have contested the existence of the debt to the applicant. On the contrary, they have made promises of payment which the parties agree have not been fulfilled to this day.

6 On 9 October 1990 the applicant also sent a letter to the representative of the European Community in Ouagadougou. In that letter the applicant informed the representative that the sums due under the subcontracting agreement had still not been paid and asked the Commission to take account of this situation when authorizing payments to the ONPF.

7 On 6 March 1991 the applicant, in order to secure its claim, caused a preventive attachment order to be issued against the Commission pursuant to Article 1445 of the Belgian Judicial Code in respect of all amounts owed by the Commission to the State of Burkina Faso, totalling a principal sum of FCFA 85 112 000, together with interest and the costs of attachment. On 11 March 1991 the order was served, through the Belgian Minister of Foreign Affairs, on the Commission which acknowledged receipt by letter of 17 April 1991, without raising any objection.

8 It is common ground that, after the attachment order, the Commission made certain payments to Burkina Faso relating to the contract for 210 boreholes, under the terms of which the applicant had a subcontracting agreement with the ONPF. Furthermore, the Commission made certain other payments to Burkina Faso in respect of other projects in respect of which contracts had been awarded to the ONPF.

9 By letter of 14 June 1991 the Commission informed the applicant that it intended to take no action on the attachment order. This refusal was based on Article 1, third sentence, of the Protocol on the Privileges and Immunities of the European Communities ('the Protocol'), which provides as follows:

'The property and assets of the Community shall not be the subject of any administrative or legal measure of constraint without the authorization of the Court of Justice.'

According to the Commission, the attachment in question would be such as to interfere with the functioning and the independence of the Communities. The Commission has stated that it was for the applicant, if necessary, to seek authorization from the Court of Justice under Article 1 of the Protocol. It is common ground that no proceedings of this nature have been brought before the Court.

The action for annulment

10 In its action the applicant seeks annulment of the Commission's decision, notified on 14 June 1991, refusing to give effect to the attachment order issued against it. In this connection the applicant claims in essence that, in the circumstances of the present case, authorization from the Court to proceed to attachment was not necessary.

11 That argument must be rejected.

12 Pursuant to Article 1 of the Protocol, the property and assets of the Communities may not be the subject of any administrative or legal measure of constraint

without the authorization of the Court. It is clear from the wording of that provision that such immunity is automatic and, in the absence of the authorization of the Court, prevents the execution of any measure of constraint against the Communities, there being no need for the Community institution concerned to rely expressly on Article 1 of the Protocol, in particular by giving notice to the person who caused the order to be issued. Under those circumstances, it is for the latter to seek authorization from the Court to waive immunity. However, if the institution concerned states that it has no objection to the measure of constraint, the application for authorization is devoid of purpose and need not be examined by the Court (see order of the Court in Case 1/87 SA *Universe Tankship* v *Commission* [1987] ECR 2807).

13 It must also be observed that, since the Court's authorization for administrative or legal measures of constraint to be taken is required only with a view to safeguarding the privileges and immunities of the European Communities, the jurisdiction of the Court must, with respect to attachment orders, be confined to considering whether such measures are liable, in view of the effects which they have under the applicable national law, to interfere with the proper functioning and independence of the European Communities. For the rest, attachment proceedings are governed entirely by the applicable national law (*Universe Tankship* order, cited above).

14 It follows that the possibility of attaching a debt under national law is suspended until the immunity of the Communities is lifted, either by waiver on the part of the institution concerned or by authorization of the Court, irrespective of any time-limit laid down by national law.

15 In this case it is common ground that the applicant never applied to the Court for authorization to attach the debt. Nor may the present action for annulment be construed in that sense.

16 However, it is necessary to examine whether the Commission's conduct during the period between the service on it of the attachment order and the dispatch of the letter of 14 June 1991 informing the applicant that it intended to take no action on the order is tantamount to a waiver of the immunity provided for by the Protocol.

17 On that point it must be observed, firstly, that the Commission's letter of 17 April 1991 only contains an acknowledgement of receipt of the attachment order served on it and is not therefore a waiver, which must be express.

18 Secondly, however regrettable it may be that the Commission was so slow in reacting to an order which had been duly served on it by the Ministry of Foreign Affairs of the host country, that conduct cannot be construed as equivalent to an express waiver of the immunity prescribed by the Protocol. It cannot therefore prevent the Commission from pleading immunity at a later stage.

19 It follows that the application for annulment must be dismissed.

The action for compensation

20 In its action for compensation the applicant claims that the unlawful conduct of the Commission caused it damage. According to the applicant, the Commission acted unlawfully, firstly, by not complying with the attachment order and, secondly, and independently of the existence of that order, by continuing EDF payments to the State of Burkina Faso without concerning itself with the proper use of the sums in question, and after having been informed that the applicant had not been paid for its work in connection with the project, by reason of the misappropriation of funds by that State.

21 It must be observed *in limine* that, as the Court has consistently held (see Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 18), it follows from the second paragraph of Article 215 of the Treaty that the Community may incur non-contractual liability and the right to compensation for damage suffered may be given effect only if a series of conditions are satisfied, namely the illegality of the conduct with which the Community institutions are charged, the reality of the damage and the existence of a causal link between that conduct and the alleged damage.

22 As regards the first cause of the alleged damage, namely the Commission's failure to comply with the attachment order, it is sufficient to observe that as long as the Commission has not expressly waived its immunity and as long as it has not been lifted by the Court, the Commission may not be charged with failure to comply with an attachment order, since the immunity it pleads is designed precisely to prevent enforcement of that order.

23 With regard to the second cause, namely the continued payments from the EDF to Burkina Faso, the Court has consistently held (see Case 126/83 *STS Consorzio per Sistemi di Telecomunicazione via Satellite* v *Commission* [1984] ECR 2769 and C-257/90 *Italsolar* v *Commission* [1993] ECR I-9) that public contracts funded by the EDF remain national contracts which the authorities of the ACP States alone are responsible for preparing, negotiating and concluding, that the action taken by the Commission's representatives is only intended to determine whether the conditions of Community financing are fulfilled, and that sub-contractors or persons awarded contracts only have legal relations with the ACP State responsible for the contract.

24 As a result, no allegation of wrongful conduct can be made against the Commission if it pays funds to an ACP State in accordance with the financing conditions prescribed, which in the present case is not disputed by the applicant.

25 The action for compensation must therefore be dismissed.

Costs

26 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Rodríguez Iglesias Joliet

Moitinho de Almeida Grévisse Edward

Delivered in open court in Luxembourg on 29 April 1993.

J.-G. Giraud G. C. Rodríguez Iglesias

Registrar President of the Fifth Chamber