

## IN THE MATTER OF SEBASTIEN GERMAIN AJAVON V. REPUBLIC OF BENIN

APPLICATION NO 013/2017

JUDGEMENT (REPARATIONS) OF 28 NOVEMBRE 2019

## DISSENTING OPINION BY JUDGE GERARD NIYUNGEKO

1. I concur with the decisions of the Court on reparations in favour of the Applicant, *except* for the amount of Thirty Billion (30 000 000 000) CFA Francs granted as reparation of the prejudice for the loss of investment opportunity in the oil sector on the one hand (paragraph iii.5 of the operative part), and on the other, in regard to the amount of Three Billion (3 000 000 000) CFA Francs granted as reparation for moral prejudice suffered by the Applicant (paragraph iv.3 of the operative part). In my opinion, these amounts are excessive and cannot be objectively justified.

**I. Reparation of prejudice relating to the loss of investment opportunity in the oil sector**

2. It emerges from the case file, that in 2016, the Applicant's company, *Common SA*, reached with *Philia Group Ltd*, within the framework of a partnership, a confidentiality agreement to cover all confidential information exchanged between the two structures as regards oil commercialization projects, and then a Memorandum of Understanding (MOU) for the establishment of a roadmap to carry out all the activities related to the two projects through a joint venture platform [paragraph 46 of the Judgement].

3. It further emerges from the case file that as a result of criminal proceedings initiated against the Applicant by the Respondent State in the matter of suspected drug trafficking, *Philia Group Ltd* announced the suspension, with immediate effect, of all ongoing negotiations or commercial discussions with the Applicant in relation to these projects [paragraphs 51 and 52 of the Judgement].

4. As the Court noted, there is no doubt that the Applicant suffered a loss in business opportunities [paragraphs 54 and 55 of the Judgement]. Furthermore, there is no doubt that the Applicant is entitled to reparation in this regard [paragraph 59 of the Judgement].

5. The Applicant claims pecuniary reparation of One Hundred and Fifty Billion (150 000 000 000) CFA Francs [paragraph 60 of the Judgement]. However, as we have noted, the Court granted him a lump sum of Thirty Billion (30 000 000 000) CFA Francs. To justify its decision, the Court stated that it based it, *inter alia*, on the following: the amounts

claimed by the Applicant and the bases of their calculation; the moment when the Applicant's expectations arose; the lump sum nature of this type of reparation; the particular circumstances of the case (the financial capacity of the Applicant; his knowledge of the business world and his reputation); the random nature of any commercial activity; as well as the criteria of fairness and reasonable proportionality [paragraphs 61 to 66 of the Judgement].

6. It is precisely the reasonable nature of the amount granted which however poses a problem. In my opinion, in its assessment of this decisive criterion, the Court omitted: (i) to give the full weight it deserves to the random nature of the investment project initiated by the Applicant, and (ii) to take into consideration the amounts claimed by the same Applicant in regard to other claims for reparation for material prejudice.

7. Regarding *the random nature of the Applicant's investment project*, it would have been necessary, in my view, to seriously consider that the said project was still at the embryonic stage, and that as the Court itself admits, "the sale of petroleum products under the aforesaid projects, had not taken off" [paragraph 55 of the Judgement]. At this stage and under such conditions, an investor may make fabulous plans which may or may not materialize. The investor may gain or lose as well. These forecasts are only a view of the mind. The observation is valid for all investments, and there was no proof that the oil sector would be an exception. We cannot therefore rely on this type of projections, to make a reliable calculation, even if it means granting implicitly a given percentage of the amount claimed.

8. As regards consideration of *the amounts claimed by the same Applicant in relation to the other claims for reparation for material prejudice*, the Court, in my opinion, ought to have considered, as a comparison, the amount that the same Applicant claimed for reparation for loss of profit and devaluation of shares in relation to his companies, stemming from the violation of his rights. From this dual perspective, the Applicant claims a total amount of around Six Billion CFA Francs ( $4\,359\,661\,765 + 1\,960\,526\,692 = 6\,320\,188\,457$ ), and the Court, based on evidence, granted him these amounts, and rightly so [paragraphs 38 and 42 of the Judgement]. From thereon, it is difficult to understand how someone who claims, justifiably so, a reparation of an amount of around Six Billion CFA Francs for damages concerning his companies which have been functioning for many years and were very prosperous (making him a "great businessman" and a "business magnate" in the country), can at the same time claim, for a project which is still at the level of negotiation and which has not gone operational, reparation of an amount about *twenty five times higher* [One Hundred and Fifty Billion], and that the Court goes as far granting him an amount about *five times higher* [Thirty Billion]! How can we still consider, in the circumstances, such an amount as being reasonable, equitable and proportionate? Asking the question is already answering it.

9. In my opinion, by taking into account the random nature of a project which has not yet seen the light of day, on the one hand, and the amounts claimed and granted in relation to the ongoing prosperous projects which have lasted for several years, on the other, it would have been reasonable to grant the Applicant, for reparations of the prejudice resulting from the loss of business opportunities, an amount significantly lower than the one granted in relation to his existing and operational projects.

## **II. Reparation of moral prejudice suffered by the Applicant**

10. The Applicant contends, and the Court notes correctly, that he suffered moral prejudice on two accounts [paragraphs 83 to 87; 91]. First of all, as a result of the damage to his reputation and his image, as an important political figure and a successful businessman at the national and international level, following the criminal proceedings instituted against him for drug trafficking, and in the end following his sentence to twenty years imprisonment. Secondly, as a result of the moral suffering he underwent, made of sadness, anxiety and disarray in seeing his enterprises destroyed and living in exile, as well as the fear to be imprisoned for a period of twenty years.

11. Considering these two aspects, the Applicant claims pecuniary reparation of an amount of One Hundred Billion (100 000 000 000) CFA Francs [paragraph 87], but the Court grants him a lump sum of Three Billion (3 000 000 000) CFA Francs [paragraph 95]. In this regard, the Court holds that "the amount of the reparation to award the Applicant in the instant case, must be commensurate with the gravity of the charge levelled against him and the degree of humiliation and moral suffering he must have endured as a businessman and politician, president of the Employers' Association and a candidate who ranked 3rd in the 2016 presidential election in his country" [paragraph 94 of the Judgement].

12. In my opinion, this amount, though clearly less than what the Applicant claimed, remains excessive, taking into consideration the circumstances of the case. Regarding the *prejudice resulting from the damage to his image and his reputation as a politician and businessman*, this was essentially repaired through the judgement of this Court on the merits of the case on 29 March 2019 [paragraph 292 xxii] which ordered the Respondent State to annul judgement No. 007/3C.COR rendered on 18 October 2018 by *CRIET* so as to erase all its effects. The Court itself recognises "such a measure as a source of moral satisfaction" [paragraph 92], but in my opinion, does not draw all the consequences thereof. In fact, the image and reputation of the Applicant, which had been tarnished by the cases on drug trafficking and the sentence which followed were completely restored in the eyes of his partners, following the above mentioned judgement of this Court, ordering the annulment of the sentence. And the material prejudice resulting

from the same facts had already been taken into account by the Court, so that no other pecuniary compensation should have been granted to him in this regard.

13. The only pecuniary compensation for the Applicant should have been only related to the second aspect of the alleged moral prejudice, that is, *the moral suffering experienced by the Applicant as a result of the anguish resulting from the risk of destruction of his enterprises, his life in exile and the risk of imprisonment if he returned to his country*. And in our opinion, the amount of reparation for this aspect of moral prejudice ought to have been symbolic and far lower than the amount granted by the Court. Here once more, in my opinion, the Court has demonstrated unjustified generosity.

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14. In conclusion on the two issues of disagreement, I hold the view that pecuniary reparation for prejudice legitimately found by the Court must remain what it is, that is, a measure of simple compensation<sup>1</sup>, and not a source of enrichment for the beneficiary.

**Judge Gérard Niyungeko**



<sup>1</sup> See, *inter alia*, *Dictionnaire de droit international*, Jean Salmon, ed., Bruxelles, Bruylant, 2001, p. 975 : "In its general meaning, reparation consists in re-establishing an earlier situation after a prejudice either by reinstating things as they were before or through compensation for the prejudice suffered" [translation is ours].