



**IN THE EAST AFRICAN COURT OF JUSTICE  
FIRST INSTANCE DIVISION  
AT ARUSHA**



(Coram: Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J)

**REFERENCE NO.5 OF 2013**

**BETWEEN**

**MR. GODFREY MAGEZI.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL OF THE  
REPUBLIC UGANDA.....RESPONDENT**

**14<sup>TH</sup> MAY, 2015**

## JUDGMENT OF THE COURT

### A. INTRODUCTION

1. Mr. Geoffrey Magezi (hereafter “*the Applicant*”) is a resident of the Republic of Uganda, a Partner State of the East African Community (hereinafter referred to as “**EAC**”). His address of service for purposes of this Reference is c/o Nyanzi, Kiboneka & Mbabazi Advocates, Plot 103 Buganda Road, P.O. Box 7699, Kampala.
2. On 25<sup>th</sup> July, 2013, the Applicant brought this Reference under Articles 6(d), 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community (hereinafter referred to as “*The Treaty*”) and Rule 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as “*Rules*”). He has sued the Attorney General of the Republic of Uganda in his capacity as the Chief Legal Adviser to the Government as the Respondent, the Inspector General of Government, the Auditor General of Uganda, the Public Procurement and Disposal of Public Assets Authority (PPDA), the National Medical Stores and Quality Chemical Industries Ltd (QCIL), as Interested Parties, for violation and/or infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.
3. On 25<sup>th</sup> November, 2013, he lodged before this court an Amended Statement of Reference in which he discontinued the Reference against the Interested Parties and confirmed the judicial proceedings against the Attorney General only.

### B. REPRESENTATION

4. Mr. Mohamed Mbabazi, represented the Applicant while Mr. Kodoli Wanyama, Principal State Attorney, George Karemera, Senior State

Attorney, and Mr. Bichachi Ojiambo, State Attorney represented the Respondent.

### **C. FACTUAL BACKGROUND**

5. At a time when in Uganda access to the treatment of HIV/AIDS was almost impossible to the poor and malaria was at its peak, the Government of Uganda (the “*Government*”) conceived the establishment of a pharmaceutical factory to manufacture drugs to treat illnesses in that country. Therefore, the Government and **QCIL**, a Private Limited Company incorporated in accordance with Ugandan Laws and Regulations, signed a Memorandum of Understanding (The “*MoU*”) on 14<sup>th</sup> December, 2005, under which the off-take purchase of Antiretroviral (“*ARVs*”) and anti-malaria drugs from **QCIL** by the Government was guaranteed until 2019. A guarantee to QCIL was also issued on the same date and both the MoU and the Guarantee provided that QCIL shall construct a pharmaceutical drugs and products factory which shall carry out the manufacture of ARVs and Anti malaria drugs.
6. The MoU provided that the Government shall purchase the drugs from the QCIL Plant in Uganda before the construction of the factory was completed and the drugs manufactured. Moreover, it was agreed that the prices of those drugs would be equal to or less than the prices provided in a joint UNICEF-UNAID-WHO-MSF Project.
7. Prior to the completion of the construction of the aforesaid factory in 2007, the Applicant alleged that he discovered that the Government, through the National Medical Stores had procured drugs from QCIL imported from India and which were at an unjustified 15% mark-up of international prices and that this act had caused a financial loss of

**USD17,826,038.94** to the public. The Applicant also alleged that acting as a whistle-blower, he brought that malpractice to the attention of the Inspector General of the Government (hereinafter referred to as “the **IGG**”) who started investigations and produced a report that confirmed the said loss.

8. In her report, the IGG recommended to the Government to consider recovery of the payments made above the 15% mark-up for drugs purchased illegally from QCIL, which amounted to **USD17,826,038.94**.
9. Whereas the Applicant expected a reward in accordance with Article 19 of Whistle-blowers Protection Act, 2010 and in the light of the conclusions and recommendations of the IGG, the latter, by a turnabout, reviewed her conclusions related to the recovery of the alleged loss highlighted in the aforesaid report, hence the filing of this Reference.

#### **D. THE APPLICANTS' CASE**

10. The Applicant's case is contained in his Amended Reference, his reply to the Respondent's Response filed on 20<sup>th</sup> May, 2014, his Affidavit sworn on 17<sup>th</sup> June, 2014, his written submissions filed on 17<sup>th</sup> November, 2014 and his rejoinder to the Respondent's submissions filed on the 12<sup>th</sup> January, 2015. In summary, the Applicant's case is as follows:-

- In the course of the year 2009, the Applicant got information alleging that the Government of Uganda, through the National Medical Stores procured ARVs under the MoU dated 14<sup>th</sup> December, 2005 between the Government of Uganda and QCIL

at non-competitive prices contrary to the spirit of the PPDA and Regulations governing Public Procurements;

- On 25<sup>th</sup> April, 2010, the Applicant instructed his Lawyers to gather all the information pertaining to all procurements made by the National Medical Stores from QCIL. Thereafter, and upon receipt of the information required, the Applicant analysed price information in the procurement and discovered irregularities in the implementation of the MoU between the Government and QCIL Ltd. He then disclosed the information to the Inspectorate of Government in accordance with the provisions of the Whistle-blowers Protection Act, No.6 of 2010. Later on, the Inspectorate acknowledged the Applicant's disclosure and pledged that it would investigate and take appropriate action. The disclosure touched on acts of corruption, abuse of office, misappropriation, illicit enrichment, plunder and wastage of government resources by the Government of Uganda and/or its officials, servants and agents in complicity with QCIL;
- The investigation by the IGG led to the conclusion of a loss by the Government of Uganda of USD17,826,038.94 in four transactions carried out between December, 2009 and October, 2010 due to inflated prices and thus the IGG made recommendations on the appropriate action to be taken by the Government in redress of the malpractices and illicit transactions contained in the IGG's Report;
- Following the report issued on 20<sup>th</sup> December, 2011 and in accordance with Section 1 of the Whistle-blowers Protection

Act, the Applicant as a whistle-blower expected a reward of 5% of the net liquidated sum of money upon the disclosure to the IGG. Both the Whistle-blowers Protection Act and Inspectorate of Government Act, 2002 provide for such a reward;

- On 22<sup>nd</sup> October, 2012, the Applicant wrote to the IGG seeking an update on the implementation of the IGG's recommendations and more specifically the reward provided for under the Whistle-blowers Protection Act. In her response dated 14<sup>th</sup> December 2012 to the Applicant, the Inspector General of Government advised the Applicant to approach the Attorney General of Uganda who, in his legal capacity of legal representative of Government, has the obligation and necessary resources to implement the IGG's recommendations and to satisfy the Applicant's Claim;
- In the light of the above advice, the Applicant wrote to the Attorney General requesting to be updated on the status of the implementation of the IGG's report and recommendations but to date, the Attorney General has never responded to that letter. Instead, the Applicant discovered various letters with contradictory positions in regard to the aforesaid implementation and no appropriate action has so far been taken with regard to the implementation of the IGG's report and recommendations;
- Later on by letter dated 8<sup>th</sup> July, 2013, the IGG overturned her recommendations and considered that there was no need to recover the amount of **USD17,826,038.94**. The Applicant alleged that, the turnabout by the Inspectorate of the

Government is inconsistent with Articles 6(d), 7(2) and 8(1)(c) of the Treaty; and

- Finally, the Applicant has sought the declaratory Orders as set out in the Amended Reference.

## **E. THE RESPONDENT'S CASE**

11. The Respondent's case is contained in his Response to the Amended Reference filed on 7<sup>th</sup> February, 2014 supported by the Affidavit sworn by one, Richard Kiggundu, Finance Manager of the QCIL on 11<sup>th</sup> July, 2014 and the Affidavit dated 29<sup>th</sup> July, 2014 sworn by one Ms. Jane Aceng, the Director General of Health Services in the Ministry of Health, in the Republic of Uganda and mainly in his written submissions filed on 23<sup>rd</sup> December, 2014.

12. In a nutshell, his case is as follows:-

- A MoU and a Guarantee between the Government of Uganda and QCIL Ltd was signed on 14<sup>th</sup> December, 2005 and amended on 16<sup>th</sup> April, 2012;
- The Applicant indeed made a disclosure of alleged malpractices that occurred between the National Medical Stores and QCIL Ltd;
- The IGG carried out investigations and produced a report on 20<sup>th</sup> December 2011;
- In the follow-up of the recommendations made by the Inspectorate of Government Unit, the IGG sought an update on the implementation of the recommendations and the Attorney General of Uganda on 12<sup>th</sup> April, 2012 and 27<sup>th</sup> May, 2013

issued two legal opinions stating in particular that there was no loss caused to Government by the supply of ARVs, ACTs and other drugs by QCIL Ltd;

- The Attorney General, by issuing his legal opinion, acted within his constitutional powers and that cannot be said to have contravened the principles of good governance, democracy and rule of law;
- The Attorney General independently and within his constitutional mandate analysed all relevant facts in the report and shared his conclusions with the IGG. He then evaluated the IGG's recommendations for their appropriate implementation;
- The IGG does not require any consent or approval of any authority to discontinue proceedings as provided under Section 14(8) of the Inspectorate of Government Act, 2002;
- The Attorney General exercised his constitutional mandate in issuing the aforesaid legal opinion and in doing so, he neither altered the IGG's report nor influenced the Inspectorate of Government;
- The Respondent would raise a preliminary objection as to whether matters in the Reference are proper questions for the interpretation or infringement of the Treaty; and
- The Reference has no merit and should be dismissed.

## **F. SCHEDULING CONFERENCE**

13. On 3<sup>rd</sup> June, 2014, a Scheduling Conference was held by the Court where Parties appeared and the following were designed as points of disagreement or issues for determination:-

- i) Whether this is a matter of interpretation before this Honourable Court pursuant to Articles 27(1), 30(1) and (3) of the Treaty;*
- ii) Whether this Honourable Court can find against an entity that is not a Party to this Reference and specifically Quality Chemical Industries Ltd;*
- iii) Whether the content and the implications of the Inspectorate of Government's letter dated 8<sup>th</sup> July, 2013 was in breach of Principles of good governance, rule of law, accountability and transparency contrary to the provisions of Articles 6(d), 7(2) and 8(1)(c ) of the Treaty;*
- iv) Whether there was any loss of USD17,826,038.94 by the Government of Uganda and Quality Chemicals Limited;*
- v) Whether there was inaction, refusal/or failure by the Government of Uganda to recover USD17,826,038.94 from Quality Chemical Industries Limited; and*
- vi) What reliefs are available to the Parties?*

## **G. DETERMINATION OF THE ISSUES**

14. We have considered the Reference in the context of the pleadings and Submissions made by the Applicant and Respondent, and here below we now address the issues in contention.

15. In doing so, we have in mind that the two first issues were raised as preliminary objections by the Respondent. Since those issues have been distilled as issues for determination, we think it is prudent to address them one by one as they were agreed upon during the Scheduling Conference.

**ISSUE NO.1: Whether this is a Matter for Interpretation before this Honourable Court pursuant to Articles 27(1) and 30(1) & (3) of the Treaty:**

16. First and foremost, surprising as it may be, the Applicant shied away from submitting on the above issue in his written submissions, but rather, he opted to await and counter the written submissions thereof by the Respondent since he is the one who raised that issue as a preliminary objection.

**THE APPLICANT'S SUBMISSIONS**

17. The Applicant, when he finally addressed the Court on this issue in his Rejoinder to the Respondent's written Submissions, submitted that the jurisdiction and mandate of the Court is clearly stated in the Treaty and that in the context of the Reference, the Court is under obligation to determine whether the acts of the Attorney General of Uganda and the IGG, through their respective letters breached Treaty provisions. The Applicant added that it was for that reason that he challenged the legality of the acts of the IGG through his letter dated 8<sup>th</sup> July, 2013.

18. In conclusion, the Applicant submitted that the preliminary objections should be dismissed and he invited the Court to answer the said issue in the affirmative.

## THE RESPONDENT'S SUBMISSIONS

19. In his Response to the Amended Reference, the Respondent on his part contended that he would raise a preliminary objection to the extent that the matters complained of by the Applicant are not issues for interpretation by this Court. Instead, that the facts complained of are questions to do with interpretation of a contract between two Parties which is a preserve of the National Courts.
20. Through his written Submissions filed on 23<sup>rd</sup> December, 2014, the Respondent submitted that the Reference does not contain any question for interpretation, or infringement of Treaty provisions and went as far to argue that the Applicant is challenging the powers of the IGG and the Attorney General of Uganda provided for under Articles 119 and 225 of the Constitution of Uganda which is outside the jurisdiction of this Court.
21. It was the Respondent's further submission that the Applicant has attempted to use the Court as an Appellate Court to overrule the decisions of the Inspectorate of Government and the Attorney General's legal opinion which is an abuse of process of Court as provided under Rule 47(c) of the Rules. The Respondent further argued that the facts challenged by the Applicant did not demonstrate a *prima facie* case of any breach of the Treaty by the Republic of Uganda or any cause of action under the Treaty.
22. In conclusion, the Respondent cited the Cases of **Modern Holdings limited vs. Kenya Ports Authority, EACJ Reference No.1 of 2008** and **James Katabazi & 21 Others vs. The Secretary General of the EAC and The Attorney General of the Republic of Uganda**

**Reference No.1 of 2007** in support of his Submissions and prayed that Issue No.1 be answered in the negative.

### **DETERMINATION ON ISSUE NO.1**

**23.** The above issue is: Whether this is a Matter for Interpretation before this Honourable Court pursuant to Articles 27(1) and 30(1) & (3) of the Treaty. Put another way; whether this Court has jurisdiction to entertain the Reference in accordance with the aforesaid Articles. At the outset, and for the sake of clarity, we hereunder reproduce Articles 27 (1), 30(1) & (3) of the Treaty.

**24.** Article 27(1) reads as follows:-

**“The Court shall initially have jurisdiction over the interpretation and application of this Treaty:**

***Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on Organs of Partner States.”***

**25.** At this juncture, we may pause and ask ourselves whether the terms of this Article as they are framed need further clarification. It is common knowledge that this Court is vested with jurisdiction over interpretation and application of the Treaty save for the proviso enshrined in the above Article.

**26.** Article 30 provides as follows:-

***“1. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation,***

*directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty;*

2. ....

**3. *The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.***"

**27.** To dispel any misunderstanding among the Parties, let us spell out from the Articles the conditions for any person to bring a Reference before this Court. Any plain reading of the aforementioned Article underscores that prior to submitting a Reference before the Court, any person must meet the following conditions:-

*a) Be a legal or natural person; and*

*b) Be resident of an EAC Partner State; and*

*c) Is challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community.*

**28.** Having said so, what are the matters challenged in the Reference by the Applicant? The Applicant is seeking the interpretation of the Treaty as to whether the letter of the IGG dated 8<sup>th</sup> July, 2013, as well as the legal opinions of the Attorney General dated **12<sup>th</sup> April, 2012 and 27<sup>th</sup> May, 2013** infringed Articles 6(d), 7(2) and 8(1)(c ) of the Treaty.

29. At this stage, Mr. Godfrey Magezi is indeed, a natural person, a resident of Uganda, and the Republic of Uganda is a Partner State in the meaning of Article 1 of the Treaty and the Applicant is challenging the legality of the actions of the Attorney General and IGG of Uganda through their aforesaid letters.

30. With respect to the Respondent, it is our view that the matters raised in the Reference do meet the requirements laid down in the above Articles and as to whether the Reference is well or ill-founded is immaterial at this point.

31. Previously, this Court has on constant objections as to lack of jurisdiction held and invariably so in **James Katabazi & 21 Others vs. the Secretary General of the EAC and The Attorney General of the Republic of Uganda, EACJ Reference No.1 of 2007** and in **Samuel Mukira Mohochi, Reference No.5 of 2011** that it has jurisdiction over interpretation of the Treaty.

32. In **Mukira Mohochi**, the Court found that:-

***“..... This Court does have jurisdiction to interpret and apply any and all provisions of the Treaty save for those excepted by the provisions to Article 27.”***

33. Further, in the same judgment, the Court added that:-

***”.....It is that alleged infringement which through interpretation of the Treaty under Article 27(1) constitutes the cause of action in the instant Reference, and consequently, establishes the legal foundation of the jurisdiction of this Court in this Reference.”***

34. From the foregoing, we are of the firm view that since there is before us a person who can sue and another who can be sued and that, once all alleged acts are placed before us for interrogation as has happened in this Reference, then a cause of action has arisen.
35. With regard to Article 30(3) of the Treaty in relation to the mandate of the Inspectorate of Government of Uganda, we hasten to say that this Court is not going to interfere in any way with the report of the IGG because it lies outside the province of our jurisdiction.
36. However, the mere inclusion of some aspects of the IGG's report in the Reference cannot prevent the Court from exercising its jurisdiction where the Applicant alleges that the actions of the Respondent have violated Treaty provisions.
37. In view of the foregoing, we find and hold that the Reference is properly before this Court.

**ISSUE NO.2: Whether this Honourable Court can find against an entity that is not a Party to this Reference and specifically Quality Chemical Industries Limited:**

38. Prior to the Amended Statement of Reference being filed, QCIL was one of the five Interested Parties. Upon the amendment of the Reference, QCIL ceased to appear as such and now the question is whether the Court can make decisions which are to affect a party which did not participate in the proceedings. In his rejoinder dated 12<sup>th</sup> January, 2015, the Applicant on this issue submitted that:-
- There is no Reference against QCIL and consequently, the Court cannot find against a non-Party;

- The finding of the Court that would affect QCIL is the issue of the loss of **USD17,826,038.94** which in the Applicant's Submissions is not justiciable before this Court;
- The mandate of the Court is to interpret the contents of the letter dated 8<sup>th</sup> July, 2013 and inaction of the Attorney General of Uganda to implement the IGG's recommendations;
- The recovery of the aforesaid sum of money is not sought from the Court, but rather to determine whether the purported recovery and/or inaction and failure to recover by the Government is inconsistent with Articles 6(d), 7(2) and 8(1) (c) of the Treaty;
- The Respondent in his submissions has not shown clearly how QCIL would be affected by the Court's findings and the submissions are purely speculative;
- In conclusion, the Applicant invited the Court to interpret and make declaration that, the acts and inaction of the Respondent in the context of the violation of the Treaty and dismiss the objection framed in Issue No.2.

### **THE RESPONDENT'S SUBMISSIONS**

**39.** The Respondent submitted on Issue No.2 that it would be unfair and a violation of the principles of natural justice to find against a *third party*; not party to the Reference. He further argued that a fair and impartial trial would involve a hearing by an impartial and disinterested tribunal, the right to be present or be represented by an advocate, to present its defence supported by evidence. In support of his submissions, he cited **Modern Holdings (EA) Limited Vs. Kenya**

**Ports Authority EACJ Reference No.1 of 2008, Carolyne Turyatempa & 4 Others Vs. Attorney General and Another, Constitutional Petition No.15 of 2006 and Kampala Bottlers vs. Damanico (U) Ltd Supreme Court Civil Appeal No.22 of 1992.**

40. In conclusion, the Respondent invited the Court to adopt the authorities cited and apply them to the above case, and answer the Issue No.2 in the negative.

### **DETERMINATION ON ISSUE NO.2**

41. The question sends us back to the Principle of natural justice based on a fair hearing in any judicial proceeding. It follows that any party to a judicial proceeding has a fundamental right to be informed of a proceeding against him or her and to consider, challenge or contradict any evidence in that proceeding.

42. On 17<sup>th</sup> February, 2015 when the Court heard this Reference, the Applicant highlighted his written submissions and conceded on that issue by saying:-

***“Correct my Lords, but I had already put a rider in the beginning of that issue, one is irrelevant and diversionary.”***

43. In his rejoinder, the Applicant clearly adopted the authority of **Carolyn Turyatempa** [*supra*] and averred that it favoured him. The relevant finding held by the Constitutional Court is that:-

***“..... it is incompetent in respect of those reliefs, which if granted, would affect the interests of the third Parties in the suit lands, yet the third Parties are not Parties to this Petition.”***

44. The principles of fairness and natural justice abhor finding against a party which has not been given an opportunity to present its case. In fact, the above principles comprise among others:-

- The right to be informed of charges;
- The right to a fair hearing; and
- The right to be given an opportunity to defend his/her case personally or to be represented.

45. In light of the above principles, to make any adverse order against QCIL without hearing it would be against the principle of natural justice and we decline the invitation to do so.

46. Therefore, Issue No.2 is answered in the negative.

**ISSUE NO.3: Whether the Content and the Implications of the Inspectorate of Government's Letter dated 8<sup>th</sup> July, 2013 was in breach of Principles of Good Governance, Rule of Law, Accountability and Transparency contrary to the Provisions of Articles 6(d), 7(2) and 8(1)(c ) of the Treaty:**

47. From the outset, we hasten to state that the gist of the Reference gravitates around the above issue. It is indeed, the respective letters of the Attorney General of Uganda and the IGG that are the bone of contention between the Parties in the Reference.

**THE APPLICANTS'S SUBMISSIONS**

48. It is the Applicant's submissions that, upon his disclosure of impropriety in the implementation of the MoU between the Government of Uganda and the QCIL, the IGG carried out investigations and discovered malpractices. The IGG then reported and at the same time recommended that:-

***“1. The Attorney General should as a matter of urgency cause the review of the prices of drugs purchased under the Memorandum of Understanding with a view to ensuring that drugs purchased from CIPLA Ltd are purchased at prices not higher than International prices, and drugs purchased from QCIL are not more than 15% higher than CIPLA International prices;***

***2. The Government of Uganda and QCIL should review the need for further importation of drugs as the QCIL plant in Uganda has already been commissioned; and***

***3. The Government of Uganda should consider recovery of the payments made above the 15% mark-up for drugs purchased from QCIL and payments for drugs purchased from CIPLA at prices above CIPLA International prices which amounted to USD17,826,038.94 for drugs procured between December 2009 and October 2010, and subsequent procurements which have not been calculated under this investigation” (see Amended Statement of Reference pp. 49-50).***

**49.** It is the Applicant’s further submission that, upon receipt of a copy of the IGG report and recommendations, the Attorney General instead of implementing the latter went ahead to criticize it on various dates:-

Firstly, on 12<sup>th</sup> April, 2012, the Attorney General wrote to the Inspector General of Government complaining about the content of the report and specifically saying that QCIL did not take advantage of the statutory 15% local content advantage. The Attorney General added that the Whistle-blower, Mr. Godfrey Magezi, being a representative of M/S Ajanta

Pharmacy which had been supplying Anti-retroviral and Malaria drugs to the Ministry of Health, was motivated by business rivalry. Therefore, any information disclosed to the IGG about the impropriety in question should have been subject to criticism. The Attorney General concluded by stating that as long as the IGG did not bring out any wrong doing on the part of QCIL, the MoU could not be amended;

Secondly, on 29<sup>th</sup> May, 2013, through a letter addressed to the Health Minister and copied to the IGG, the Deputy Attorney General indicated that:-

***“Pursuit of recovery of USD17,826,038.94 recommended by the IGG is without basis and will be an exercise in futility which will expose Government paying heavy damages and costs.”***

With reference to the aforesaid letters, the IGG on 8<sup>th</sup> July, 2013 wrote to the Minister of Health stating that:-

***“.....the Inspectorate deems the review and amendment of the Original MoU, and the execution of the Amended MoU and Guarantee on 16<sup>th</sup> April, 2012, to be adequate implementation of all recommendations contained in the report and deems the matter closed.”***

**50.** It was the Applicant’s argument that the IGG’s letter constituted a turn-about caused by the Attorney General’s rejection of the report and that in doing so, the office of the IGG abdicated its constitutional and statutory mandates.

51. The Applicant submitted that the Attorney General has no powers to review the IGG's report as long as the mandate of the IGG derives from the Constitution. Had he such a power, the Attorney General should have applied it to other investigations carried out by the Inspectorate of Government instead of being selective and unequal by quashing one report only without any legal basis or criteria, argued the Applicant.

He contended that once he has made a disclosure followed by investigations and findings of impropriety under the Whistle-blowers Protection, the only action that should have been taken was the one appropriate in accordance with Section 8 of the above Act to the extent that the Applicant expected to be rewarded.

52. The Applicant therefore asserted that the actions of both the IGG and Attorney General constituted an infringement and a breach of the principles of good governance, accountability and rule of law as provided for under Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

53. In support of his submissions, the Applicant relied on the authorities of **James Katabazi & 21 Others vs. Secretary General of the East African Community and the Attorney General of the Republic of Uganda EACJ Reference No.1 of 2007**, **Smit Indira Nehru Gandhi vs. Shri Raj Narain & Anathor Air 1975 SC 2299 Supp SCC or 19762 SCR 347** and **HEABC vs. Facilities Subsector Bargaining Association 2004 BCSC 603** as well as on the definition of good governance, accountability and rule of law in those decisions.

54. In conclusion, the Applicant invited this Court to find Issue No.3 in the affirmative.

## **THE RESPONDENT'S SUBMISSIONS**

55. The Respondent on his part submitted that both the IGG and the Attorney General of Uganda acted within their respective constitutional and statutory mandates.

56. He further argued that the IGG derives powers from the Constitution and the Laws of Uganda and pointed out that more specifically, Section 14(5) and (6) of the IGG Act provides that:-

***“5. The Inspectorate shall have powers to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of Authority or public office.***

***6. The Inspector General, may during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances.”***

57. In respect of the 1995 Constitution of the Republic of Uganda, the Respondent stated that Article 230(1) & (2) reads:-

***“1. The Inspector General of Government shall have power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, , abuse of authority or of public office.***

***2. The Inspector General of Government may, during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances.”***

58. The Respondent then averred that the IGG applied the above provisions while discharging her duties and in so doing, did not in any way operate outside the principles of good governance, democracy and rule of law. He added that the various authorities and legal sources quoted by the Applicant have been cited out of context but he agreed with the definition of rule of law as laid down in **James Katabazi** [supra].

59. Regarding the Attorney General's legal opinion, the Respondent further submitted that his advice did not in any way hinder the IGG's powers to the extent that he exercised his constitutional mandate under Article 119(3) and (4) of the Uganda Constitution. The Respondent asserted that upon further scrutiny of the IGG report, he wrote down his legal opinion and forwarded it to the IGG who, after consideration, reviewed her recommendations.

60. The Respondent further pointed out that he did not quash, set aside or nullify the IGG's recommendations but rather that he scrutinized the report and came up with appropriate advice in the light of his constitutional mandate. In support of his submissions, the Respondent cited a number of authorities including the Case of **Jim Muhwezi & 3 ORS vs. Attorney General & ANOR, Constitutional Petition No.10 of 2008** where the Applicant had alleged that it was unconstitutional for the President of the Republic of Uganda to direct the IGG to investigate any matter. The Constitutional Court indeed found that the IGG has a plain exercise of discretion on whether or not to investigate any matter and stated so in clear terms as follows:-

***“....the President did all these in the impugned letter to the IGG. He like anyone else has the right to make a complaint to***

***the IGG. It is the absolute right of the IGG to investigate and determine how to do it. Whether the President “directs” or “instructs” the IGG is in my opinion of no consequence since the Office of the IGG is independent and the IGG must take the decision independently whether to investigate and how to investigate.***

***.....He will most likely use the terms of command like “direct”, “order” or “instruct”, even where the officer ordered, directed or instructed has the powers under the Constitution to choose or to act or not to act.”***

**61.** The Respondent therefore submitted that his legal opinion did not amount to a directive or an order to the IGG in as far as the IGG is constitutionally clothed with the powers to decide what actions she would take. In light of the foregoing, the Respondent invited the Court to answer Issue No.3 in the negative.

### **DETERMINATION ON ISSUE NO.3**

**62.** The issue before us is neither an issue of the IGG’s report nor of the content of the report, but an issue of consistency of the aforesaid letters of the IGG and Attorney General of the Republic of Uganda with Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

**63.** From the onset and for the sake of clarity, it is important to recall the contents of the above Articles of the Treaty.

Article 6(d) reads as follows:-

***“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:-***

***(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender, equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.***

Article 7(2) of the Treaty reads:-

***“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”***

Lastly, Article 8(1)(c) states that:-

***“The Partner States shall abstain from any measures likely to jeopardize the achievement of the objectives or the implementation of the provisions of this Treaty.”***

**64.** In his submissions, the Applicant submitted and insisted on the definition of good governance, democracy and rule of law as the basis of his Reference whereas the Respondent argued that the above definitions were cited out of context save for the one laid down in **James Katabazi** [*supra*] where this Court found that:-

***“The rule of law requires the government to exercise its powers in accordance with well-established and clear rules, regulations and legal principles .... when a government official acts, pursuant to an express provision of a written law, he acts within the rule of law.”***

65. The nexus between Articles 6(d) and 7(2) of the Treaty lies in the principles of good governance, democracy and rule of law which are not detailed anywhere else in the Treaty.

66. In its 1992 report entitled **“Governance and Development”**, the World Bank defined good governance as **“the manner in which power is exercised in the management of a country’s economic and social resources for development.”**

67. The International Fund for Agricultural Development (IFAD) in the Sixty-Seventh Session of its Executive Board described the essence of good governance as **“predictable, open and enlightened policy, together with a bureaucracy imbued with a professional ethos and an executive arm of government accountable for its actions. All these elements are present in a strong civil society participating in public affairs, where all members of the society act under the rule of law”** [emphasis added].

68. For the International Development Association (IDA), good governance can be assessed on the following four major pillars or principles:-

- Accountability;
- Transparency;
- The rule of law; and
- Participation.

69. As regards the principles of democracy, the International Covenant on Civil and Political Rights (December, 1966) provides for the following rights as expressive of a true democracy:-

- Freedom of expression under Article 19;

- The right of peaceful assembly under Article 21;
- The right to freedom of association with others under Article 22;
- The right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives under Article 25.

70. Needless to say that the above Covenant is binding on the Republic of Uganda because it has signed and ratified the same.

71. The Fifty-ninth Session of the United Nations' General Assembly of 23<sup>rd</sup> March, 2005 declared that “the essential elements of democracy include respect for human rights and fundamental freedoms, *inter alia* freedom of association and peaceful assembly and of expression and opinion, and **the right to take part in the conduct of public affairs, directly or through freely chosen representatives,** to vote and to be elected at genuine periodic free election by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as pluralistic system of political parties and organisations, **respect for the rule of law, the separation of powers, the independence of judiciary, transparency and accountability in public administration ....**”  
[emphasis added]

72. The common linkages that can be deduced from those principles are, **rule of law and equity before the law**. It is our understanding that the rule of law, democracy and good governance are the major features of a civilized society and as such, the rule of law provides the general framework for good governance. Rule of law implies that every citizen is subject to the law including the lawmakers. Put another way and specifically in the context of this Reference, it means

that the IGG as well as the Attorney General of Uganda are bound by the Rule of Law.

**73.** Having said so, it is our obligation to determine whether the letter of the IGG and the legal opinion of the Attorney General of Uganda infringed Treaty provisions. Sadly, the Applicant did not elaborate enough on that issue and therefore, it is vital on our part to peruse the powers vested on the IGG by the constitution of Uganda, 1995, the Inspectorate of Government Act, 2002 and the Constitutional powers of the Attorney General as well as the IGG's letter dated 8<sup>th</sup> July, 2013 and the two legal opinions from the Attorney General. We will thereafter confront them with the aforesaid Treaty provisions.

**74.** It is the Applicant's submission that the Attorney General, through his legal opinion, usurped the powers of Parliament to make law by settling himself as the appellate body to review the findings and recommendations of the IGG which amounted to a violation of the Constitution of Uganda and Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

**75.** Article 119(3) and (4) of the Constitution of Uganda reads as follows:-

***“3 The Attorney General shall be the principal legal adviser of the Government;-***

***4 The functions of the Attorney General shall include the following:-***

***a) To give legal advice and legal services to the Government on any subject;***

- b) To draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party of in respect of which the Government has an interest;**
- c) To represent the Government in Court or any other legal proceedings to which the Government is a party; and**
- d) To perform such other functions as may be assigned to him or her by the President or by Law.”**

76. In his letter dated 12<sup>th</sup> April, 2012 and addressed to the Inspector General of Government, the Attorney General explained the content of the MoU between the Government and the QCIL and concluded by stressing as follows:-

**“However, before the clearance could be issued, the IGG informally requested the Solicitor General to stay the clearance for, it is stated there was an on-going inquiry.**

**If the enquiry referred to be the one comprised in the report forwarded, there is no bar to this office clearing the draft Memorandum of Understanding .....**

**As long as you have not formally brought to our notice any wrong doing on the party of M/S Quality Chemical Industries Limited, the current Memorandum of Understanding is cleared with the comments.**

**Your office can still go ahead with the investigations if you so wish.”**

77. From the above statement, we do not see any single word that amounts to a review or quashing of the IGG’s report and the

Applicant did not give any evidence to back his assertions at all. We are of the firm view therefore that the Attorney General acted within the legal framework and that his actions are not inconsistent with the rule of law as the Applicant has argued.

78. The Inspectorate of Government Act, 2002 gives special powers to the IGG in the exercise of his/her mandate. Indeed Section 14(6) of the Inspectorate of Government Act, 2002 spells out that:-

***“The Inspector General may, during the course of his or her duties or as consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances.”***

79. Section 14(8) goes further and states as follows:-

***“Notwithstanding any law, the Inspectorate shall not require the consent or approval of any person or authority to prosecute, or discontinue proceedings instituted by the Inspectorate.”***

80. We observe that these provisions are well framed and provide for functional independence.

81. Further and more importantly, Article 230 of Uganda Constitution, 1995 provide for special powers of the Inspectorate of Government and it reads as follows:-

***“The Inspector General of Government may, during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances.”***

- 82.** Such a provision especially provided for under the Constitution gives more powers and strength to the IGG to the extent that he or she can act independently. In the same vein, we note that the IGG wrote to the Attorney General pointing out that the review and amendment of the original MoU and the execution of the Amended MoU and Guarantee on 16th April, 2012 are adequate implementation of all recommendations contained in the report. In so doing, the IGG applied special powers conferred by the Constitution and that is consistent with the rule of law.
- 83.** The Applicant has never challenged the Inspectorate of Government Act, 2002 for being inconsistent with Articles 6(d), 7(2) and 8(1) (c) of the Treaty. Turning back to Article 8(1) (c) of the Treaty therefore, we have not found any submission from the Applicant in respect of violation of the Treaty and by any stretch of imagination, we do not see how the aforesaid IGG's letter jeopardised the achievement of the objectives of the implementation of the Treaty.
- 84.** Another salient issue that was raised by the Applicant is that the IGG's change of mind was caused by the rejection of the report by the Attorney General.
- 85.** On that issue, we only need to say that the Attorney General did not perform any function which altered the IGG's powers as set out in Article 230 of the Uganda Constitution. Moreover, the legal advice of the Attorney General is merely advisory rather than binding on the IGG.
- 86.** On the mandate of the Attorney General, the Supreme Court of India held in the case of **Mr. Shri Mani Ram Sharma and Others**

No.001322 vs. the Attorney General of India on 10<sup>th</sup> December, 2012 that:-

***“..... the duty of the Attorney General is to render advice to the Government of India on legal matters. Viewed thus, he cannot be said to be an authority as he does not perform any functions which alter the relations or rights of others. The advice rendered by him may be accepted by the Government of India or it may not be accepted. His advice per se does not have a binding effect”*** [emphasis added]

87. We fully associate ourselves with the above authority as well as the findings in the case of **Jim Muhwezi & 3 ORS vs. Attorney General and Anor, Constitutional Petition No.10 of 2008**. [supra]

88. Consequently and in view of all the foregoing, we hold and find Issue No.3 in the negative.

**ISSUE NO.4: Whether there was any Loss of USD17,826,038.94 by the Government of Uganda and Quality Chemical Limited:**

89. The paramount question herein is whether this is an issue to be determined by this Court.

#### **THE APPLICANT'S SUBMISSIONS**

90. To begin with, Counsel for the Applicant submitted that there is unfortunately no provision under the Treaty that clothes the Court with jurisdiction to ascertain whether there was such a loss or not. Consequently, he submitted that the Court should dismiss Issue No.4 for lack of jurisdiction.

## **THE RESPONDENT'S SUBMISSIONS**

91. Counsel for the Respondent on his part argued that the Applicant's case as well as his submissions are premised on the alleged inaction or failure by the Government to recover a huge loss of money. Therefore, Counsel for the Respondent submitted that the Applicant should demonstrate such a loss with enough evidence otherwise the Government cannot be blamed for any hypothetical inaction or failure.
92. In conclusion, Counsel for the Respondent invited the Court to find that there was no loss of **USD17,826,038.94** by Government of Uganda to QCIL.

## **DETERMINATION ON ISSUE NO.4**

93. We have considered the submissions from all the Parties and at this stage, we have to opine as follows:-

This issue is not a standalone question rather it has to be read and understood in the context of Issue No.3. That is to say that, once we have determined Issue No.3 in the negative, Issue No.4 is no longer alive to the extent that those two Issues are intertwined.

94. In any event, we have no jurisdiction to determine such a matter.

## **ISSUE NO.5: Whether there was Inaction, Refusal/or Failure by the Government of Uganda to recover USD17,826,038.94 from Quality Chemical Industries Limited:**

95. This Issue is a corollary of the two foregoing issues in so far as it cannot be read and interpreted in isolation. Once we have determined that there has been no violation of Articles 6(d), 7(2) and 8(1) (c), then Issue No.5 is untenable.

## **ISSUE NO.6: What Reliefs are available to the Parties?**

- 96.** All the core issues framed in the course of the Scheduling Conference have been addressed and at this stage, we have to determine the prayers sought in the Amended Reference in light of our findings.
- 97. Prayer (1):** A declaration that the inaction, refusal or failure or and/or by the Government of Uganda to recover USD17,826,038.94 from Quality Chemical Industries Ltd as per the Inspectorate's recommendations and report of December, 2011 is an aberration and fundamental departure from the principles of good governance, accountability and a subversion of the principle of rule of law and is contrary to Articles 6(d), 7(2) and 8(1) (c) of the Treaty.
- 98.** Prayer No.1 is premised on Issue No.5 which has been determined in the negative. Therefore, there is no basis to grant that prayer. It is thus disallowed.
- 99. Prayer (2):** A declaration that the Act of the Inspectorate in deeming *“the review and amendment of the original MoU and the execution of the Amended MoU and Guarantee on 16<sup>th</sup> April, 2012”* to be adequate implementation of all recommendations contained in the report and thereafter closed the matter, is a breach and infringement of Articles 6(d), 7(2) and 8(1)(c ) of the Treaty.
- 100.** The prayer is based on Issue No.3. In our analysis above, we reached the conclusion that the content and the implication of the IGG's letter dated 8<sup>th</sup> July, 2013 was consistent with the principles of good governance, rule of law, accountability and transparency.

**101.** We found indeed that the Attorney General's legal opinion to the IGG was merely advisory and did not have a binding effect. Hence, the IGG acted independently in accordance with her constitutional mandate. Consequently, once we have dismissed Issue No.3, prayer (2) becomes moot and is thus disallowed.

**102. Prayer (3):** An order enforcing compliance with and adherence to the Treaty and directing the Government of Uganda to immediately adhere and comply with the Treaty by taking measures to recover the **USD17,826,038.94** from M/S Quality Chemical Industries Ltd rather than deeming the same to have been recovered through the review and amendment of the original Memorandum of Understanding at the execution of the Amended Memorandum of Understanding and Guarantee.

**103.** Firstly, the above prayer is grounded on the alleged violation of the Treaty.

**104.** Secondly, prayers No.1, 2 and 3 are interconnected and once we have disallowed the precedent prayers, the third one automatically collapses.

**105. Prayer No.4:** An order that the costs of this Reference be paid by the Respondent.

**106.** Rule 111(1) of the EACJ Rules of Procedure provides that costs shall follow the event in any proceeding unless the Court shall for good reasons otherwise order. In that regard, we did not find any public interest in this Reference, rather the Applicant (Whistle-blower) was prompted by personal interests as an alleged whistle-blower.

**107.** Accordingly, the Applicant shall bear costs for this Reference.

## **H. CONCLUSION**

**108.** For all the foregoing reasons, the Reference is hereby dismissed and as a result, we make the following final orders:-

- 1) Prayers 1, 2, 3 and 4 are disallowed; and
- 2) The Applicant shall bear costs of the Reference.

**109.** It is so ordered.

**Delivered, dated and signed this 14<sup>th</sup> day of May, 2015 at Arusha.**

.....  
**JEAN BOSCO BUTASI**  
**PRINCIPAL JUDGE**

.....  
**ISAAC LENAOLA**  
**DEPUTY PRINCIPAL JUDGE**

.....  
**FAUSTIN NTEZILYAYO**  
**JUDGE**