

~~CONSTITUTIONAL PETITION NO. 42 OF 2012~~

(Coram: Kakuru, Kiryabwire, Cheborion, Muhanguzi, Musota, J.J.A/CC)

VERSUS

2. ATTORNEY GENERAL.....RESPONDENTS

I have had the benefit of reading in draft, the lead Judgment of my learned brother Kiryabwire, JA/CC. He has ably set out the background to the Petition and the issues to be determined by the Court so I need not repeat them here. I agree that this Petition has no merit and must be dismissed. I also agree that there be no order as to costs, because the Petition has a bearing on the public interest. I only wish to briefly give my reasons as set out hereunder:

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5 constitution. The following two issues were framed by Justice Kiryabwire for determination;

1. *Whether or not the provisions of section 17(a), 28(5), 57, 77, 88, 89 and 102 of the FIA are inconsistent with and in contravention of Articles 2, ~~26, 27, 28, 40, 40(2)~~, 42, 44 and 162(2) of the constitution.*

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2. *Whether or not the take over , liquidation, revocation of banking licence , the winding up, the closure and sale of the National Bank of Commerce to crane Bank was inconsistent with and in violation of Articles 2, 26, 27, 28, 40(2) and 162 of the constitution*

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3. Remedies

In determination of the issues, it is important to bear in mind that the constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Secondly, judicial power is derived from the people and is exercised by the courts in the name of the people and in conformity with law, values, norms and aspirations of the people.

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The petitioner is both a shareholder and director in the National Bank of Commerce Ltd (NBC), which was sold by the BOU, after it was deemed to have flouted prudential regulation for financial institutions and thus endangering depositors' interests. Prudential regulation has been defined as "a type of financial regulation that requires financial firms to control risks and hold adequate capital as defined by capital requirements, liquidity requirements, by the imposition of concentration risk (or large exposure) limits, and by regulated

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5 reporting and public disclosure requirements including supervisory processes
(*See: The Law of Financial Services Groups by Morris CHR 2019 at p.57*)

In a cash based economy like Uganda, commercial banks if properly managed, play a vital role in ensuring the prosperity and well-being of the citizens. In a paper by Vincent P. Polizatto, published by the Office of the Vice President of the

10 World Bank in January 1990, titled ***Prudential Regulation and Banking Supervision: Building an Institutional Framework for Banks*** it was aptly stated that:

15 *"Banks hold a unique position in most economies as creators of money, the principal depositories of the public's financial savings, the primary allocators of credit and managers of the country's payment systems. For this reason, governments establish public policy for banks in the public interest. In most market economies, the goals of these policies are to control the supply of money, prevent systemic financial instability, and meliorate concerns about the efficiency and equity of financial intermediation..."*

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The learned author further expressed the view with which I agree, that from a public policy perspective, the government's goal to ensure the stability of the financial system should be of paramount importance. Thus, in my view, the failure of a bank has the potential to have far-reaching consequences to the country's economy, and could impact not only on the depositors, directors, or
25 shareholders of any individual bank but could ripple through to the entire economy. At page 1 of Vincent P. Polizatto's paper (supra), it is stated that:

"The failure of a large bank or multiple bank failures may force a sudden contraction of the money supply, a failure of the payments system, a severe dislocation of the real economy, and real or implicit obligations on the part of the government. The failure of any bank, no matter how small, may lead to contagion and loss of confidence in the system, unless the government can demonstrate its ability to handle bank failures in an orderly and systematic fashion."

The recent history not only of Uganda but the wider world, is filled with examples of commercial bank collapses and closures; Tefe Trust Bank (1993) , Greenland Bank (1999), Cooperative Bank (1999), National Bank of Commerce (with which the petition is concerned (2012)), Global Bank and Crane Bank Ltd (2017). With regards to bank failures in the world, the bankruptcy of Lehman Brothers on September 15, 2008 had devastating consequences leading to the global financial crisis in 2008.

These bank failures are linked to inadequate supervision and regulation and many have called for better prudential regulation of banks and other financial institutions as a way of forestalling failures. It is for this reason that the regulation of financial institutions prioritizes the public interest and requires quick and decisive action on any bank which may be deemed to be acting in a manner which threatens the banking business.

The FIA has to be measured against the constitution which is the supreme law of the land. If any law is inconsistent with any of the provisions of the

5 constitution, the constitution shall prevail and the other law shall to the extent of the inconsistency be void see Article 2(2) of the Constitution.

The majority of the provisions of the Financial Institutions Act, 2004 (FIA) which the petitioner challenges in the present Petition are concerned with prudential ~~regulation measures put in place by Parliament and enforced by the Bank of~~

10 Uganda (BOU), aimed at ensuring that banks operate in a healthy manner thereby safeguarding depositors' interests. These include; powers to revoke the license of a financial institution operating in a manner detrimental to its depositors (Section 17 (f)); powers of the minister to revise the minimum capital requirements of financial institutions from time to time (Section 28 (5); powers
15 to remove from management and/or prohibit errant managers of financial institutions from holding any position on the boards of financial institutions (Section 55); power to remove a director of a financial institution from office if it is in the public interest (Section 77); powers to take over the management of a financial institution if it is conducting itself in a manner contrary to the act or
20 detrimental to the interests of depositors (Section 88) , the authority exercisable by the BOU on taking over (Section 89) and powers to deal with a financial institution undergoing bankruptcy (Sections 99 and 100). In addition, the petitioner challenges the special status accorded to a financial institution in bankruptcy by which bankruptcy proceedings may not be stayed (Section 101).

25 Under article 162 (1) of the Constitution, BOU is mandated to carry out specific functions. The article provides;

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“(1) The Bank of Uganda Shall –

*(a) promote and maintain the stability of the value of the currency of
Uganda;*

*(b) regulate the currency system in the interest of the economic
progress of Uganda;*

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*(c) encourage and promote economic development and the efficient
utilization of the resources of Uganda through effective and
efficient operation of a banking and credit system; and*

*(d) do all other such things not inconsistent with this article as may
be prescribed by law ”.*

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The mandate of BOU is specific on ensuring that the value of the Uganda shilling is stable and economic development of the country is promoted. This mandate is executed in the public interest and in doing so, the Bank may do such other things as are prescribed by law, including the regulation and supervision of

20 financial institutions.

In my view therefore, the prudential measures upon which the BOU based in taking over and eventually selling the National Bank of Commerce are permitted under the Constitution, which gives BOU the powers, exercisable in the public interest to maintain the stability of the financial institutions and that of the

25 economy.

5 There must be a contextual approach to constitutional interpretation. In the Canadian authority of **R v. Wholesale Travel Group Inc. [1991] 3 S.C.R 154**, it was held that:

“...the Charter [Constitution] is to be interpreted in light of the context in
~~which the claim arises. Context is relevant both with respect to the~~
10 *delineation of the meaning and scope of Charter rights, as well as to the*
determination of the balance to be struck between individual rights and
interests of society.”

It has also been stated that the principles and policies underlying a particular legislation are relevant in determining whether any legislation infringes on the
15 provisions of the Constitution. (**See: The Minister of Employment and Immigration v. Josphe (Guisepppe) Chiarelli [1992] 1 R.C.S 711 (Supreme Court of Canada).**)

In the present case, the importance of the provisions of the Financial Institutions Act in ensuring that banks adhere to proper prudential control by the BOU lay
20 down the policy and principles applicable to the present Petition. It is, therefore, my view, that the obligations for ensuring fair treatment of financial institutions by the BOU, as the regulator, must be construed, taking into account the fluid nature of the banking business and the fact that time is of the essence in the banking industry. Even just one day can be long enough to bring down a whole
25 commercial bank and rattle the economy of the country. As long as BOU keeps in constant touch and communication with the financial institution, promptly and duly informing it of the violations of the FIA as it did in this case, it can be

5 said to have acted fairly, especially, if there exists prima facie evidence indicating that the financial institution is in a bad financial shape and could fail. Fair treatment in the context of prudential regulation of financial institutions, is not synonymous with access to Courts as the petitioner wants this Court to declare.

~~A bank is a very important financial institution and decisions concerning its~~
10 operations have to be made after careful consideration especially of the consequences of the decision to the economy of the country. The decision must be based on some policy principle which gives assurance to the shareholders, depositors but more important to the banking public that their money with the bank is safe.

15 I find that the provisions of the FIA challenged by the petitioner, were put in place in the public interest of ensuring the stability of financial institutions through effective prudential regulation and, do not violate any provision of the 1995 Constitution.

As to whether in exercising prudential control over the NBC, the BOU acted in a
20 manner which contravened the Constitution, I have considered the evidence presented in support of and in answer to the Petition.

The case for the petitioner, as set forth in his affidavit in support to the petition is that; BOU communicated its pending takeover, intention to wind up, and the arranged the sale of NBC, all on one day, the 27th day of September, 2012, which
25 was evidence of highhandedness on the part of BOU.

BOU's answer was that the NBC had flouted prudential regulations for 3 years since 2009, a fact which BOU had previously assessed and had reached the view

5 that it required to take decisive action. This came after the BOU had attempted several interventions aimed at improving NBC's financial status to no avail.

Bank of Uganda alleged that NBC's core capital as at 31st December, 2010 was at Ug. Shs. 3,480,000,000/= below the statutory minimum of Ug. Shs. 4,000,000,000/= ~~that there was connected or insider lending to the~~
10 Shareholders, managers of NBC and their family members, to the tune of about Ug. Shs. 1,350,000,000/= constituting 23.46% of the bank's core capital, beyond the 20% statutory limit allowed for such transactions, yet most of the loans were non-performing.

It was further alleged by BOU that when the minimum capital requirement for
15 financial institutions was revised to Ug. Shs. 10,000,000,000/= effective 1st March, 2011, NBC was unable to raise that capital; and this default was expected to continue, even when the capital requirement increased to Ug. Shs. 25,000,000,000/= in 2013.

Although, there was an injection of Ug. Shs. 7,000,000,000/= into NBC by a
20 foreign investor in June 2012, BOU alleges that by the time of NBC's closure in September, 2012, that investment had been eroded and NBC had a capital deficiency of Ug. Shs. 929,310,000/=

In the affidavit in support of the answer to the Petition, BOU faults NBC for imprudent expenditure on activities of no commercial value like increases in staff
25 salaries, office hire and fitting. The losses started soon after NBC's inception as a financial institution in the 2nd quarter of 2010, and totaled up to Ug. Shs. 851,892,000/= in the financial year 2010. Furthermore, BOU alleged that NBC

5 showed no signs of growth and at the time of closure, it was no longer a going business concern.

Two theories arise out of the evidence in support and in answer to the Petition; firstly, and the one in favour of the petitioner is that there was misfeasance on the part of the BOU ~~in the handling of NBC's perceived non-compliance with the~~
10 FIA. Secondly, and the one in favour of the BOU is that NBC was non-compliant with the FIA and if left unchecked for long, it would have failed.

The quickest route to bank failure is for regulators such as BOU to stand by and watch, as a bank operates in a manner that is sure to kill it slowly. Where, a bank's capital slips below the minimum over a period of time; the bank has
15 incidences of insider lending; and the bank is being managed in a manner that is indifferent to commercial sense, it will be setting itself up for failure. Unfortunately, all those unwanted features were allegedly in existence with NBC just before it was closed which justified the BOU's intervention. Given the context in which the BOU was operating, as a regulator of financial institutions, I would
20 refrain from attributing any wrong doing to it.

Regarding the misfeasance, court's attention was drawn to the possible involvement in criminal activities by BOU officials with regard to the closure of NBC, but we have to bear in mind that this Court is not deciding a criminal case. The reference to a report of the Parliamentary Committee on Commissions,
25 Statutory Authorities and State Enterprises (COSASE) made in 2019, 7 years after the closure of the NBC is further indicative of the need to have a competent

5 court examine the evidence of possible misfeasance and corrupt conduct linked to the BOU officials.

The petitioner complained that the closure of NBC could not have been fair because it was conducted in one day. That the decision by BOU to revoke NBC
10 lincense, take over its operations, negotiate and conclude its sale to Crane Bank was all done on the 27th of September 2012.

The evidence adduced for BOU shows that BOU started monitoring NBC's activities in 2010, and by the time of its closure in 2012, monitoring had been going on for at least 2 years. The conclusion that the decision to close NBC was taken in one day is therefore, not a fair reflection of the true state of affairs.

15 Further, the reference to irrationality and abuse of office by the BOU officials with regard to the closure of the NBC would have best been proved by the petitioner under misfeasance. In my view, the petitioner did not prove that the BOU acted unconstitutionally per se and in violation of his right to property and to due process in compulsory acquisition of property.

20 Given the unique stature of financial institutions and the potential moral hazard they can generate when they face failure, I would find that Article 26 (2) on compulsory acquisition of land, as traditionally applied does not extend to them.

Certainly, there was no question of infringement of Article 27 on the right to privacy as alleged by the petitioner because BOU being a public body carrying
25 out prudential regulation had the right to scrutinize NBC's affairs however private.

5 The petitioner further alleged that the closure of the NBC constituted a violation of his business rights guaranteed under Article 40 (2) of the Constitution. The rights conferred by this article of the constitution are not absolute and are subject to the public interest which requires that financial institutions are managed only by fit and proper persons. BOU presented evidence in answer to

10 the Petition that the petitioner engaged in insider trading and mismanagement of NBC, which, if proven true would justify his removal from its management.

Given the uniqueness of the business which financial institutions carry out, time is of the essence in their regulation. From the facts asserted in the answer to the petition, it is reasonable to conclude that by BOU keeping open the
15 communication channels with NBC and carrying out meetings with its shareholders with the aim of resolving NBC's prudential violations, BOU acted fairly. I would therefore, refrain from holding that it violated articles 28, 42 or 44 of the Constitution.

On the basis of the evidence produced by BOU, I would conclude that there was
20 reason for the closure of the NBC in the public interest of achieving stability of the banking sector by maintaining good prudential control authorized by the Constitution.

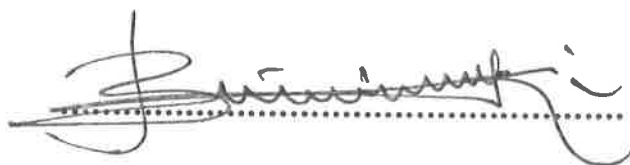
Whether or not the officials of BOU acted with criminal intent, or misfeasance in their handling of the closure of NBC, is a matter to be placed before a Court with
25 competent jurisdiction to hear and subject the evidence to scrutiny and arrive at an appropriate decision. Bank of Uganda was entitled to exercise all the powers granted to it by the FIA and in my view , it did so for the proper purpose of

5 avoiding damage to the financial system which would have been occasioned by
the possible collapse of NCB. If the Petitioner thought that the process was
clothed with illegality, irregularity or impropriety then the course of action would
be an application for judicial review in the High Court. This Court, basing on
~~affidavit evidence alone is not best suited for that role. In my view, therefore, as~~
10 a matter of constitutional interpretation, the sole purpose of the Constitutional
Court being interpretation of the constitution, the Petition cannot, but, be said
to be lacking in merit.

It is for the above reasons, that I would dismiss the Petition, with no order as to
costs.

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Dated at Kampala this 4th day of November 2020.



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Cheborion Barishaki

Justice of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 44 OF 2012

HUMPHREY NZEYI.....PETITIONER

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VERSUS

1. ~~BANK OF UGANDA~~

2. ATTORNEY GENERAL.....RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC

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Hon. Mr. Justice Geoffrey Kiryabwire, JA/JCC

Hon. Mr. Justice Cheborion Barishaki, JA/JCC

Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC

Hon. Mr. Justice Stephen Musota, JA/JCC

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JUDGMENT OF EZEKIEL MUHANGUZI, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Geoffrey Kiryabwire, JA and I agree that this petition has no merit and should be dismissed, each party to bear its own costs.

20 Dated at Kampala this 4th day of November 2020.



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Ezekiel Muhanguzi
Justice of Appeal/ Justice of the Constitutional Court.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NUMBER 44 OF 2012

HUMPHREY NZEYI

PETITIONER

VERSUS

1. BANK OF UGANDA

2. ATTORNEY GENERAL

RESPONDENTS

Coram:

Hon. Mr. Justice Kenneth Kakuru, JCC

Hon. Mr. Justice Geoffrey Kiryabwire, JCC

Hon. Mr. Justice Barishaki Cheborion, JCC

Hon. Mr. Justice Ezekiel Muhanguzi, JCC

Hon. Mr. Justice Stephen Musota, JCC

Judgment of Hon. Mr. Justice Geoffrey Kiryabwire JCC

Introduction

This Petition is brought under Articles 137 (1), (2), (3), (4) and (7) of the Constitution of Uganda 1995 (hereinafter referred to as the Constitution) and Rule 3 of the Constitutional Court (Petitions and References) Rules 2005.

Brief Facts

The Petitioner is one of the shareholders and directors of the National Bank of Commerce (U) Ltd (hereinafter referred to as "NBC") which was put under management and eventual liquidation and sale by the first Respondent Bank of Uganda (hereinafter referred to as "BOU") which is the Central Bank of Uganda.

It is alleged by the BOU on the 27th September 2012 wrote to the Managing Director of the NBC communicating the takeover of the management of the said NBC. On the same day a public notice was issued by the BOU winding up the affairs of the NBC. It is further the case for the Petitioner that on the same day BOU concluded a purchase and assumption agreement with M/s Crane Bank Ltd which then took over all deposits and assets of the NBC effective the 1st October, 2012.

The Petitioner is aggrieved that the BOU was able to take over and sell the NBC because of several provisions of the Financial Institution Act 2004

(hereinafter referred to as the "FIA") that gave the BOU sweeping powers without due regard to the Constitution.

Alleged Constitutional violations.

In the Petition the Petitioner raises the following constitutional violations:

- i. ~~The act/manner and/ or conduct of the 1st Respondent of taking~~ overliquidating, winding up, and sale of National Bank of Commerce to Crane Bank Ltd is in contravention of Articles 2, 28, 26, 27, 40(2), 42, 44, 162(2), of the Constitution of the Republic of Uganda.
- ii. Sections 17(f), 7(c), 28(5), 57, 77, 88, 89, 99, 100(2)(i) and 101 of the Financial Institutions Act, 2004 giving sweeping powers to the 1st Respondent are inconsistent with Articles 2, 26, 28, 40(2), 42, 44 and 162(2) of the Constitution of the Republic of Uganda.
- iii. The act and/or manner, in which the 1st Respondent took over, liquidated, wound up, and sold the National Bank of Commerce to Crane Bank Ltd amounts to illegal compulsory deprivation of the Petitioner's property in National Bank of Commerce contrary to Article 26 of the Constitution of the Republic of Uganda.
- iv. The provisions of Section 101 of the Financial Institutions Act barring the petitioners from seeking legal redress in Court of Law ~~in matters of winding up and liquidation amounts~~ to denying the Petitioners right of access to Courts of Law in protection of their property rights and thus inconsistent with Articles 2, 26(2), 28, 42, 44 and 162(2) of the Constitution of the Republic of Uganda.

- v. The act and/or manner, in which the 1st Respondent without any warning and hearing your Petitioners took over, liquidated, wound up, and sold the National Bank of Commerce to Crane Bank Ltd is an unfair administrative decision and contrary to the Principles of natural justice thus in contravention of Article 42 and Article 28 and 44 on the non derogable right of fair hearing as enshrined in the Constitution of the Republic of Uganda.
- vi. Section 17(f), 7(C), 77(1, 2, 3), 88, 89, 99, 100(2) (i), 101 of the Financial Institutions Act empowering the 1st Respondent, to act in an arbitrary manner, without affording the Petitioners a fair hearing, access to Courts of Law and to act contrary to the principles of natural justice are inconsistent with Articles 2, 28, 42, 44, and 162(2) of the Constitution of Republic of Uganda.
- vii. The manner and/or acts of the 1st Respondent of taking the drastic measure of winding up, liquidating and selling the National Bank of Commerce which should have been a last resort option and without any reasonable justification contravenes Article 26, 28, 40(2), 42, 44 and 162 of the Constitution of Uganda.
- viii. The manner/and act of sale of National Bank of Commerce by the 1st Respondent in less than a day after the takeover of management, winding up and liquidation, sale to Crane Bank Uganda Limited before doing the mandatory audit of the Bank as required under Section 89(3) is evidence of bad faith and collusion with Crane Bank Ltd and Contravenes Section 40(3) of the Bank of

Uganda Act, the right to privacy as enshrined in Articles 27 and 162 of the Constitution of the Republic of Uganda.

Declaration and remedies sought and prayed for:

The Petitioner seeks the following declarations and remedies from this Court:

- i. A permanent injunction against the Respondents or their agents or employees restraining them from the implementation of the winding up order of the affairs of National Bank of Commerce issued in the 1st Respondent's public notice and correspondence suspending the Managing Director of National Bank of Commerce dated 27th September 2012 and any further sale of National Bank of Commerce and allowing National Bank of Commerce and its shareholders a right to be heard.
- ii. General damages for the inconvenience and injury suffered.
- iii. Costs of the Petition.
- iv. Any other or further declaration as Court may deem fit.

Replies by the Respondents

Both the Bank of Uganda (hereinafter referred to as "BOU") and the Attorney General as Respondents filed answers to the Petition.

BOU objected to the Petition and provided reasons in its answers the details of which I will go into later in this Judgment. But suffice to broadly state that BOU avers that it violated no constitutional provisions (especially

those cited in relation to fundamental rights and freedoms in Chapter 4 of the Constitution). BOU further averred that it accorded a fair hearing to the owners of NBC during the closure, winding up and liquidation of NBC. Furthermore that at all times the BOU acted as a regulator of the banking sector using powers conferred upon it under the Financial Institutions Statue 1994 and acted in the interests of the ~~depositors of the NBC~~ who were at risk because of the weak state of the NBC.

The Attorney General also opposed the Petition and averred that this Petition disclosed no cause of action and therefore should be dismissed.

Representations

Mr. John Mary Mugisha, Fred Muwema, Severino Twinobusingye and Andrew Oluka appeared for the Petitioner. Mr. Masembe Kanyeyerezi, Ernest Sembtya and Eria Miika appeared for the first Respondent (BOU). Mr Geoffrey Madate appeared for the Attorney General.

Conferencing of the Petition

Only the Petitioners filed conferencing notes to this Petition which contained 9 issues. Mr. Muwema for the Petitioner however submitted that their proposed issues could be summarised into 3 issues:

1. Whether or not the provisions of section 17 (a), 28 (5), 57, 77, 88, 89, and 102 of the FIA are inconsistent with and in contravention of ~~Articles 2, 28, 26, 27, 40, 40 (3), 42, 44 and 162 (2)~~ of the Constitution. These covered (issues 2, 4, 5, 6, 7, 8, 9 and 10 of the conferencing notes).

2. Whether or not the takeover, the liquidation, revocation of banking licence, the winding up, the closure and sale of the National Bank of Commerce to Crane Bank was inconsistent with and in violation of Articles 2, 26, 27, 28, 40 (2), 42, 44 and 162 of the Constitution.
3. Remedies.

~~The Respondents did not object to these revised issues so it is these issues~~
I shall address my mind to instead of the long list that the Petitioner had originally proposed. I also take it that the Attorney General also abandoned his case that the Petition does not disclose a cause of action.

Interlocutory matters.

- i. On-going mediation.

When the matter came up for hearing, it was reported to Court that this dispute was under mediation and this had not been concluded. As a panel we ruled that the hearing proceed because clearly the mediation had taken long without resolution.

- ii. Application for injunction.

It was further reported that the Petitioner had filed an application for an injunction against the BOU. To our minds this application had been over taken by the Petition being called for hearing and final determination.

- iii. Application for contempt of court.

Finally when the Petition was called for hearing, Court was informed of a pending application for contempt of court. Since this was not identified as

an issue for determination by the parties when this Court took the view that this compliant had been abandoned.

Any pending application relating to these interlocutory applications /matters in the court's Registry is accordingly directed to be struck out and closed.

Duty of this Court

Before I delve into this petition, it is important that I recall the role of a constitutional court and the principles that guide its decisions.

Article 126 of the Constitution provides that judicial power which is derived from the people shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people. In adjudicating cases, the Courts shall, subject to the law, apply certain principles including the concepts that Justice shall be done to all irrespective of their social or economic status, promotion of reconciliation between the parties and the administration of justice without undue regard to technicalities.

With regard to principles of constitutional interpretation Article 137 (1) of the Constitution provides:

"...Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court..."

In this Petition is alleged that certain persons both natural and legal by their actions or omissions acted inconsistently or in violation of the Constitution. As to such actions and omissions Article 137 (2) (b) provides:

*"...any act or omission by any person or authority,
...is inconsistent with or in contravention of a provision of this Constitution,
may petition the constitutional court for a declaration to that effect, and for
redress where appropriate..."*

As to remedies Article 137 (4) provides:

*"...Where upon determination of the petition under clause (3) of this article
the constitutional court considers that there is need for redress in addition
to the declaration sought, the constitutional court may—*

(a) grant an order of redress; or

*(b) refer the matter to the High Court to investigate and determine the
appropriate redress..."*

The above provisions set the jurisdiction and parameters for the interpretation by the Constitutional Court. However Jurisdiction is not enough as it is also settled that the Petition so filed must in addition disclose a cause of action. In the case of **Baku Raphael Obudra and Obiga Kania V Attorney General** Constitutional Appeal No 1 of 2003 Justice Mulenga (JSC as he then was recalling his holding in **Ismail Serugo V Kampala City Council & Attorney General** Constitutional Appeal No 2 of 1998) held that a petition discloses a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or alleged to have contravened by the act or omission and prays for a declaration to that effect. In **Wycliffe Kiggundu V Attorney General** Civil Appeal No 27 of 1993 Hon. Justice W.W. Wambuzi (Chief Justice as he then was) held that it is not sufficient on the face of it to have an

allegation of the breach of or inconsistency of an Article or Articles of the Constitution with any act, omission or law which would have merely fulfilled the requirement to plead so under Article 137 (3) of the Constitution. In other words there must be a controversy involving interpretation before the matter can be referred to the constitutional Court.

In **Davis Wesley Tusingwire V Attorney General Constitutional** Petition 2 of 2013 this Court however held:

*"... that a liberal and broader interpretation should be given to a constitutional petition than is given to a plaint in a normal civil suit when determining whether a cause of action has been established (**Baku Raphael Obudra and Another v Attorney General Constitutional Appeal No. 1 of 2003 (SC)**). The same principal applies to subsidiary legislation... "*

It can also be deduced from the decisions of **Serugo; Raphael Baku and Wycliffe Kiggundu** (Supra) that it is evident that the onus to prove that there is a controversy involving interpretation lies with the Petitioner.

Issue No. 1. Whether or not the provisions of section 17 (a), 28 (5), 57, 77, 88, 89, and 102 of the FIA are inconsistent with and in contravention of Articles 2, 26, 27, 28, 40, 40 (3), 42, 44 and 162 (2) of the Constitution. These covered (issues 2, 4, 5, 6, 7, 8, 9 and 10 of the conferencing notes).

Case for the Petitioner

Counsel for the Petitioner attacked the FIA arguing that it had provisions that were inconsistent with and in contravention of the Constitution. Counsel submitted that the said Act gave wide and open ended powers to the central bank as regulator which were unconstitutional and thereby could be misused. He then raised the following arguments in support of this issue.

First, that the impugned sections of the FIA did not have an in built mechanism for the bank (NBC) to be heard before a regulatory action was taken against it. Counsel argued that the Act gave the BOU sweeping powers to regulate without any condition and or with regard to the law. He argued that Article 162 (2) of the Constitution provided that the BOU in carrying out its duties had to conform to the Constitution but in the case of NBC BOU did not do so. Counsel further argued that there should have been a prudent mechanism in the law whereby an aggrieved party could be heard like a tribunal. He submitted that a banking licence was property and therefore the revocation of such a licence should not be done without a hearing and or regard to rules of natural justice.

Counsel gave the examples of Section 17 of the FIA which allows the BOU to revoke a licence of a financial institution if it feels that the financial institution is in BOU's opinion operating to the detriment of the depositors of the said institution. Section 17 of the FIA provides:

"...

The Central Bank may, at any time, revoke a licence of a financial institution if it is satisfied that the financial institution at any time—
(a) has ceased to carry on business;

- (b) is significantly undercapitalised as defined in subsection (4) of section 87 of this Act or is unable to pay its liabilities as they mature;*
- (c) has gone into liquidation;*
- (d) has been wound up;*
- (e) has been dissolved;*
- (f) is in the opinion of the Central Bank conducting business in a manner detrimental to the interests of depositors;*
- (g) has in the view of the Central Bank contravened this Act or any other financial law in a manner which is serious or persistent;*
- (h) has engaged in serious deception of the Central Bank or the general public in respect of its financial condition, ownership, management, operations or other facts material to its business;*
- (i) has without the consent of the Central Bank amalgamated with another financial institution or sold or otherwise transferred its assets and liabilities to another financial institution;*
- (j) has failed to comply with any condition stipulated by the Central Bank under subsection (2) of section 12 of this Act;*
- (k) has failed to comply with any instruction or direction given by the Central Bank under Part IX of this Act to remedy managerial or financial deficiencies.*
- (l) does not or may not fulfil or has not or may not have fulfilled any of the licensing conditions specified in section 11 of this Act..."*

He compared section 17 of the FIA to the licensing section 10 of the same Act [I think he meant section 12 (9) – (11)] which provides that:

"

(9) Any person aggrieved by a decision of the Central Bank under this section may appeal to the High Court against the decision of the Central Bank within thirty days after being notified of the decision and the High Court may confirm or set aside the decision.

(10) ~~Where the High Court sets aside a decision of the Central Bank under subsection (9), the High Court shall direct the Central Bank to reconsider its decision and refund the financial institution the fines so far paid.~~

(11) On an appeal under subsection (9), the question for determination of the High Court shall be whether, for the reasons stated by the appellant, the decision appealed against was unlawful or not justified by the evidence on which it was based..."

Counsel argued that there should have been similar provisions of appeal in the FIA when it came to the revocation of a banking licence.

Counsel equally attacked sections 28 (5), 57 and 77 of the FIA which imposed civil penalties on a financial institution said not to meet the regulatory required minimum capital without a hearing being offered to the said institution and yet the said penalties had a crippling effect on the financial institution.

Finally on this point Counsel submitted that this Court should take the opportunity of this Petition to make recommendations to improve the law on the regulation of financial institutions so that there were no violations of the Constitution.

Secondly, Counsel argued that BOU purported to exercise its powers in the interests of depositors only and yet the owners of the banks also had interests in the bank that were being ignored. He argued that both owners and depositors had equal standing before the Constitution and the law. It was also therefore the duty of the central bank to protect the interests of the investors/owners of the bank.

On the matter of BOU acting in the public interest, Counsel submitted that in the case of the NBC, there was no evidence showing that the depositors of the NBC were complaining about the bank. Furthermore there was also no evidence that there was a run by the depositors on the bank

Thirdly, Counsel argued that section 101 of the FIA had the effect of ousting the jurisdiction of court by refusing actions in court. Section 101 of the FIA provides:

"

(1) Notwithstanding anything to the contrary in any other law, a court shall not entertain any application for stay of proceedings in relation to the liquidation or winding up of a financial institution under this Act.

(2) Subsection (1) does not apply to an application filed by the Central Bank..."

He argued that the right to go to court was a non-derogable right and that it was part of the process of getting a fair hearing.

The case for the first Respondent



Counsel for the first Respondent submitted that the Petition lacked merit and should be dismissed with costs.

He argued that whereas the NBC was closed in 2012, the matters leading to its closure date further back to 2009. He submitted that the NBC was closed because it had failed to meet the minimum required capital to operate as a bank and after study by the central bank it was decided that the bank could not be resuscitated.

He argued that even when the owners of the NBC raised Ug shs 7,000,000,000/= from an outside investor, there were challenges in its application because the foreign investor thought he was buying 76% shareholding in the bank. However, they could not legally take more than 49%. The result of this was that the foreign investor took the NBC shareholders to court and that this matter is still pending in court.

Counsel submitted that coming up to the final closure the central bank and the owners of NBC had no less than 16 separate "interactions" as to how to resolve the problem of the bank but they came to nothing. In this regard, Counsel submitted that there were minutes of these meetings on court record. He further submitted that the record will also show that about 10 different letters were written to the NBC and copied to the shareholders (in particular Hon. Matthew Rukikaire who was board chairman of NBC) about the poor state of the bank.

He insisted that the continued activities of the NBC would be detrimental to the interests of depositors. Counsel argued that the NBC was not a going concern and had negative core capital (Ug Shs 1,800,000,000/=) and was involved in insider lending (26% of which was linked to its directors or their

families). He disagreed that with regard to this particular case that the BOU had acted in an arbitrary and high handed way. He argued that if there was unfairness in the process the owners could have applied for a declaration in Judicial Review only that under section 101 such an application would not stop the winding up. He further argued that at times it is necessary for a central bank to take pre-emptive action on a failing bank given its possible effect on the financial system of a country. In this regard he referred us to the Kenyan constitutional case of **Kimani Waweru & 4 ors V Central Bank of Kenya & 7 ors** [2018] eKLR.

He argued that in banking it is important to protect the public interest and it would be wrong to adopt an adverse construction in these circumstances.

Counsel argued that section 101 of the FIA did not stop legal action against the Central Bank but only that a stay in winding up would not be granted.

The Submissions of the Attorney General (second Respondent).

The second Respondent associated himself with the arguments of the first Respondent and had nothing to add to them.

Findings and decision of the Court

I have addressed myself to the arguments of counsel for and against the Petition and to the authorities supplied for which I am grateful.

In this matter, the Petitioner seeks to challenge certain provisions of an Act of Parliament as being unconstitutional. The main grievance as I

understand it is that the said provisions give arbitrary powers to the Central Bank/BOU to close a bank without affording the owners the all-important right to a hearing which is non-derogable. As a result of this constitutional lapse the owners of the NBC were deprived of their property in the bank.

~~BOU which is the Central Bank of Uganda plays a pivotal role in ensuring~~
that the economy of Uganda is stable and growing. Article 161 of the Constitution provides:

"

1) The Bank of Uganda shall—

(a) Promote and maintain the stability of the value of the currency of Uganda;

(b) Regulate the currency system in the interest of the economic progress of Uganda;

(c) Encourage and promote economic development and the efficient utilisation of the resources of Uganda through effective and efficient operation of a banking and credit system; and

(d) Do all such other things not inconsistent with this article as may be prescribed by law.

(2) In performing its functions, the Bank of Uganda shall conform to this Constitution but shall not be subject to the direction or control of any person or authority.

(3) Subject to the provisions of this Constitution, Parliament may make laws prescribing and regulating the functions of the Bank of Uganda..."

Article 161 (2) of the Constitution actually gives the BOU a lot of independence in order to carry out its functions. I however agree with

Counsel for the Petitioner that even with this independence comes accountability in that the BOU must conform to the provisions of the Constitution and apart from that BOU is free from the direction or control of any person or authority.

Counsel for the Petitioner has argued that in closing the NBC, its owners were not accorded a fair hearing as required under Article 28 of the Constitution. Article 28 of the Constitution is a very long provision that requires careful study and it provides:

"

(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

(2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.

(3) Every person who is charged with a criminal offence shall—

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(b) be informed immediately, in a language that the person understands, of the nature of the offence;

(c) be given adequate time and facilities for the preparation of his or her defence;

~~*(d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;*~~

(e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;

(f) be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;

(g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

(4) Nothing done under the authority of any law shall be held to be inconsistent with—

(a) clause (3)(a) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts;

(b) clause (3)(g) of this article, to the extent that the law imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused are to be paid their expenses out of public funds.

(5) Except with his or her consent, the trial of any person shall not take place in the absence of that person unless the person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person.

(6) A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.

(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

(9) A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(10) No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

(11) Where a person is being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person.

(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law..."

The Supreme Court has had occasion to consider the meaning of Article 28 of the Constitution in the Constitutional Appeal **Rev Bakaluba Peter Mukasa V Betty Namboze** Constitutional Appeal No 04 of 2009 Justice Bert Katureebe JSC (as he then was) found as follows:

"...The Constitution only gives the salient features of what constitutes fair trial, i.e. that it must be before "an independent and impartial court or tribunal established by law "it does not define fair trial but because of its importance, allegations of denial of the right of fair hearing or trial are very serious indeed and should not be made lightly or merely in passing. They impact on the core of our trial system."

Fair and impartial trial is defined under Black's Law Dictionary as;

" A hearing by an impartial and disinterested tribunal; a proceedings which hears before it condemns, which proceeds upon inquiry, and tenders judgment only after trial consideration of evidence and facts as a whole..."

In the Supreme Court in another constitutional appeal **National Counsel for Higher Education V Anifa Kawooya Bangirana SCCA**

No 04 of 2011 (Judgment of Lady Justice C.N.B. Kitumba) the Supreme Court cited with approval the decision Justice Bert Katureebe (JSC) in **Mpunga and Sons Transporters V Attorney General** SCCA No 17 of 2001 and found:

*"...In **Mpunga and Sons Transporters Ltd Vs Attorney General & Anor (supra)** the same learned Justice considered the Audi Alteram rule which is the same as the right to fair hearing and quoted with approval the authority of **Russell Vs Norfolk (1949) 1 ALLER 109** wherein it was stated thus:*

"The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, and the subject matter that is being dealt with..."

The first element that seems to come out is that whereas the right to a fair hearing is normally connected with a form of proceedings before a court or tribunal, it is also the same requirement of natural justice under the *audi alteram* principle that one should not be condemned unheard. In this matter it has been argued that the provisions FIA does not afford a bank undergoing receivership or liquidation the right to be heard. With respect I do not agree with this argument.

First, there are provisions in Part 9 of the FIA where the BOU gives a chance to the distressed bank/financial institution to make good their violation of the FIA. One example of the general parameters set out in FIA

for an intervention by the BOU in bank/financial institution to place. These statutory parameters of intervention are found in section 82 of the FIA which provides:

82. (1) If the Central Bank has reason to believe or finds that the affairs of the financial institution are conducted in a manner detrimental to the interests of the depositors or prejudicial to the interests of the financial institution or in contravention of this Act, or any other written law or that the financial institution has refused to submit to inspection, or has provided false information, the Central Bank may, without prejudice to any other course of action—

(a) order in writing that the financial institution takes remedial action to comply with this Act or regulations, notices, or orders issued under this Act;

(b) issue directions regarding measures to be taken to improve the management, financial soundness or business methods of the financial institution;

(c) require the directors or management of the financial institution to execute an agreement concerning their implementation of orders or directions issued under paragraphs (a) and (b) of this subsection; or
Intervention

(d) perform or appoint an agent to perform a special examination of the financial institution to determine the financial condition of the institution and evaluate resolution options, at the cost of the financial institution.

(2) Where a financial institution fails, refuses or neglects to comply with an order, direction, or agreement issued or made under subsection (1) then the Central Bank may do any or all of the following—

(a) initiate a legally binding cease and desist order, of either temporary or indefinite duration requiring the financial institution and its management to—

(i) stop the improper or unacceptable practice;

ii) put a limit to lending; or

(iii) stop any declaration of dividends.

b) remove or suspend any person from the management of the affairs of the financial institution;

(c) impose penalties on the offending member of the management to be met personally;

(d) appoint a person who, in the opinion of the Central Bank is, suitably qualified and competent to advise and assist the institution generally or for the purposes of implementing the orders, directions or agreements under paragraph (a), (b) or (c) of this subsection and the advice of a person so appointed shall have the same force and effect as a direction made under paragraph (a), (b), or (c) and shall be deemed to be a direction of the Central Bank under this section;

(e) appoint a person, suitably qualified and competent in the opinion of the Central Bank, to manage the affairs of the financial institution for such period as shall be necessary to rectify the problem;

(f) require the financial institution to reconstitute its board of directors within such period as shall be specified;

(g) withhold approvals on establishment of new branches;

(h) withdraw the foreign exchange dealers' licence require the financial institution to add such capital as may be specified; or

(j) impose any other sanctions as the Central Bank may deem appropriate in the circumstances..."

This intervention policy does not appear to me, as alleged by the Petitioner, to be arbitrary and or automatic in application as the policy even affords the distressed bank an opportunity to provide a recovery plan. In this case as Counsel for the first Respondent submitted the NBC and BOU were in discussions over the problem of the bank for a period of about 3 years before the NBC was closed (2009-2012). Indeed a letter from BOU signed by Mr. Apolo Obbo to the Director Commercial Banking dated 18th May 2011 noted that the operations of the NBC had been downgraded to "unsatisfactory". In the said letter the BOU pleads with the NBC to take corrective actions. The paragraph in the letter reads:

"...The management of the National Bank of Commerce is urged to take note of the supervisory concerns and initiate corrective actions in order to improve the performance of the bank..."

There are also minutes of meetings between the shareholders of the NBC and BOU dated 10th May 2012, and 22nd June 2012 on how the capital inadequacy of the bank could be resolved.

As to the imposition of civil penalties without the right to be heard, section 128 (1) of the FIA provides:

"...

(1) Before imposing a civil penalty on any financial institution or person under this Act, the Central Bank shall, except in the case of an emergency, give to the financial institution or person not less than three days' notice in writing requiring the financial institution or person to show cause why the civil penalty should not be imposed..."

It is clear here that a notice to show cause why a civil penalty should not be imposed is granted by the law. The very minimum period in this regard is 3 days unless there is an emergency. There is no evidence in this matter that a penalty notice of less than 3 days was ever imposed on the NBC.

As to section 101 of the FIA which provides that no stay shall be granted during the winding up or liquidation of a financial institution, I find that this is not an ouster of the jurisdiction of the court. The section only limits the remedy that a party may have. Such limitation is not unusual during insolvency.

I am also inclined to agree with the citation by the Constitutional Court of Kenya in the Kimani case (Supra) of the case of **Richardson and David Ltd V Kenya Deposit Insurance Corporation & anor** [2015] eKLR where Ogola J held as follows:

"...A bank is a very important financial institution and decisions concerning its operations should not appear to be made whimsically. Those decisions must be seen to be based on some policy principles which can be stated

and dependent upon. This policy principle, when stated, will not only give assurance to the entity to be liquidated, its shareholders and depositors but more important to the banking public..."

This is a very balanced finding incorporating the interests of all stakeholders. The Banking and financial sector is all about perceptions and ~~a poor perception can lead to economic troubles.~~ In this matter the provisions of the FIA to my mind have policy principles which can be stated and dependent upon by the stakeholders. It is therefore clear that it is not possible under the FIA to close a bank in one day as alleged by the Petitioner. The evidence on record shows that problems of the NBC had started long before the date flagged by the Petitioner of the 27th September, 2012. It is also clear to me that the owners of the NBC were given a hearing as to the state of the NBC and a chance to take corrective actions. Having found as such it follows that there is no need for me to specifically address the other alleged violations of the Constitution by BOU as they would flow from a finding that the right to be heard was violated; which I have not found.

What I can find merit in the arguments of the Petitioner is that there can always be room for improvement as to how the actual intervention law and policy is carried out. Here a call for some form of independent tribunal as suggested by Counsel for the Petitioner may help especially when it comes to ~~engaging shareholders~~ who feel the central bank will always somehow find against them in favour of the depositors. However here I accept the caution that was taken in the **Kimani case** (supra) when the court adopted and followed the Kenyan Court of Appeal decision in **Kenya**

Deposit Insurance Corporation V Richardson & David Ltd & Central Bank of Kenya Civil Appeal No 66 of 2016 consolidated with Civil Appeal 67 of 2016 that:

"... A court of law is not an expert in the management of financial institutions. The constitution has bestowed the mandate on parliament to enact statutes to create bodies to manage and regulate such institutions. The KDI Act and the Central Bank of Kenya Act are Acts of parliament which have vested and entrusted CBK and KDIC with the powers to regulate the financial sector..."

I would therefore urge the Parliament of Uganda in light of the recent recurrence of failing banks/financial institutions in Uganda to improve the law embodied in the FIA with regard to the management of failing financial institutions.

As to first issue I therefore find in the negative.

Issues No. 2

Whether or not the takeover, the liquidation, revocation of banking licence, the winding up, the closure and sale of the National Bank of Commerce to Crane Bank was inconsistent with and in violation of Articles 2, 26, 27, 28, 40 (2), 42, 44 and 162 of the Constitution.

Case for the Petitioner

The case for the Petitioner under this issue is not very different from the first issue already resolved above only that this time the grievance goes to

acts of the BOU as to how they took action against the NBC based on the existing law. Counsel for the Petitioner argued that the takeover of the NBC was automatic and the revocation of the licence was automatic and arbitrary. The whole exercise was said to have been done in a rush. He argued further that there was no sensitivity to the rights of the existing shareholders.

He argued that when taking administrative action there is a duty to act fairly and justly. I believe here counsel was referring to Article 42 of the Constitution which provides:

"Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her..."

He gave the example that when taking over a bank it would be proper to first call the owners and take an inventory of assets and cash available. He wondered how Crane Bank could have taken over the NBC without first doing a due diligence.

Counsel also faulted the BOU for disclosing financial information about the NBC without the consent of the bank contrary to Section 40 (3) of the Bank of Uganda Act. This he submitted amounted to a violation of the right to privacy and confidentiality under Article 27 of the Constitution.

Case for the Respondent

Counsel for the Respondent rejected the arguments that the BOU of Uganda had acted improperly. He argued that if there was unfairness then the Petitioner could have sought redress under judicial review or under a normal suit with an action for damages.

Submissions by the Attorney General [second Respondent].

In the answer to the Petition, the Attorney General averred that the BOU acted in good faith in accordance to its mandate under the Constitution of Uganda, the Bank of Uganda Act and the FIA.

Findings and decision of the Court

I have considered the arguments by the Petitioner and Respondents on this issue and the authorities provided for which I thank them.

The acts of the BOU as presented by the Petitioner in this matter to my mind appear to be too generalised. I found that the provisions used by the BOU to intervene and revoke the licence of the NBC and then wind it up are not unconstitutional. It is still possible to argue that notwithstanding the law, the manner in which the act of removing management and winding up the NBC were done could have been unconstitutional. The onus to prove this lies with the Petitioner; but I find he has not been able to do so. It is not enough in my view to say that the whole process was rushed in one day. There are times in my view when a regulator may have to act quickly to avert a systemic failure in the financial system or to give confidence to the banking public. Secondly where provisions of the Bank of Uganda Act have not been complied with then again this is a matter of evidence that can be best handled at a trial court.

All in all I also answer this issue in the negative.

Issue No 4. Remedies

Having found as I have above, the Petition fails and is dismissed.

As to costs, since the matter of the NBC was resolved a long time ago I find it just that each party bear its own costs.

Dated at Kampala this 4th day of NOV 2020



Hon Mr. Justice Geoffrey Kinyabwire

Justice of Appeal/Constitutional Court

HUMPHREY NZEYI ::::::::::::::::::::::::::::::::::: PETITIONER

~~1. BANK OF UGANDA~~

**CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC
HON. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC
HON. JUSTICE CHEBORION BARISHAKI, JA/JCC
HON. JUSTICE EZEKIEL MUHANGUZI, JA/JCC
HON. JUSTICE STEPHEN MUSOTA, JA/JCC**

This petition therefore fails and is dismissed. Each party to bear its own costs.

Dated this 4th day of November 2020



Stephen Musota
JUSTICE OF APPEAL

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THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.44 OF 2012

HUMPHREY NZEYI APPELLANT

VERSUS

10

1. BANK OF UGANDA

2. THE ATTORNEY GENERAL RESPONDENTS

15

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Mr. Justice Geoffrey Kiryabwire, JA/JCC
Hon. Mr. Justice Cheborion Barishaki, JA/JCC
Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC
Hon. Mr. Justice Stephen Musota, JA/JCC

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JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC

I have had the opportunity of reading in draft the Judgment of my learned brother Kiryabwire JA. In his Judgement, he has ably set out the introduction and the background to this petition. He has also set out the jurisdiction and the duty of this Court. I have found no reason to reproduce them here. He has reproduced the
25 declarations and remedies sought by the petitioner and the submissions of Counsel on the issues agreed upon. There is no need for me to repeat them here either. I will therefore proceed to determine the questions raised.

- 30
- 1) *Whether or not the provisions of Section 17(a) , 28(5), 77, 88, 89 and 102 of the Financial Institutions Act are inconsistent with and in contravention of Articles 2, 26, 27, 78, 40, 40(3), 42, 44, 162(2) of the Constitution.*

The petitioner is one of the shareholders of the now defunct National Bank of Commerce herein referred to as NBC. That bank was placed under liquidation by the

5 Bank of Uganda the first respondent and was eventually liquidated and its assets and liabilities sold to another Bank, Crane Bank Ltd on 27th September 2012.

It is contended by the petitioner that:-

10 (i) *The act/ manner and/ or conduct of the 1st Respondent of taking over, liquidating, winding up, and sale of National Bank of Commerce to Crane Bank Ltd is in contravention of Articles 2, 28, 26, 27, 40(2), 42, 44, 162(2), of the Constitution of the Republic of Uganda.*

15 (ii) *Sections 17(f), 7(c), 28(5), 57, 77, 88, 89, 99, 100(2)(i) and 101 of the Financial Institutions Act, 2004 giving sweeping powers to the 1st Respondent are inconsistent with Articles 2, 26, 28, 40(2) 42 ,44 and 162(2) of the Constitution of the Republic of Uganda*

20 (iii) *The act and/ or manner, in which the 1st Respondent took over, liquidated, wound up, and sold the National Bank of Commerce to Crane Bank Ltd amounts to illegal compulsory deprivation of the Petitioner's property in National Bank of Commerce contrary to Article 26 of the Constitution of the Republic of Uganda.*

25 (iv) *The provisions of Section 101 of the Financial Institutions Act barring the petitioners from seeking legal redress in Court of law in matters of winding up and liquidation amounts denying the Petitioners right of access to Courts of Law in protection of their property rights and thus inconsistent with Articles 2, 26(2), 28, 42, 44 and 162(2) of the Constitution of the Republic of Uganda.*

30 (v) *That act and/ or manner in which the 1st Respondent without any warning and hearing your Petitioners took over, wound up, liquidated and sold National Bank of Commerce (U) LTD to Crane Bank Ltd is an unfair administrative decision and contrary to the Principles of natural justice thus in contravention of Article 42 and Article 28 and 44 on the non derogable right of fair hearing as enshrined in the Constitution of the Republic of Uganda.*

35 (vi) *Sections 17(f), 7(c), 77(1, 2, 3), 88, 89, 99, 100(2)(i),101 of the Financial Institutions Act empowering the 1st Respondent, to act in an arbitrary manner, without affording the Petitioners a fair hearing, access to Courts of Law and to act contrary to the principles of natural justice are*

5 inconsistent with Articles 2, 28, 42, 44, and 162(2) of the Constitution of the Republic of Uganda.

10 (vii) The manner and/ or acts of the 1st Respondent of taking the drastic measure of winding up, liquidating and selling the National Bank of Commerce which should have been a last resort option and without any reasonable justification contravenes Article 26, 28, 40(2), 42, 44 and 162 of the Constitution of Uganda.

15 (viii) The manner/and act of sale of National Bank of Commerce by the 1st Respondent in less than a day after the takeover of management, winding up and liquidation, sale to Crane Bank Uganda Limited before doing the mandatory audit of the Bank as required under Section 89(3) is evidence of bad faith and collusion with Crane Bank Ltd and Contravenes Section 40(3) of the Bank of Uganda Act, the right to privacy as enshrined in 20 Articles 27 and 162 of the Constitution of the Republic of Uganda.

The first respondent opposed the petition contending in its answer thereto as follows:-

- 25 1. The 1st Respondent denies that Sections 7(c), 17(f), 28(5), 57, 77, 88, 89, 99, 100(2)(i) and 101 of the Financial Institutions Act 2 of 2004 (hereinafter the "FIA") or any of them are inconsistent with Articles 2, 26, 28, 40(2), 42, 44 and 162(2) of the Constitution of the Republic of Uganda (hereinafter the "**Constitution**") as alleged in paragraphs 3(ii), 3(iv) and 3(vi) of the Petition or at all.
- 30 2. The 1st Respondent further denies that its taking over and closure of National Bank of Commerce [hereinafter "NBC"] pursuant to Sections 88(1)(a) and (b) and 89(1)(k) of the FIA and the issuance of an Order for the winding up of NBC's affairs was in contravention of Articles 2, 26, 27, 28, 40(2), 42, 44 and 162(2) of the Constitution as alleged in paragraphs 35 3(i), 3(iii), 3(v) and 3(vii) of the Petition or at all.
- 40 3. The 1st Respondent further denies that the transfer of the deposit liabilities of NBC to Crane Bank Limited through a Purchase of Assets and Assumption of Liabilities Agreement entered into pursuant to Section 100(2) (1)(i) of the FIA was contrary to Section 89(3) of the FIA and Section 40(3) of the Bank of Uganda Act and further contravened Articles 27 and 162 of the Constitution as alleged in paragraphs 3(viii) of the Petition.

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4. The 1st Respondent denies that the Petitioner is entitled to a permanent injunction restraining its being wound up, the suspension of its Managing Director and or the sale of its assets as alleged in 3(ix) of the Petition. It is further denied that the Petitioner is entitled to general damages, costs or any other declaration as alleged in paragraphs 3(x) to (xii) of the Petition.

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5. The 1st Respondent shall aver that this Petition is incompetent as it does not seek to challenge the revocation of NBC's banking license pursuant to Section 17(f) of the FIA which is a prerequisite for the carrying on of banking business as stipulated in Section 4 of the FIA. The only contention taken is as to the Constitutionality of the said Section 17 (f) of the FIA but not the 1st Respondents exercise of its powers under the said provision. Accordingly, NBC having no banking license no action can be brought such as the present petition seeking for NBC not to be wound up as that is the fate of a financial institution that holds- license in relation to its financial institution business.

25
The second respondent also opposed the petition contending in its answer to the petition as follows:-

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1. Save for the Central Bank being the regulator of Financial Institutions in Uganda the contents of Paragraph 2 are denied.
2. In response to paragraph 3, the 2nd Respondent contends that there are NO Provisions of the Financial Provisions Act, 2004 that are inconsistent with and in contravention of the provisions of the Constitution of the Republic of Uganda 1995.
3. In further response to paragraph 3 the 2nd Respondent contends that the acts complained of in Paragraph 3(i), (ii), (iii), (iv), (v), (vii) and (viii) are not inconsistent with the constitution as alleged or at all.
4. The 2nd Respondent shall further contend that grant of a permanent injunction in the circumstances is overtaken by events.
5. In further response to the allegations contained in the Petition, the 2nd respondent contends that the Petition discloses no questions for constitutional interpretation.

5 6. That the Petition should be dismissed with costs as against the 2nd Respondent since there is no act or omission perpetrated by the Respondents in contravention of any provision of the Constitution.

7. 7. The 2nd Respondent asserts that the Applicant is not entitled to the orders and declarations sought.

10 Justice Kiryabwire has set out the issues for determination as follows:-

1. Whether or not the provisions of section 17 (a), 28 (5), 57, 77, 88, 89, and 102 of the FIA are inconsistent with and in contravention of
15 Articles 2, 28, 26, 27, 40, 40 (3), 42, 44 and 162 (2) of the Constitution. These covered (issues 2, 4, 5, 6, 7, 8, 9 and 10 of the conferencing notes).

2. Whether or not the takeover, the liquidation, revocation of banking licence, the winding up, the closure and sale of the National Bank of
20 Commerce to Crane Bank was inconsistent with and in violation of Articles 2, 26, 27, 28, 40 (2), 42, 44 and 162 of the Constitution.

3. Remedies.

With respect I find that the issue of whether or not the National Bank of Commerce was condemned unheard as alleged in the petition was not included in the issues for
25 determination. I have found it important to resolve it first.

I must state from the onset that, I am unable to find that the Financial Institutions Act does not have an inbuilt mechanism in which banks under the supervision of the Central bank can be heard.

A right to be heard is one of the principles of natural justice derived from a Latin
30 phrase 'aud alteram partem, meaning "listen to the other side". It is the principle that no one should be judged without first having been given the opportunity to be heard.

5 The right to be heard is not restricted to oral hearings. Neither is it restricted to a formal hearing before a tribunal or a set up of such nature. The right to be heard therefore, in the final analysis comes down to the opportunity to be heard, which does not invariably require a formal hearing. Written representations may be on their own as they often do, constitute a sufficient opportunity to be heard.

10 I have had the opportunity to peruse the pleadings hereto. The answer to the petition sets out in details the genesis of the controversy between the first respondent and the National Bank of Commerce and details it up to the date it was closed and sold off to Crane Bank Ltd. Specifically the period between January 2009 to September 2012, the two parties were in constant touch through the exchange of
15 various correspondences including agreements, undertaking and memorandum of understanding. They also held meetings the minutes of which are on record.

There is evidence on record to show that the National Bank of Commerce and the first respondent were in constant touch with each other over the performance of the Bank between 2009 and 2012 when it was closed. This is clearly set out in the first
20 respondent's answer to the petition and the accompanying affidavit of Benedict Ssekabira referred to earlier.

In his affidavit, Ssekabira, sets out the chronology of the events leading to the closure of National Bank of Commerce. His averments are supported by documentary evidence annexed thereto.

25 It appears from the affidavit of Ssekabira which facts are not challenged that- Regular on site examinations were conducted by the first respondent to assess National Bank of Commerce's Capital adequacy, assets quality, management, farming, liquidity and sensitivity to market risks as at 31st January 2009, 31st December 2009 and 31st December 2010. In each case a report was issued, excerpts
30 of which are attached to Ssekabira's affidavit referred to above.

5 There is no evidence by the petitioner challenging those reports or contending that they were not availed to National Bank of Commerce. On the contrary, there is evidence to confirm that National Bank of Commerce acted on those reports to remedy its short comings set out therein.

There is on record daily monitoring reports prepared by one Alex Kihumuro of
10 National Bank of Commerce's Finance Department for the status of the bank as at 26th September 2012.

There is an audit report prepared by PKF Uganda, certified accountants dated 23rd March 2012 indicating the statement of profit and loss position of National Bank of Commerce for the year 31st December 2010 and 31st December 2011.

15 Also on record is a letter by the first respondent's Governor addressed to the Chairman National Bank of Commerce dated 5th October 2011 regarding capitalisation of the Bank through sale of some of its shares.

The shareholders of National Bank of Commerce met with the first respondent's officers lead by its deputy Governor and discussed wide ranging issues on 10th May
20 2012 and the minutes of that meeting are attached to the affidavit of Ssekabira.

A follow up meeting between the first respondent's deputy Governor, his team and the National Bank of Commerce shareholders was held on 25th June 2012. The minutes of that meeting are on record.

A memorandum of understanding between the first respondent and National Bank
25 of Commerce had been negotiated and finalised on 27th March 2012 and forwarded to the Chairman Board of Directors National Bank of Commerce.

The same was signed on 29th March 2012. On June 19th 2012 Mr. Ssekabira wrote to the Board Chairman National Bank of Commerce bringing to his attention its failure

5 to comply with the Memorandum of Understanding referred to above and demanding that National Bank of Commerce takes remedial measures.

Another letter was written by one J Bagyenda (Mrs.) first respondent's Executive Director's Supervisor bringing to attention of National Bank of Commerce Chairman Board of Directors its non compliance with Financial Institutions Act in respect of
10 minimum capital requirements. The letter was replied to on 13th July 2012.

The issue of noncompliance with the minimum paid up capital requirements was again raised by the first respondent in the letter to National Bank of Commerce, Board Chairman on 20th September 2012. On 8th October 2012, the first respondent appointed M/s Pricewaterhouse Coopers Ltd to make on inventory of assets and
15 liabilities of National Bank of Commerce Ltd. On 27th September 2012 the first respondent, canceled National Bank of Commerce's banking licence, appointed a liquidator, sold its assets and liabilities of Crane Bank. On 28th September 2012 a public notices was placed in the press (New vision Newspaper) informing the public of the events of the day proceeding.

20 There is evidence on record in addition to that set out above, to prove that between 2010 and September 2012, National Bank of Commerce and the first respondent were engaging each other on a wide range of issues that were eventually reduced into a Memorandum of Understating. Clearly the National Bank of Commerce was given an opportunity to be heard in respect of all issues that culminated into its
25 closure.

This ground therefore fails. I find that the National Bank of Commerce was not denied an opportunity to be heard before it was finally closed on 27th September 2012.

30 I now revert to the first issues set out by Kiryabwire at page 6 of his Judgment.

5

1. Whether or not the provisions of section 17 (a), 28 (5), 57, 77, 88, 89, and 102 of the FIA are inconsistent with and in contravention of Articles 2, 28, 26, 27, 40, 40 (3), 42, 44 and 162 (2) of the Constitution. These covered (issues 2, 4, 5, 6, 7, 8, 9 and 10 of the conferencing notes).

10

2. Whether or not the takeover, the liquidation, revocation of banking licence, the winding up, the closure and sale of the National Bank of Commerce to Crane Bank was inconsistent with and in violation of Articles 2, 26, 27, 28, 40 (2), 42, 44 and 162 of the Constitution.

15

3. Remedies.

I am required to answer the question whether Section 17 of Financial Institutions Act is constitutional.

20

That Section provides as follows:-

25

The Central Bank may, at any time, revoke a licence of a financial institution if it is satisfied that the financial institution at any time—

(a) has ceased to carry on business;

(b) is significantly undercapitalised as defined in subsection (4) of section 87 of this Act or is unable to pay its liabilities as they mature;

(c) has gone into liquidation;

(d) has been wound up;

30

(e) has been dissolved;

(f) is in the opinion of the Central Bank conducting business in a manner detrimental to the interests of depositors;

(g) has in the view of the Central Bank contravened this Act or any other financial law in a manner which is serious or persistent;

35

(h) has engaged in serious deception of the Central Bank or the general public in respect of its financial condition, ownership, management, operations or other facts material to its business;

5 (i) has without the consent of the Central Bank amalgamated with another financial institution or sold or otherwise transferred its assets and liabilities to another financial institution;

(j) has failed to comply with any condition stipulated by the Central Bank under subsection (2) of section 12 of this Act;

10 (k) has failed to comply with any instruction or direction given by the Central Bank under Part IX of this Act to remedy managerial or financial deficiencies.

(l) does not or may not fulfill or has not or may not have fulfilled any of the licensing conditions specified in section 11 of this Act.

15 It is contended by the petitioner that, the above Section of Financial Institutions Act is inconsistent with Articles 2, 28, 26, 40, 42, 44, 162(2) of the Constitution.

20 I am constrained to reproduce the above Articles of the Constitution, if for nothing else but clarity.

2. Supremacy of the Constitution.

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

25 (2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

28. Right to a fair hearing.

30 (1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

35 (2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.

(3) Every person who is charged with a criminal offence shall—

5

(a) *be presumed to be innocent until proved guilty or until that person has pleaded guilty;*

(b) *be informed immediately, in a language that the person understands, of the nature of the offence;*

10

(c) *be given adequate time and facilities for the preparation of his or her defence;*

(d) *be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;*

15

(e) *in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;*

20

(f) *be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;*

25

(g) *be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.*

(4) *Nothing done under the authority of any law shall be held to be inconsistent with—*

30

(a) *clause (3)(a) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts;*

35

(b) *clause (3)(g) of this article, to the extent that the law imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused are to be paid their expenses out of public funds.*

- 5 (5) *Except with his or her consent, the trial of any person shall not take place in the absence of that person unless the person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the*
- 10 *person to be removed and the trial to proceed in the absence of that person.*
- 15 (6) *A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.*
- (7) *No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.*
- 20 (8) *No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.*
- 25 (9) *A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or*
- 30 *acquittal.*
- (10) *No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.*
- 35 (11) *Where a person is being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person.*
- (12) *Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.*

26. Protection from deprivation of property.

(1) Every person has a right to own property either individually or in association with others.

(2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—

~~(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and~~

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for— (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and (ii) a right of access to a court of law by any person who has an interest or right over the property.

27. Right to privacy of person, home and other property.

(1) No person shall be subjected to—

(a) unlawful search of the person, home or other property of that person; or

(b) unlawful entry by others of the premises of that person.

(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

40. Economic rights.

(1) Parliament shall enact laws—

(a) to provide for the right of persons to work under satisfactory, safe and healthy conditions;

(b) to ensure equal payment for equal work without discrimination; and

5 (c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.

(2) Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.

10 (3) Every worker has a right—

~~(a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests;~~

(b) to collective bargaining and representation; and

15 (c) to withdraw his or her labour according to law.

(4) The employer of every woman worker shall accord her protection during pregnancy and after birth, in accordance with the law.

42. Right to just and fair treatment in administrative decisions.

20 Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

44. Prohibition of derogation from particular human rights and freedoms.

25 Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

30 (c) the right to fair hearing;

(d) the right to an order of habeas corpus.

162. Functions of the bank.

(2) *In performing its functions, the Bank of Uganda shall conform to this Constitution but shall not be subject to the direction or control of any person or authority.*

There is nothing in *Section 17* of Financial Institutions Act that is inconsistent with any of the above Articles of the Constitution. The words used in *Section 17* of Financial Institutions Act are simple and clear. When juxtapositioned with Articles reproduced above, I find no contradiction and the petitioner has pointed out none. Similarly I find nothing in *Sections 28(5), 57, 77, 88, 89 and 102* of Financial Institutions Act that contravenes or is inconsistent with any of Articles of the Constitution set out above.

However, all the sections of Financial Institutions Act complained of must be read together with all the Articles of the Constitution set out above. This is a fundamental principle of legal interpretation.

The question is not about plain meaning of the impugned Sections, but rather their applicability.

The first issue set out by Kiryabwire JA and reproduced above therefore must also be answered in the negative.

The next issue is "whether or not the liquidation, revocation banking licence, the winding up, the closure and sale of National Bank of Commerce, to Crane Bank was inconsistent with and in violation of Articles 2,26,27,28,40, 42,44 and 162(2) of the Constitution."

The arguments of Counsel in respect of this issue are set out in the Judgment of Kiryabwire JA and will not repeat them here. I have already held that the impugned Sections of Financial Institutions Act are constitutional. However, I have added a caveat, to wit:- the Financial Institutions Act must be applied and or enforced in accordance with the provisions of the Constitution.

5 That question I am required to answer in the above issue is “whether on facts of the petition before us, the 1st respondent whilst enforcing the provision of Financial Institutions Act, did so in compliance with the Constitution and the relevant legislation.”

Revocation of Licence

10 The first respondent being the Central Bank of Uganda has power under Section 17 of the Financial Institutions Act to revoke a licence of any financial institution licenced under that Act. That Section provides as follows:-

Revocation of Licence

15 The Central Bank may, at any time, revoke a licence of a financial institution if it is satisfied that the financial institution at any time—

- (a) has ceased to carry on business;
- (b) is significantly undercapitalised as defined in subsection (4) of section 87 of this Act or is unable to pay its liabilities as they mature;
- (c) has gone into liquidation;
- 20 (d) has been wound up;
- (e) has been dissolved;
- (f) is in the opinion of the Central Bank conducting business in a manner detrimental to the interests of depositors;
- (g) has in the view of the Central Bank contravened this Act or any other
- 25 financial law in a manner which is serious or persistent;
- (h) has engaged in serious deception of the Central Bank or the general public in respect of its financial condition, ownership, management, operations or other facts material to its business;
- (i) has without the consent of the Central Bank amalgamated with another
- 30 financial institution or sold or otherwise transferred its assets and liabilities to another financial institution;
- (j) has failed to comply with any condition stipulated by the Central Bank under subsection (2) of section 12 of this Act;
- (k) has failed to comply with any instruction or direction given by the
- 35 Central Bank under Part IX of this Act to remedy managerial or financial deficiencies.
- (l) does not or may not fulfill or has not or may not have fulfilled any of the licensing conditions specified in section 11 of this Act.

5 On the facts before me, clause (a) is not applicable as National Bank of Commerce had not ceased business at the time of its banking licence was revoked by the first respondent on 27th September 2012.

10 It had not been wound up, neither had it been dissolved. Clauses (d) and (e) are therefore not applicable.

I also find no evidence that National Bank of Commerce had engaged in serious deception of the Central Bank or the general public in respect of its financial condition, ownership, management, operations or other material facts to its business. On the contrary it appears clearly from the affidavit of Ssekabira excerpts of which have been reproduced above, that between 2009-2012, the first respondent and the National Bank of Commerce were working closely and openly.

20 All the information that was required to be disclosed was indeed, disclosed by National Bank of Commerce culminating into a Memorandum of Understating dated 29th March 2012. I also find clauses 17(i) 17(j) and 17(L) inapplicable to the facts before me.

25 The clauses in contention, therefore are 17(c) liquidation, 17(f) conducting business in a manner detrimental to the interests of the depositors 17(g) contravention of Financial Institutions Act or any other law in a manner which is serious and persistent, 17(k) failure to comply with any instruction or direction given by the first respondent under part 14 of the Financial Institutions Act to remedy managerial or financial deficiencies.

30 Annexure H₁ to the affidavit of Ssekabira in support of the 1st respondent's answer to the petition is an advertisement in the English Diary. The New Vision of 28th September 2012. It is a notice to the public issued by the first respondent, it states as follows:-

35

BANK OF UGANDA

37/45 KAMPALA ROAD, P.O.-BOX 7120, KAMPALA;

5 Telephone: 256414-258441/6 or 258061, Telex:
61069/61344; Fax: 256414-233818
Web site: www.bou.or.ug E-mail address: info@bou.or.ug

10 ***BANK OF UGANDA TAKE OVER OF THE MANAGEMT OF NATIONAL
BANK OF COMMERCE (u) LTD***

15 *In exercise of its powers under Section 88(1) (a) & (b) of the Financial
Institutions Act, 2004, Bank of Uganda has effective today, 27th September,
2012, taken over the Management of National Bank of Commerce (U) Ltd
(NBC).*

20 *This action has been taken because Bank of Uganda has determined that the
continuation of NBC's activities is detrimental to the interests of its depositors.*

The Management and the Board of Directors of NBC are hereby suspended.

25 *NBC will remain closed until further notice by the Bank of Uganda. Bank of
Uganda will shortly inform NBC depositors of the arrangements that will be put
in place to enable them to access their depositors.*

*Bank of Uganda reassures the public that it will continue to protect depositors'
interests and maintain the stability of the financial sector.*

30 A day before the advert appeared in the press the first respondent had written to
the managing Director National Bank of Commerce communicating a takeover of its
management. That letter is annexed to the affidavit of the petitioner as annexure
'A'. It reads as follows:-

35 *"Ref: DGV.122.1 OJ*

*Tel: 341223
258441
Telex: 61059
Cables:UGABANK
Fax: 231549*

5 27th September 2012

The Managing Director,
National Bank of Commerce (U) Ltd.
Yusuf Lule Road
10 Kampala

Dear Sir,

~~Takeover of Management of National Bank of Commerce (U) Ltd~~

15 In exercise of its powers under Section 88(1)(a) & (b) of the Financial Institutions Act 2004 (the FIA), Bank of Uganda has effective today, 27th September, 2012, taken over the management of National Bank of Commerce (U) Ltd. (NBC).

20 You are accordingly suspended and are requested to hand over any bank property that may be in your possession to Mr. Benedict Sekabira, Director Commercial Banking.

25 Notwithstanding your suspension, you are required to remain available and follow any instructions that maybe issued by Mr. Benedict Sekabira.

Yours faithfully.

30 Louis Kasekende (PhD)
Deputy Governor

35 In the above letter and in first respondent in the public notice the first respondent states that the National Bank of Commerce had been takeover pursuant to Section 88(1) a and b of the Financial Institutions Act.

That Section provides as follows:-

40 **88. Management take-over**

(1) The Central Bank may take over management of a financial institution if—

(a) it is conducting its business in a manner contrary to this Act;

(b) the continuation of its activities is detrimental to the interests of depositors;

10 The Financial Institutions Act has 134 Sections. No specific Section was cited in any correspondence issued by the first respondent to National Bank of Commerce or the public as having been violated as a result of which the bank was being taken over.

15 I am inclined to assume that, the violation of Financial Institutions Act related to clause (a) of Section 88(1) ~~already reproduced above~~. I must assume therefore that the first respondent took over the management of the National Bank of Commerce because the contravention of its activities as a bank was detrimental to the interests of the depositors. I have assumed this was the reason because I have found no other reason in the evidence before me upon which the first respondent took over the National Bank of Commerce.

20 In his affidavit in support of the first respondent Ssekabira states as follows:-

8. **THAT** in further substantiation of the averments in paragraphs 1 to 7 above, the 1st Respondent shall state as follows;

25 a) NBC was a deposit taking financial institution which held a banking license issued by the 1st Respondent pursuant to Section 4 of the FIA. The banking license empowered NBC to take deposits from the public, in common with twenty four (24) other licensed banks, and was held subject to various stringent regulatory conditions, applicable to all banks, and set out in the FIA and the regulations made thereunder. This statutory regulatory regime is primarily designed to protect the interests of depositors and is overseen by the 1st Respondent as statutory regulator. Under the minimum core capital requirements of the FIA, depositors' monies constitute upto 92% of the risk weighted assets of a financial institution, whilst shareholders' minimum statutory capital constitutes 8% of the risk weighted assets of a financial institution.

35 b) Over the period 2009 to 2010, the 1st Respondent as regulator of financial institutions conducted various on-site examinations on NBC as at the 31st January 2009, 31st December 2009 and 31st December 2010 and on each of the three occasions NBC's CAMELS (Capital Adequacy, Asset Quality, Management, Earnings, Liquidity

and Sensitivity to Market Risk) rating was found unsatisfactory and its overall risk rating on all these three occasions was found to be high.

- c) In relation to the 31st December 2010 inspection, NBC's core capital was found to be Ug. Shs. 3,480,000,000/= [Uganda Shillings Three Billion four Hundred Eighty Million] which was below the then statutory minimum capital requirement of Ug. Shs. 4,000,000,000/= [Uganda Shillings Four Billion only], credit facilities granted to its Board Chairman and other insiders including the Petitioner, Humphrey Nzeyi and his immediate family were non-performing, the aggregate exposure of the bank's insiders and their related interests amounted to Ug. Shs. 1,350,000,000/= [Uganda Shillings One Billion Three Hundred Fifty Million] or 23.46% of the bank's core capital exceeding the 20% statutory limit and outstanding credit facilities to two (2) of the bank's non-executive directors and their related interests violated Section 34(8) of the FIA being in excess of 2.5% of its core capital.

[A copy of an extract the 1st Respondent's On-Site Inspection Report as at the 31st December 2010 indicating the matter in paragraphs 8(b) and (c) above is attached marked "A "J"]

- d) On the 1st March 2011, pursuant to the Financial Institutions (Revision of Minimum Capital Requirements) Instrument No. 43 of 2010 which came into force on the 5th November 2010, the minimum paid up statutory capital requirement for commercial banks was raised from Ug. Shs. 4,000,000,000/= [Uganda Shillings Four Billion] to Ug. Shs. 10,000,000,000/= [Uganda Shillings Ten Billion] to be further increased on the 1st March 2013 to Ug. Shs. 25,000,000,000/= [Uganda Shillings Twenty Five Billion]. NBC as elaborated upon further below failed to meet this Ug. Shs. 10,000,000,000/= [Uganda Shillings Ten Billion] minimum statutory capital requirement from the said 1st March 2011 up till its closure on the 27th September 2012 other than for a very brief period between late May 2012 and June 2012 when Ug. Shs. 7,000,000,000/= [Uganda Shillings Seven Billion] was injected but this was quickly eroded and by July 2012, they were again below the minimum statutory capital requirement and by the time of closure, it had a capital deficiency of Ug. Shs. 929,310,000/= (Uganda Shillings Nine Hundred Twenty Nine Million Three

5 Hundred Ten Thousand) which they had failed to make good in
spite of repeated demands to pay up. Of all the twenty five (25)
10 licensed banks, none other than NBC failed to comply with this
minimum statutory requirement. There was therefore every
reason to fear having failed to comply with the Ug. Shs.
10,000,000,000/= [Uganda Shillings Ten Billion] requirement, NBC
would have no chance of meeting the Ug. Shs. 25,000,000,000/=
[Uganda Shillings Twenty Five Billion] that would fall due on the
1st March 2013 five (5) months from the date of closure.

15 [Copies of the Financial Institutions (Revision of Minimum
Capital Requirements) Instrument No. 43 of 2010, of the
Graph and Table indicating NBC's core capital over the
period December 2010 up till August 2012 and of Daily
20 Monitoring Report prepared by NBC's finance department
for the status as at the 26th September 2012 being the day
prior to NBC's closure are attached marked "Bo/", "B(ii)"
and "B(iii)."

- 25 e) On the 18th May 2011, the 1st Respondent issued a directive to NBC
to take note of the supervisory concerns and initiate corrective
actions following the 31st December 2010 unsatisfactory rating but
NBC failed to take the requisite corrective action.

30 [A copy of the 1st Respondent's letter to NBC dated the is"
May 2011 is attached marked "C"]

- 35 f) NBC first started making losses in the second quarter of 2010. The
losses were mainly caused by large increases in expenditure on
staff salaries and provisions for bad debts. NBC also spent several
billion shillings on fitting out its new headquarters offices rented
by them in a building on Yusuf Lule Road in Kampala. These
expenditures were way out of proportion to the income of the bank
and added very little of commercial value to the banking business.
NBC made a loss of Ug. Shs. 851,892,000/= [Uganda Shillings Eight
40 Hundred Fifty One Million Eight Hundred Ninety Two Thousand]
in the year 2010.

- g) During 2011, NBC's financial performance worsened, and its losses
escalated because of the failure of management to control

5 operating costs and the need to make ever larger provisions for bad loans, including loans to insiders. By the end of 2011, NBC's non-performing loans comprised 38% of its total loans. NBC made a loss of Ug. Shs. 4,086,129,000/= [Uganda Shillings Four Billion Eight Six Million One Hundred Twenty Nine Thousand) in 2011.

10 [A copy of the Certified Accountant Audit Report dated the 23rd March 2012 indicating in the statement of Profit and Loss position for the years 31st December 2010 and 31st December 2011 referred to in paragraphs 8(f) and (g) above is attached marked "D"]

15
20 h) NBC was only kept afloat in 2011 by an injection of capital by an investor from United Arab Emirates - Emirates Africa Link - in the third quarter of 2011. NBC's local shareholders sold some of their shares to Emirates Africa Link but the local and foreign investors were unable to agree on precisely how large a share of NBC's equity should be allotted to the latter which led to an acrimonious legal dispute between the shareholders. This legal dispute itself contributed to NBC's problems because of its ruinous effect on the governance of NBC and the damage it caused to public confidence in NBC. The dispute between the shareholders were also a serious obstacle to attracting new investment into NBC from reputable investors who could have been able to provide both capital and management expertise needed to turn around NBC's performance.

30 (i) On the 5th October 2011, the 1st Respondent's Governor wrote to the NBC Chairman to express the 1st Respondent's concern about the shareholders dispute and to urge the shareholders to resolve it urgently. In February 2012, this dispute escalated into an actual suit H.C.C.S No. 73 of 2012 Emirates Africa Link Versus NBC, Amos Nzeyi and Anor in which the plaintiff sought specific performance of an alleged acquisition and payment for a 76% stake in NBC. Further
35 earlier to this in October 2010, another legal dispute was filed in Court H.C.C.S No. 361 of 2010 Prof. Kanyeihamba & 320 Ors Versus Amos Nzeyi, Amama Mbabazi and 2 Ors in which NBC's majority shareholders were sued by 321 minority shareholders for a
40 declaration inter alia that NBC does not

5

(A copy of the 1st Respondent's Governor's letter to NBC dated the 5th October 2011 is attached marked "E")

10

j) *With the exception of the capital brought in by Emirates Africa Link, no other measures were implemented by the shareholders and management of NBC to put NBC back on a sound footing in 2011 or in the first quarter of 2012 despite several letters from the 1st Respondent to NBC setting out explicitly what needed to be done if NBC was to be restored to viability. By the end of March 2012, NBC's core capital had fallen to below 50% of the minimum statutory requirement because of the on-going losses it was incurring.*

15

20

k) *Between March 2012 and September 2012, the 1st Respondent made numerous efforts to impress upon the directors and shareholder of NBC the importance of implementing remedial action to save the bank including raising new capital, recovery of non-performing loans, cutting costs and in particular resolving the disputes among shareholders. The Deputy Governor of the 1st Respondent personally met with the NBC directors and majority shareholders four (4) times in an effort to seek a resolution to NBC's troubled status including a meeting held on the 10th May 2012 and another meeting held on the 25th June 2012. Additionally, following a Court Ruling in one of the shareholders' disputes, the 1st Respondent facilitated an extra-ordinary general meeting of the shareholders in Kabale on the 1st June 2012 to elect a new Board of Directors. None of these efforts by the 1st Respondent however resolved the shareholders' disputes and NBC continued to be weakened by its internal acrimony.*

25

30

35

[Copies of the Minutes of the meetings between the Deputy Governor of the 1st Respondent and the majority shareholders of NBC dated 10th May 2012 and of the 25th June 2012 together with the hand written signed attendance sheets are attached marked "F(i)" and "F(ii)"]

40

[Further copies of the letters of the 1st Respondent to NBC dated the 20th February 2012, 29th February 2012, 21st March 2012, the Notice of appointment of advisor pursuant to Section 82 of the FIA the 27th March 2012, the MOU of the 29th March 2012, the letter of

the 11th May 2012, the letter of the 19th June 2012, the letter of 10th July 2012, NBC's response of the 13th July 2012 and the letter of 20th September 2012 are attached marked "F(iii) I to "F(xiii) "].

l) NBC had experienced virtually no growth over the course of the last four (4) years and lost market share. At the time it was closed, it had deposits of Ug. Shs. 9,500,000,000/= [Uganda Shillings Nine Billion Five Hundred Million] which is 0.08% of the total deposits in the banking system. Given the trend in its financial performance of over two (2) years, its inability to meet the minimum statutory capital requirement, effective the 1st March 2011, of Ug. Shs. 10,000,000,000/= [Uganda Shillings Ten Billion] which requirement was to raise to Ug. Shs. 25,000,000,000/= [Uganda Shillings Twenty Five Billion] on the 1st March 2013 hardly five (5) months from the date of its closure, the inability of its shareholders to take the necessary action to restore the bank to commercial viability, the fact that since 2010 NBC's total expenses had been more than double its total income trend which showed no sign of improvement, NBC's continued operations had become a threat to its depositors. It was imprudent to expect that shareholders would be able to inject new capital to prevent the bank from collapsing in the face of large on-going losses and shareholders' disputes. By intervening in a timely manner to close the bank, while it still had sufficient assets to cover its deposits, the 1st Respondent was able to safeguard these deposits in full and thus fulfill its primary responsibility as a bank regulator under the FIA.

9. **THAT** pursuant to Sections 88(1)(a) and (b) of the FIA, the 1st Respondent as a regulator, under its primary mandate of protecting the interests of depositors, is empowered to take over management of a financial institution if the continuation of its activities is detrimental to the interests of depositors and/or the financial institution is conducting its business in a manner contrary to the FIA both of which grounds cover the circumstances of NBC as described above.

10. **THAT** pursuant to Section 89(1)(f) and (k) of the FIA, the 1st Respondent upon taking over management of a financial institution has the power to inter alia close the financial institution and/or liquidate it.

The evidence set out above points to the following facts:-

5 The National Bank of Commerce appears to having doing well until sometime in
2009 when the 1st respondent on routine on site examination intended to determine
the Bank's capital adequacy, Assets quality, management earnings, liquidity and
sensitivity to market rating was found unsatisfactory. Specifically in relation to 31st
10 December 2010 inspection of the capital was shs. 3,480,000/= below the statutory
minimum of shs. 4,000,000/=. There was also insider lending of up to
shs. 1,350,000,000/= constituting 23.40 percent of the bank's core capital and
exceeding 20 percent statutory limit. Further the bank's non-executive Directors
and their related interests violated Section 34(8) of Financial Institutions Act in
excess of 2.5 percent of its core capital.

15 This appears to have been the problem, at the end of December 2010. National Bank
of Commerce was required to raise shs. 530,000,000/= to satisfy the minimum
capital requirement, and to reduce its insider lending portfolio.

20 On 1st March 2011, pursuant to the Financial Institution (Revision of minimum
capital requirement) S.I 13 of 2010. All Commercial Banks were required to have a
minimum of shs. 10,000,000/= as statutory capital on 18th of May 2011, the first
respondent wrote a letter to the National Bank of Commerce, expressing concerns
about its unsatisfactory performance following an offsite report for the quarter
25 ended 31st March 2011. The reasons for the poor performance is set out in the
affidavit of Ssekabira referred to above in paragraph 8(f) and (g) already
reproduced above names, increase in expenditure or staff salaries and provisions
for bad debts. Renting of new building housing its new headquarter offices which
expenses were way out of proportion to the bank's income.

30 In 2011 the first respondent's Governor wrote to the National Bank of Commerce
Board Chairman expressing his concern over shareholders dispute that had
escalated into a law suit and also about an earlier suit between minority
shareholders and majority shareholders.

35 However, in June 2012, National Bank of Commerce was able to raise its core capital
to shs. 10,670,000,000/= slightly over the required minimum. This did not last long
as it had fallen below the minimum by the end of August 2012.

40 By the time it was closed it had deposits of shs.9,500,000,000/= and a capital
deficiency of shs. 929,310,000/=. While summing up, Ssekabira sets out the reasons
for the bank's closure as follows:-

45 *8)(L) NBC had experienced virtually no growth over the course of
the last four (4) years and lost market share. At the time it was*

5 closed, it had deposits of Ug. Shs. 9,500,000,000/= [Uganda
Shillings Nine Billion Five Hundred Million] which is 0.08% of the
total deposits in the banking system. Given the trend in its
financial performance of over two (2) years, its inability to meet
10 the minimum statutory capital requirement, effective the 1st March
2011, of Ug. Shs. 10,000,000,000/= [Uganda Shillings Ten Billion]
which requirement was to raise to Ug. Shs. 25,000,000,000/=
[Uganda Shillings Twenty Five Billion] on the 1st March 2013
hardly five (5) months from the date of its closure, the inability of
its shareholders to take the necessary action to restore the bank to
15 commercial viability, the fact that since 2010 NBC's total expenses
had been more than double its total income trend which showed
no sign of improvement, NBC's continued operations had become a
threat to its depositors. It was imprudent to expect that
shareholders would be able to inject new capital to prevent the
20 bank from collapsing in the face of large on-going losses and
shareholders' disputes. By intervening in a timely manner to close
the bank, while it still had sufficient assets to cover its deposits, the
1st Respondent was able to safeguard these deposits in full and
thus fulfill its primary responsibility as a bank regulator under the
25 FIA.

9. **THAT** pursuant to Sections 88(1)(a) and (b) of the FIA, the 1st
Respondent as a regulator, under its primary mandate of protecting the
interests of depositors, is empowered to take over management of a
30 financial institution if the continuation of its activities is detrimental to
the interests of depositors and/or the financial institution is conducting
its business in a manner contrary to the FIA both of which grounds cover
the circumstances of NBC as described above.

35 I am unable to find any evidence in the affidavit of Ssekabira or elsewhere to show
that the interests of the depositors of National Bank of Commerce were at risk, so
serious as to warrant its closure. Through a series of consultations, memorandum
of agreement and other undertaking National Bank of Commerce had been able to
raise its core capital requirement to over shs.10,000,000/= the statutory minimum
40 in July 2012. The minimum capital requirement of shs. 10,000,000/= had been set in
March 2011 prior to that, the minimum capital requirement was shs.4,000,000/=.
From December of 2010 to June of 2012 National Bank of Commerce held that over
shs.4,000,000/= shillings as core capital

5 This evidence is set out in a table and graph annexed to the affidavit of Ssekabira as annexed B11.

That table indicates that by September of 2011 National Bank of Commerce had raised its core capital to 8.78 billion shillings, 120 million shillings shy of the
10 statutory requirement. Although the core capital fell again in March 2012 to 3.43 billion shillings, it was raised to 10.67 billion shillings in September 2012 and was ~~9.36 billion in August 2012. There is an explanation by the National Bank of~~
Commerce regarding the short fall state to arise from an accountability error.

15 By 19th September 2012, National Bank Commerce required a capital injection of shs 793,142,000/= as set out in a letter wrote to National Bank of Commerce Board Chairman by the first respondent on 20th September 2012. National Bank of Commerce was closed, liquidated and sold seven days later on 27th September 2012 by the first respondent.

20 There is no comparative data, in the evidence of the first respondent to enable me determine, National Bank of Commerce's performance *visa-vis* the other commercial Banks and the economy as whole. In absence of such evidence I am unable to determine that the National Bank of Commerce was doing "badly" and was therefore
25 the exception to the general rule and a danger to the economy.

This is in my view extremely important, because in the absence of a comparative analysis we cannot rule out the possibility of a biased decision. Administrative decision must be exercised judiciously and therefore must be rational.

30 Before an administrative decision is taken to close one Bank out of 26 licensed banks in the Country, a comparative analysis is required setting out the financial

5 performance of other banks in order to arrive at a rational decision completely free of bias. I shall revert to the consequence of this later in this judgment.

At the time of its closure, the National Bank of Commerce's financial standing was set out as follows (annexture H₁₁ to the affidavit of Ssekabira).

10

Assets Transferred

ANNEX A - ASSETS TRANSFERRED

ITEM	ASSET TRANSFERRED	PRICE AS % OF BOOK VALUE	BOOK VALUE(UG.SHS.	PRICE(UG .SHS
1.	Secured performing loans	70%	298,339,989/=	208,837,992/=
2.	Treasury Securitas	99.97%	8,780,482,989/=	8,777,541,035/ =
3.	Land	75%	400,000,000/=	300,000,000/=

15

ANNEX B - LIABILITIES

(a) Total Time Deposits
Fixed Deposits

Ug.Shs.628,736,089/=

(b) Demand and Savings Deposits

Current Accounts

Ug.Shs.3,470,337,484/=

Savings Accounts

Ug.Shs.4,038,978,748/=

20

25

ANNEX C - ASSETS IN ESCROW

A. Unsecured Performing Loans

Ug.Shs.499,287,894/=

5	B. Secured Non-Performing Loans	Ug. Shs. 338,555,840/=
	C. Unsecured Non-performing Loans	Ug.Shs. 676,641,667/=

10 What I understand from the above information is that assets exceeded liabilities, even without the assets in escrow. The assets listed as being held in escrow all recoverables, a large percentage of which was held by shareholders and directors. There were also almost shs. 500,000,000/= of unsecured but performing loans in respect of which security could have been sought. The secured but none performing loans could have been recovered by way of foreclosure.

15 No doubt National Bank of Commerce was going through a storm but it appears it was not sinking. There were disputes between the shareholders. There was also the issue of shares to be allotted to International Investments House COLLC.

20 On 29th March 2013 National Bank of Commerce and first respondent entered into a Memorandum of Understating as follows (Ssekabira affidavit Annexure F(VIII).

2.0 DURATION OF THE MOU

25 2.1 *The MOU will remain in force until revoked by the BOU.*

3.0 CAPITAL RESTORATION PLAN

30 3.1 *NBC shall submit to BOU a Capital Restoration Plan to rectify the current impairment of the minimum capital prescribed under Regulation 3 of the Financial Institutions (Revision of Minimum Capital Requirements) Instrument, 2010 by April 4, 2012. The Capital Restoration plan will be designed to ensure that NBC fully complies with the minimum unimpaired capital requirement by April 20, 2012. Reference is made to the directive communicated to NBC by the Executive Director Supervision in the letter dated February 20, 20 12 and a penalty will continue to be charged per day in default until the bank complies with the minimum capital requirement.*

4.0 BUSINESS OPERATIONS

4.1 **NBC shall not:**
i) *Declare or distribute any dividends.*

5
ii) Award or pay any bonuses to any of its Directors, officers or other employees.

10
iii) Award or pay any increment in the salary, emoluments or other benefits, to any of its Directors, officers or other employees.

iv) Grant any new loans.

15
v) Incur any capital expenditure without prior approval of BOU.

vi) Finance the travel of Shareholders and Directors without the clearance of BOU.

20
vii) Finance any legal expenses arising from the share holding dispute without the clearance of BOU.

"5.0 RECOVERY OF NON-PERFORMING LOANS AND ADVANCES

25
5.1 NBC is directed to recover all non-performing insider loans by April 16, 2012 including where applicable foreclosing on securities and ensuring that the guarantors honour their liabilities.

30
5.2 NBC should institute measures to recover all other non performing loans including foreclosing on loan securities and such measures shall be implemented by April 20, 2012.

6.0 MANAGEMENT OF NBC

35
6.1 BOU shall appoint a person to advise and assist NBC in formulating and implementing remedial measures to rectify the financial impairment of the bank.

40
6.2 The Advisor appointed under 5.1 above shall report to Bank of Uganda on all matters pertinent to NBC.

6.3 The remuneration of the Advisor shall be at the cost of NBC.

45
6.4 The Managing Director of NBC shall co-operate closely with the Advisor and BOU and ensure that all other officers of the institution do so.

5

7.0 COMPLIANCE AND MONITORING OF THE MOU

7.1 Compliance with the terms of the MOU must be strictly observed.

10

7.2 BOU shall at its discretion, assign examiners to visit NBC on a periodic basis to review the accuracy of reporting, performance and compliance to the terms of the MOU.

15

~~**7.3** NBC shall ensure and demonstrate to BOU that effective systems and controls are in place to ensure compliance with the orders herein and any other orders as may be issued by the BOU in this regard.~~

20

7.4 BOU reserves the right to remove officers of NBC who refuse, omit, neglect and or fail to comply with this MOU.

7.5 The Advisor will assist BOU to verify the accuracy of reporting and compliance with the terms of the MOU.

25

On 11th May 2012 the first respondent wrote to the shareholders of the National Bank of Commerce together with Emirates Africa Link the investor urging them to take further steps in resolving their conflicts and to raise 7 billion shillings from the bank.

30

That letter read as in part as follows:-

Dear Shareholders

35

Remedial Actions to be Implemented by National Bank of Commerce Ltd.

40

I am writing to follow up on our meeting held on 10 May 2012. At that meeting I believe we came to a mutual understanding of the essential steps which are required to restore NBC to economic viability and to safeguard its deposits; notably the speedy resolution of disputes between shareholders, the recapitalisation of the bank and the formulation of a feasible long term business strategy. Accordingly, I am setting out below the measures that the Bank of Uganda requires NBC to implement in the near term, together with applicable deadlines.

- 5 1. All shareholders' disputes must be resolved and all of the necessary legal
procedures for transferring and/ or allotting shares to their respective
owners in accordance with the law (e.g. signed share transfer forms filed
with the Companies Registry) must be completed in order to clear the
10 current convoluted shareholding structure of NBC. The deadline for this
remedial measure is 30 working days beginning on Monday 14 May, 2012
(i.e. by Friday 22 June, 2012).
- 15 2. As soon as the shareholders' disputes are resolved and the shareholding
~~records are regularised, the shareholders should inject~~ sufficient new
capital through the issuance of new paid up shares, either to existing
shareholders or any new shareholders as approved by the Bank of
Uganda, to raise core capital to the statutory minimum of Shs. 10 billion.
- 20 3. Within 10 working days from Monday 14 May, 2012, the shareholders
must raise Shs.7 billion in the form of a subordinated loan to ensure that
the bank's deposits can be adequately protected in the interim period
before the bank is fully recapitalised through the issuance of new paid up
shares. The subordinated loan should be invested in Government
25 securities. Once the bank is in a position to issue new shares, the
subordinated loan may be converted into share capital.
4. NBC should submit a draft business plan to the Bank of Uganda within 30
working days from Monday 14 May 2012."

30 On 19th June 2012, the first respondent wrote to the National Bank of Commerce
Chairman as follows:-

"EDS.122.10J

35 June 19,2012
The Chairman
Board of Directors
National Bank of Commerce (U) Ltd.
Kampala

40 Dear Sir
**Compliance with the Memorandum of Understanding (MOU) and
Remedial Measures**

5 This has reference to the conditions set out in the MOU executed between
Bank of Uganda and National Bank of Commerce (U) Ltd. (NBC) and the
subsequent remedial measures issued vide BOU letters dated May 11,
2012 and June 04; 2012. NBC's compliance deadline for the remedial
10 measures issued by BOU is June 22, 2012. In view of this, we require NBC
to do the following by 22nd June 2012:

1. To provide to BOU a written status of the concrete steps taken to
achieve resolution of the shareholding dispute which has resulted
15 in a convoluted shareholding structure.
2. While BOU acknowledges receipt of the original letter from Mr.
Ahmed Dagher dated July 25, 2011 to NBC authorizing the
capitalization of a sum of 'USD 3,000,000 paid in by IIH LC on
prorate basis to all shareholders, we require your confirmation as
20 to how the pro-rata distribution to all shareholders will be done
given the current shareholder disputes (IIH and Prof.
Kanyeyihamba). BOU is concerned that the dispute between
shareholders regarding the percentage shareholdings may not
permit an agreeable and comfortable pro-rata distribution of the
25 funds and is still constrained to include that amount in the paid up
capital of NBC.
3. BOU requires the full and complete up-dated and registered
shareholding position following the payment of new capital last
30 month.
4. NBC must submit the vetting documents in respect of any of the
Board Members appointed by the AGM of Kabale on June 01, 2012
to enable BOU complete the vetting process.
- 35 5. NBC to submit a draft business plan to BOU as required under the
BOU directive.
- 40 6. NBC to inform BOU of the status of the steps so far taken to appoint
a substantive Managing Director and Executive Director to run the
affairs of the bank.

Bank of Uganda directs NBC to promptly respond to the issues listed
above within the stipulated deadline of June 22, 2012."

On 10th July 2012, the first respondent wrote to the National Bank of Commerce Board Chairman as follows:-

"Non-compliance with the Financial Institutions (Revision of Minimum Capital

Requirements) Instrument No. 43 of 2010 by National Bank of Commerce (U) Ltd.

Bank of Uganda has noted with concern that as at July 9, 2012, the paid up capital of National Bank of Commerce (U) Ltd (NBC) had been eroded by losses to **Shs.9.51bn** which is below the minimum statutory requirement of **Shs 10bn by Shs.490m**. Consequently, the bank is directed to inject additional capital to address the shortfall by July 17, 2012.

In view of the continuing loss trend in NBC, we direct that the shareholders immediately inject at least **Shs 1 bn** to ensure that there is adequate capital unimpaired by losses to absorb the monthly operational losses and to remain compliant with the minimum capital requirement at all times.

Please note that failure to comply with this directive will lead to a penalty in accordance with Section 126(2) of the FIA 2004 and the penalty will remain in force until NBC attains compliance with the minimum statutory capital requirement."

In response the National Bank of Commerce Chairman wrote as follows:-

"Non-compliance with the Financial Institutions (Revision of Minimum Capital Requirements) Instrument No. 43 of 2010 by National Bank of Commerce (U) Ltd.

Bank of Uganda has noted with concern that as at July 9, 2012, the paid up capital of National Bank of Commerce (U) Ltd (NBC) had been eroded by losses to **Shs.9.51bn** which is below the minimum statutory requirement of **Shs10bn by Shs.490m**.

Consequently, the bank is directed to inject additional capital to address the shortfall by July 17, 2012. In view of the continuing loss trend in NBC,

5 we direct that the shareholders immediately inject at least Shs 1bn to ensure that there is adequate capital unimpaired by losses to absorb the monthly operational losses and to remain compliant with the minimum capital requirement at all times.

10 Please note that failure to comply with this directive will lead to a penalty in accordance with Section 126(2) of the FIA 2004 and the penalty will remain in force until NBC attains compliance with the minimum statutory capital requirement,

15 Yours faithfully,

J. Bagyenda (Mrs.)
Executive Director Supervision

20 In his affidavit Ssekabira stated that in the month of June the National bank of Commerce raised shs. 7,000,000/= towards its capitalization and its core capital rose from 3.43 billion shillings to 10.67 billion shillings. In July 2012, that capital was eroded by losses to 9.36 billion shillings on 20th September 2020 one J. Bagyende Executive Director supervision with the first respondent wrote to the National
25 Bank of Commerce Board Chairman as follows:-

"September 20, 2012

30 Mr. Mathew Rukikaire
The Chairman
Board of Directors,
National Bank of Commerce (U) Ltd
Kampala

35 Dear Sir,

National Bank of Commerce (U) Ltd. (NBC) - Non-Compliance with the Minimum Paid-up Capital Requirement

40 This has reference to our letter dated September 14, 2012 communicating a penalty charge to NBC for non-compliance with the minimum paid-up Statutory Capital requirement of **Shs.10.0billion**.

5 *This is to advise that NBC Capital position is eroded to **Shs.9.207billion***
as at September 19, 2012, requiring a capital injection of
***Shs.793million**. As directed in our letter dated July 10, 2012, the*
10 *shareholders need to immediately inject at least **Shs1.0billion** to ensure*
adequate reserves to absorb the operational losses and to remain
compliant with the minimum capital requirements.

The schedule attached shows NBC's capital position as at September 19,
2012.

15 *Yours faithfully,*

J. Bagyenda (Mrs.)
Executive Director Supervision

20 Seven days later, the first respondent revoked the National Bank of Commerce's
licence, placed under liquidation, appointed one of its staff Ssekabira, as the
liquidator and sold it to another Bank-Crane Bank, since defunct.

25 The functions of the Bank of Uganda are set out under *Article 162* of the
Constitution. They do not include supervision of Financial Institutions.

30 The authority to supervise, regulate and discipline all financial and pensions funds
institution is derived from Parliament, under *Section 6(L), (i) and g* of the Bank of
Uganda Act (CAP 51).

35 Bank supervision is therefore a delegated function, from Parliament. Similarly all
the power granted to Bank of Uganda under the Financial Institutions Act (2004)
are not derived directly from the Constitution but Parliament. They are delegated
powers.

40 Parliament cannot legislate on all aspects of a certain matter. It therefore vests
broad authority in the executive and or state agencies such as the first respondent to
implement the same. In so doing it leaves gaps as of necessity to be filled by those
agencies in accordance with their discretion. The agencies are required to use this
discretion in order to act upon the authority vested in them by Parliament.

45 By exercising discretion invariably the agency has to consider various alternatives
available to them under the particular statute. This is not a blank cheque for the
agency to do as it wants. The discretion is subject to fetters. It is subject to controls

5 set out in the Constitution and under the particular statute and other related legislation. The agency such as the first respondent is required to ensure that the delegated function or discretion is used to actualise the letter and the spirit of the statute from which it is derived.

10 The agency exercising such power may violate it when it fails to exercise, or when it does so incorrectly, that is with improper motives, bias, external influence or in violation of the statute that vested such power. Being an executive function or at times a *quasi judicial* one such decisions are subject to the constitution and to judicial review.

15 The instances in which Courts may interfere with administrative decisions have been well articulated by Mubiru J in *Thugitho Festor vs Nebbi Municipal Council High Court at Arua, Miscellaneous Application No. 0015 of 2017* (unreported) at pages 5-6 of his Judgment as follows:-

20 *The limits within which courts may review the exercise of administrative discretion were stated in Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1947] 2 ALL ER 680: [1948] 1 KB 223, which are;- (i) illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse" or "absurd" that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process;(2)The common law requirement of fair hearing;(3) the common law requirement that the decision is made without an appearance of bias;(4) the requirement to comply with any procedural legitimate expectations created by the decision maker.*

5

10

15

The judicial attitude when reviewing an exercise of discretion must be one of restraint, only intervening when the decision is shown to have been illegal, unfair or irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order, would only be justified if there is a charge of bad faith or abuse or misuse by the authority of its power. The challenge ought to be over the decision making process and not the decision itself. The jurisdiction to decide the substantive issues is that of the authority and the Court does not sit as a Court of Appeal, since it has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made. It is elsewhere said that, if a review of administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible.

20

25

30

A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the

5 *decision on the available facts i.e. there is insufficient evidence to justify the decision taken).*

10 *Decisions made without the legal power (ultra vires which may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects*
~~*in its exercise) include; decisions which are not authorised, decisions*~~
taken with no substantive power ore where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

15

20

25

30 See also *Onyaro John Owiny vs Kitugum Municipal Council High Court at Gulu Miscellaneous Cause No. 0007 of 2018* (per Mubiru J) unreported, page 5. I cite the above High Court decisions with approval as they both articulate the law correctly and I have found no reason to repeat what is stated in the above authorities here.

5 In addition to illegality, irrationality and procedural impropriety, the Courts may set
aside administrative decision on account of Manifest error in assessment. The
purposes of this administrative law concept is the prohibition of abuse of powers. It
is intended to subject public administration to minimum standards of morality and
prevent the use of power to pursue objectives inconsistent with public interest. It is
10 intended to instruct administrative bodies to have logic and common sense.

Although it is similar in many ways with irrationality in English law, it is mostly
used in civil law jurisdictions, but has its own specific tenets. It contains a certain
degree of subjectivity, it is ~~an error that does not raise doubt in the mind of a~~
15 reasonable person. See: *Jerzy Porchomilik, Abuse of Discretionary powers 2018*
lubhim (Rwef. UMo-2015/17/B/H55/00430).

Whether the impugned decision of the first respondent to take over National Bank
of Commerce , revoke its banking licence, wind it up and sale it to Crane Bank Ltd in
one day 27th September 2012 was manned by ;

1. Illegality
2. Procedural impropriety
3. Irrationality
4. Manifest errors in assessment

Illegality

I have already reproduced a Notice to the public issued by the first respondent in
respect of its decision to take over the National Bank of Commerce. I am constrained
to produce it. It states that:-

BANK OF UGANDA

37/45 KAMPALA ROAD, P.O. BOX 7120, KAMPALA;
Telephone: 256414-258441/6 or 258061, Telex:
61069/61344; Fax: 256414-233818

Web site: www.bou.or.ug E-mail address: info@bou.or.ug

BANK OF UGANDA TAKE OVER OF THE MANAGEMT OF NATIONAL BANK OF COMMERCE (u) LTD

*In exercise of its powers under Section 88(1)(a) & (b) of the Financial
Institutions Act, 2004, Bank of Uganda has effective today, 27th September,*

5 2012, taken over the Management of National Bank of Commerce (U) Ltd (NBC).

 This action has been taken because Bank of Uganda has determined that the continuation of NBC's activities is detrimental to the interests of its depositors.

10 The Management and the Board of Directors of NBC are hereby suspended.

 NBC will remain closed until further notice by the Bank of Uganda. Bank of Uganda will shortly inform NBC depositors of the arrangements that will be put in place to enable them to access their depositors.

15 Bank of Uganda reassures the public that it will continue to protect depositors' interests and maintain the stability of the financial sector.

20 The reading of the whole of the Financial Institutions Act appears to me clearly, that Parliament intended to provide for regulation and control of financial institutions in order to maintain financial stability and the value of the currency. It was also intended to protect the interest of depositors.

25 In this regard it set up a legal regime that allowed the Central Bank to regularly supervise financial institutions in such away as to ensure that at all time they are properly managed and conform in their operations with sound standard practices. The law also gave power to the central Bank to use its expertise and where necessary its resources to ensure that financial institutions do not just collapse. In this regard Part II of the Financial Institutions Act Sections 4-17 provide for process of licencing financial institution. Part III deals with restriction and limitations of shareholding in those institutions. Part IV is in respect of capital requirements providing specifically for minimum capital. Part V details prohibitions and restrictions on lending, reduction in capital, core capital requirements and so on. Part VI regulates accounts and financial statements and Part VII in respect of corporate governance regulations and standards, including appointments and removal of directors, internal and external audit.

40 All the aforementioned parts of the Financial Institutions Act deal with regulations. Parts VII provides for the supervision of institutions by the Central Bank. Sections 79, 80 and 81, Part IX, are in respect of corrective measures. Instances in which the Central Bank may intervene in the management of a financial institution.

5 Parts X and Part XI deals with receivership and liquidation measures to be taken when the institutions can no longer be salvaged. The rest of the provisions are in respect of general and miscellaneous matters.

10 The elaborate layout of the Financial Institutions Act, reveals the purpose and intent of Parliament. It is a guide to the regulatory agency in this case the 1st respondent the way the law requires it to apply the powers provided there under. It appears to me clearly that the enactment of sections under Part IX, was intended to set out the sequence required to be followed by the Central Bank once a financial institution has failed to comply with the Financial Institutions Act.

15 I hasten to state here, that it is the duty of the Central Bank to ensure, through its supervisory powers that every financial institution adheres to the Financial Institutions Act and where it does not, corrective measures are taken at the earliest opportunity.

20 In the matter before me the first respondent being the Central Bank, it is the first respondent's case that it took the measures that it did, which are the impugned acts in this petition on 27th September 2012 because it had determined that "the continuation of the National Bank of Commerce's activities were detrimental to the interests of its depositors.

25 This in itself is an indictment on the first respondent as it had failed by its own admission to carry out its duty produced under Section 79, 80 and 81 of Financial Institutions Act. These sections relate to regular inspection of licenced financial institutions such as the National Bank of Commerce, regular requirements to furnish all information and data on banks operations and failure to put into effect provision of Section 81 intended to ensure the enforcement of strict supervision on a defaulting institution. Having failed to do so, the Financial Institutions Act, provides under Part IX, power to the first respondent to as the next step to take corrective actions to remedy the breach or mischief. The first point in case is Section 82. It provides as follows:-

"82. Intervention

40 *(1) If the Central Bank has reason to believe or finds that the affairs of the financial institution are conducted in a manner detrimental to the interests of the depositors or prejudicial to the interests of the financial institution or in contravention of this Act, or any other written law or that the financial institution has refused to submit to inspection, or has*

5

provided false information, the Central Bank may, without prejudice to any other course of action—

(a) order in writing that the financial institution takes remedial action to comply with this Act or regulations, notices, or orders issued under this Act;

10

(b) issue directions regarding measures to be taken to improve the management, financial soundness or business methods of the financial institution;

15

(c) require the directors or management of the financial institution to execute an agreement concerning their implementation of orders or directions issued under paragraphs (a) and (b) of this subsection; or (d) perform or appoint an agent to perform a special examination of the financial institution to determine the financial condition of the institution and evaluate resolution options, at the cost of the financial institution.

20

(2) Where a financial institution fails, refuses or neglects to comply with an order, direction, or agreement issued or made under subsection (1) then the Central Bank may do any or all of the following—

25

(a) initiate a legally binding cease and desist order, of either temporary or indefinite duration requiring the financial institution and its management to—

(i) stop the improper or unacceptable practice;

(ii) put a limit to lending; or

(iii) stop any declaration of dividends.

30

(b) remove or suspend any person from the management of the affairs of the financial institution;

(c) impose penalties on the offending member of the management to be met personally;

5 (d) appoint a person who, in the opinion of the Central Bank is, suitably qualified and competent to advise and assist the institution generally or for the purposes of implementing the orders, directions or agreements under paragraph (a), (b) or (c) of this subsection and the advice of
10 a person so appointed shall have the same force and effect as a direction made under paragraph (a), (b), or (c) and shall be deemed to be a direction of the Central Bank under this section;

15 (e) appoint a person, suitably qualified and competent in the opinion of the Central Bank, to manage the affairs of the financial institution for such period as shall be necessary to rectify the problem;

(f) require the financial institution to reconstitute its board of directors within such period as shall be specified;
20 (g) withhold approvals on establishment of new branches;
(h) withdraw the foreign exchange dealers' licence;
(i) require the financial institution to add such capital as may be specified;

or

25 (j) impose any other sanctions as the Central Bank may deem appropriate in the circumstances."

Where corrective measures have not yielded the intended results, the first respondent is required to invoke the provisions of Sections 85, 86 and 87 of the Financial Institutions Act. The law makes this requirement mandatory under
30 Section 84 which provides as follows:-

84. Prompt mandatory corrective actions

35 The prompt, mandatory corrective actions prescribed in sections 85 to 87 of this Act, shall take precedence over any discretionary corrective actions available to the Central Bank under this Act or any other law.

The mandatory corrective measures required to be taken by the Central Bank are set out in Sections 85, 86 and 87 as follows:-

5 **85. Adequately capitalised financial institutions suffering large losses**

10 (1) Where a financial institution which complies with the capital requirements prescribed in sections 26 and 27 of this Act has incurred or is likely to incur large losses within any financial year, the Central Bank shall take the following actions against that financial institution—

15 (a) prohibit the financial institution from declaring and distributing any dividends which are, in the opinion of the Central Bank, likely to cause the financial institution not to comply with the capital requirements prescribed in sections 26 and 27 of this Act;

 (b) undertake more frequent inspection of that financial institution.

20 (2) In addition to the actions prescribed in subsection (1) of this section, the Central Bank may require the directors or management of the financial institution to provide a written explanation detailing the causes of those losses and the measures to be taken by the financial institution to rectify the position and avert future losses.

25 **86. Undercapitalised financial institutions**

 (1) An “undercapitalised financial institution” is one which does not comply fully with any or all of the capital requirements prescribed in sections 26 and 27 of this Act.

30 (2) Where a financial institution is undercapitalised, the Central Bank shall take the following actions against that financial institution—

 (a) all of the actions prescribed in subsection (1) of section 85;

35 (b) order the financial institution to submit to the Central Bank within forty five days after the making of the order, a capital restoration plan to restore the financial institution to capital adequacy as prescribed in sections 26 and 27 of this Act within one hundred and eighty days of making that order; and

40 (c) prohibit the financial institution from awarding any bonuses, or increments in the salary, emoluments and other benefits of all directors and officers of the financial institution.

45 (3) In addition to the actions prescribed in paragraphs (a), (b) and (c) of subsection (2) of this section, the Central Bank may appoint a person, suitably qualified and competent in the opinion of the

5 Central Bank, to advise and assist the financial institution in
designing and implementing the capital restoration plan, and the
person appointed shall regularly report to the Central Bank on the
progress of the capital restoration plan.(4) Where a financial
10 institution has been ordered by the Central Bank to submit a
capital restoration plan or to add more capital, and the financial
institution fails, refuses or neglects to comply with the order, or to
implement the capital restoration plan, the Central Bank shall—

(a) prohibit the financial institution from opening new
branches;

15 (b) impose restrictions on growth of assets or liabilities of
the financial institution as it shall deem fit;

(c) restrict the rate of interest on savings and time deposits
payable by the financial institution to such rates as the
Central Bank shall determine;

20 (d) in addition to the actions prescribed in subsection (2)
the Central Bank may—

(i) remove officers of the financial institution
responsible for the financial institution's non-
compliance with the orders;

25 (ii) order the financial institution to do any or such
other things that the Central Bank may deem
necessary to rectify the capital deficiency of the
financial institution.

30 **87. Significantly undercapitalised financial institutions**

(1) Where a financial institution is significantly undercapitalized,
the Central Bank shall immediately take any or all of the following
actions against the financial institution—

35 (a) take any or all of the actions prescribed in section 86
and this section;

(b) enter into an agreement with the board of directors of
the financial institution requiring the financial institution
to rectify its significant undercapitalisation within ninety
days, and to restore capital adequacy within one hundred
and eighty days, or within such shorter periods as the
40 Central Bank shall order.

(2) In addition to the actions prescribed in subsection (1) of this
section, the Central Bank may take any or all of the following
actions—

- 5 (a) restrict the financial institution from engaging in new foreign exchange business;
 (b) prohibit the financial institution from engaging in new off-balance sheet transactions.

(3) If at any time—

10 (a) after the period specified in paragraph (b) of subsection (1), the financial institution has failed to raise its capital to the levels necessary to rectify its significant undercapitalisation; or

15 ~~(b) before the end of the period specified in paragraph (b)~~
 of subsection (1), the financial position of the institution continues to deteriorate, the Central Bank shall without having to wait for the expiry of that period, close the financial institution and place it under receivership, or where the closure of the financial institution would pose a systemic risk to the stability of the financial system, the Central Bank shall take the financial institution into statutory management in accordance with section 88 of this Act; except that subsection (6) of section 89 of this Act shall not apply to a statutory management under this section.

25 (4) For the purposes of this Act, a "significantly undercapitalized" financial institution is one which does not comply with any of the following—

30 (a) hold the minimum capital funds, unimpaired by losses, of at least fifty percent of the requirement prescribed in section 26 of this Act;

 (b) hold core capital of at least fifty percent of the requirement prescribed in section 27 of this Act;

 (c) hold total capital of at least fifty percent of the requirement prescribed in section 27 of this Act.

35 (5) This section shall not be construed so as to preclude the Central Bank from closing any financial institution under any other provision of this Act.

40 Parliament by enacting Section 84 of Financial Institutions Act reproduced above deliberately curtailed the power of the Central Bank. Under that Section the Central Bank is required to take mandatory corrective measures prescribed under Sections 85, 86 and 87 of the Act before it takes any other measures, against a faltering financial institution. Section 84 is mandatory in its terms.

5 This restriction not only curtails the powers of the Central Bank under the Financial Institutions Act, but it extends to any other law. The evidence on record, already reproduced above reveals that on 19th September 2012 the National Bank of Commerce had raised its core capital to shs.10.67 billion and was therefore above the statutory minimum requirement. The core capital fell to shs.9.207 billion as at 10 19th September 2012.

The first respondent was required to invoke Section 86 of the Financial Institutions Act. That section would have come into play on the date the bank's core capital fall below the required minimum in July 2012. The measures taken prior to July 2012, 15 whilst the Bank was undercapitalized yielded positive results when, the Bank was able to raise the capital. It cannot be that, the measures taken by the first respondent prior to July 2012 when the Bank raised the statutory minimum were still subsisting as at 27th July 2012 when it was closed. The compliance, in July of 2012 had given the bank a new lease of life, it could not be faulted for the default in 20 that had already been remedied at the time it was closed.

There is no provision under Section 87 that empowers the first respondent to close a financial institution during the period the provisions of that section are in force. I find that on the facts before the National Bank of Commerce could not have been 25 classified as "*Significantly undercapitalized*" as at 27th September 2020 when it was closed. It had more than 90 percent of statutory minimum core capital.

Accordingly Section 87(5) was not applicable to it. For emphasis, in view of the provisions of Section 84 of the Financial Institution the 1st respondent can only 30 invoke the provisions of Section 88 after mandatory corrective measures set out in Section 84 have failed to yield positive results in the time lines set out under Sections 85, 86 and 87 of the Act.

I find that the first respondent acted outside the scope of its authority when it 35 revoked the National Bank of Commerce's licence, closed the Bank, took over its management and sold it all in one day, without complying with PART IX of the Financial Institutions Act and without specifically complying with the mandatory provisions of Section 84 of that Act. The 1st respondent acted illegally when it 40 proceeded to invoke the provisions of Section 88 of the Financial Institutions Act in contravention of Section 84 of the Act.

Be that as it may, upon proceeding under Section 88 of the Financial Institutions Act to take over close and sale the National Bank of Commerce, the first respondent would have been required to strictly adhere to the provision of that Section which 45 are set out in mandatory terms. Section 89 of the Financial Institutions Act must be

5 read and construed together with Section 88 of that Act. Whereas Section 89 sets out power of the Central Bank upon taking over management of any financial institution under subsection 2 of the Section, those powers must be exercised in conformity with the other provisions of the Act and specifically subsections 3,4 and 5.

10 Subsection 3 requires the Central Bank, as soon as possible after the taking over management of a financial institution, to appoint an audit to make an inventory of the assets and liabilities to that financial institution and to submit a report to it. ~~From the evidence available on record, this was not done.~~

15 Section 89(4) required the Central Bank to issue a notice informing the public that it had taken over the management of the National Bank of Commerce. The evidence on record indicates that the National Bank of Commerce had its licence revoked on 27th September 2012. On the same day the first respondent took over its management.

20 The first respondent proceeded to liquidate the bank on the same day. That very same day the National Bank of Commerce was sold to the Crane Bank Ltd. The notice informing the public of the takeover was placed in the News papers the next date, 28th September 2012 after the event. The notice was superfluous to say the least. It cannot be stated that the intention of the legislation had been complied with in this case.

25 I find that the respondent failed to comply with Section 89(4) when the notice there under was issued after the event. The above finding underscores, my earlier observation that, the power conferred upon the first respondent in the Financial Institutional Act was intended to be used in a systematic manner. If this was not so Parliament would have waived the requirement for such a notice in certain circumstances. It did not. From the above reason I find that the first respondent failed to comply with subsection 5 of Section 88 of the Financial Institutions Act, which requires the Central Bank to exercise statutory management similarly the first respondent failed to comply with the provisions of Section 89(6) of the Financial Institutions Act, for the reasons I have stated above.

30 I am alive to the provisions of Section 89(2) which sets all the powers of the Central Bank including the power to take over and manage a financial institution, liquidate it, close it, sell it or do any other act necessary to enable the Central bank carry out its obligation.

5 All the above powers are subject to the law and specifically subject to other provisions of the Financial Institutions Act. They cannot all logically be exercised at the same time in simultaneous transactions. I shall revert to this later.

10 PART XI of the Financial Institutions Act provides for liquidation. Section 99 of the Financial Institutions Act is concerned with liquidation by the Central Bank 99(1) and (2) provides as follows:-

99. Liquidation by the Central Bank

15 ~~(1) The Central Bank shall, on determination that the financial institution should be liquidated, make an order for the winding up of the affairs of the financial institution.~~
(2) The order referred to in subsection (1) shall be published in a local newspaper of general circulation in Uganda.

20 The winding up order, was published in the New Vision of 28th September 2012 a day after the National Bank of Commerce had already been sold to Crane Bank Ltd. My reading of the Financial Institutions Act leads me to the conclusion that Parliament intended and provided for a process of liquidation, even by the Central Bank. Liquidation therefore, under the Financial Institutions Act is a process and not
25 an event. There is no provision under Financial Institutions Act or any other law that provides for instant liquidation on paper.

The case in point is Section 102 that requires a liquidator to write claims from creditors and Section 103 that requires a liquidator to finish a report within a
30 period not exceeding 5 months of assets of the Financial Institution.

Had Parliament intended to grant powers to a liquidator to summarily liquidate a financial institution it would have stated so. It did not. By liquidating the National Bank of Commerce in a summary manner the first respondent acted in
35 contravention of Sections 99, 100, 102 and 103 of the Financial Institutions Act.

Article 161, establishes the Central Bank, as Bank of Uganda, the first respondent. The authority of the Central Bank is vested in its board of Directors. The relevant parts of Article 161 provides as follows:-

40 **"161. The central bank.**

(1) The Bank of Uganda shall be the central bank of Uganda and it shall be the only authority to issue the currency of Uganda.

- 5 (2) *The authority of the Bank of Uganda shall vest in a board which shall consist of a governor, a deputy governor and not more than five other members.*
- (3) *The governor, the deputy governor and all other members of the board shall—*
- 10 (a) *be appointed by the President with the approval of Parliament;*
- (b) *hold office for ~~a term of five years~~ but shall be eligible for reappointment.*
- (4) *The office of governor and deputy governor shall each be a public office, and the governor and deputy governor shall respectively be chairperson and deputy chairperson of the board."*
- 15

The Bank of Uganda is established by the Bank of Uganda Act (CAP 57) Sections 2 and 3 of that Act stipulates as follows:-

2. Establishment of the bank.

- 20 (1) *The Bank of Uganda established under the Bank of Uganda Act, 1966, shall continue as the Central Bank of Uganda.*
- (2) *The bank shall be a body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name.*
- (3) *The bank may, subject to the limitations contained in this Act relating to the business which the bank may carry on, purchase, hold,*
- 25 *manage*
- and dispose of real and movable property, and may enter into contracts that may be expedient.*

3. The seal of the bank.

- 30 (1) *The seal of the bank shall be authenticated by the signatures of the governor and the secretary to the board.*
- (2) *In the absence of the governor, the deputy governor may sign in his or her place, and the person performing the functions of the secretary may sign in the absence of the secretary.*
- 35 (3) *A document issued by the bank and sealed with the seal of the bank and authenticated in the manner provided under this section shall be received and taken to be a true document without further proof unless the contrary is shown.*
- 40

5 The authority of the Bank is vested in its board of Directors established under Section 7 of CAP 51 (Supra). It reads as follows:-

7. The board of directors.

10 (1) The governing body of the bank shall be a board of directors consisting of—

(a) the governor, who shall be the chairperson;

(b) the deputy governor who shall be the deputy chairperson;

~~(c) the Secretary to the Treasury; and~~

15 (d) not less than four nor more than six other directors.

(2) The directors referred to under subsection (1)(d) shall be appointed by the Minister.

20 (3) A member of the board may hold office for a period of four years, and different members shall be appointed at different times so that the expiry date of the members shall fall at different times.

(4) A member of the board appointed under subsection (2) shall be eligible for reappointment.

25 (5) A director may resign his or her office by writing under his or her hand addressed to the Minister and the resignation shall take effect one month from the date of receipt of the letter of resignation by the Minister.

(6) If a member of the board dies or resigns or otherwise vacates office before the expiry of the term for which he or she was appointed, the Minister may appoint another person in his or her office, and the person so appointed shall hold office for the unexpired period of the term of office of

30 the person in whose place he or she is appointed.

(7) Whenever for any sufficient reason the offices of the governor and the deputy governor are vacant at the same time, the Minister shall, in consultation with the board, designate one of the executive directors to perform the duties of the deputy governor and attend meetings of the board until the appointment of the governor or deputy governor, but the executive director shall not for those purposes be or be deemed to be a member of the board.

35 (8) Whenever for any sufficient reason the governor and deputy governor are absent at the same time, the governor shall designate a senior officer to perform the executive functions of the deputy governor and attend meetings of the board until the resumption of office by the governor or the deputy governor, and the board shall appoint from among themselves a chairperson for the period of absence of the governor and deputy governor.

40

5 The duties and powers of the Board are set out under Section 10 of Act 51 as follows:-

10. Duties and powers of the board.

The board shall—

- 10 (a) be responsible for the general management of the affairs of the bank;
- (b) ensure the functioning of the bank and the implementation of its functions;
- ~~(c) formulate the policies of the bank;~~
- 15 (d) do anything required to be done by the bank under this Act; and
- (e) do anything that is within, or incidental to, the functions of the bank.

20 The office of the governor and deputy governor are established under Section 27 of the Act and offices of Executive Director and other staff are established under Section 28 of the Act as follows:-

28. Appointment of employees.

- 25 (1) There shall be executive directors who shall be appointed by the board and carry on supervisory functions over a number of departments as may be determined by the board.
- (2) There shall be heads of departments of the bank who shall be appointed by the board.
- (3) The bank shall have other officers and employees as the board may determine.
- 30 (4) Except as may otherwise be provided by byelaws of the bank, all appointments of employees shall be made by the board.
- (5) Employees of the bank shall be engaged on terms and conditions that shall be laid down by the board.
- 35 (6) No salary, fee, wage or other remuneration or allowance paid by the bank shall be computed by reference to the net or other profits of the bank.
- (7) No employee of the bank shall be liable—

- 40 (a) for any loss or damage suffered by the bank unless that loss or damage was caused by his or her own default or wilful act;
- (b) to any legal proceedings for anything which is done in good faith under this Act.

5 It is evident from the above provisions of both the Constitution and the Bank of Uganda Act, that Parliament vested the powers of the bank in its board of directors. All actions of the bank therefore must be done by only in the name of the Board of Directors. The law does not vest any power in any other person or body other than the board.

10 It appears clearly that the Governor of the first respondent has no independent or parallel authority outside the board. He acts for and on its behalf.

15 In the same vein, ~~the deputy governor has no independent authority, but acts under~~ the directors of the board and deputies of the governor in his/her absence. In this regard, the winding up order dated 27th September 2012 referred to above ought to have been signed by the governor and the secretary and sealed.

20 There is no evidence that at the time the winding up order was issued, the Governor was absent or unable to perform that function in which case the deputy governor would have signed in his acting capacity. The same position applies in respect of the statutory notice to the public issued on the same day 27th September 2012 already reproduced above.

25 Similarly the sale agreement between the first respondent and Crane bank dated 27th September 2012 was signed by one J. Bagyenda (Mrs.) as "Ag. Deputy Governor" and witnessed by one George N Nyeko as Bank Secretary. As far as I could establish from the photo copy of that agreement the seal of Bank of Uganda was not affixed, as required under Section 3 of CAP 51.

30 That Section reads as follows:-

3. The seal of the bank.

35 (1) *The seal of the bank shall be authenticated by the signatures of the governor and the secretary to the board.*

(2) *In the absence of the governor, the deputy governor may sign in his or her place, and the person performing the functions of the secretary may sign in the absence of the secretary.*

40 (3) *A document issued by the bank and sealed with the seal of the bank and authenticated in the manner provided under this section shall be received and taken to be a true document without further proof unless the contrary is shown.*

5 The Secretary to the Bank is required to sign jointly with the governor as stipulated above. The sale agreement referred to above between the 1st respondent and Crane Bank, the Secretary merely witnessed the signature of Mrs. Bagyenda.

10 Again the Memorandum of Understanding between the National Bank of Commerce dated 29th March 2012 was signed by the Deputy Governor Louis Kasekende together with an unnamed person who is referred to as Ag. Executive Director Supervision Ltd (*sic*) Bank of Uganda. The document does not have a seal. This document was executed in contravention of Section 3 of CAP 51 (*Supra*).

15 There is nothing on record to indicate that the Board of Directors of the first respondent bank was at any time away of the facts surrounding the National Bank of Commerce from the beginning to the end. The employees of the 1st respondent appear to have usurped the powers of the board, in contravention of the letter and the spirit of both the Financial Institutions Act and the Bank of Uganda Act.

20 The sale agreement between the first respondent and Crane Bank limited referred to above was entered into on 27th September 2012. The same day that the first respondent took over the National Bank of Commerce and liquidated it. It is inconceivable that Crane Bank could have entered into such an agreement without
25 having obtained relevant information regarding the Assets, liabilities and such information as is detailed in that agreement. In disclosing information regarding the affairs of National Bank of Commerce to Crane Bank Limited without prior consent of National Bank of Commerce the first respondent contravened *Section 40(3)* of the Bank of Uganda Act which stipulates as follows:-

30
(3) The bank shall not publish or disclose any information regarding the affairs of a financial institution or of a customer of a financial institution unless the consent of the institution or the customer has been obtained.

35 This further underscores my earlier finding and holding that, the first respondent can only sale a financial institution after having taken it over under Section 88 of Financial Institutions Act.

40 Therefore the argument that Section 40(3) of Bank of Uganda Act makes it difficult for the Central bank to exercise its mandate under Section 89(f)(k) or (L) is misconceived, as those provisions of the Financial Institutions Act come into play after the Financial Institution has been taken over and is under the management and control of the Central Bank. Section 40(3) of the Bank of Uganda Act, operates
45 before a financial Institution has been taken over under Section 88 of Financial

5 Institutions Act. The two Sections read together lead no other conclusion that both the Bank of Uganda and the Financial Institutions Act, did provide for a process during which a financial institution is taken over, liquidated, and sold in simultaneous transactions all concluded in less than 24 hours.

10 I find that the first respondent contravened Section 40(3) of the Bank of Uganda Act.

Whether, the proceeding leading to the closure of the National Bank of Commerce invoked any procedural irregularity and or impropriety.

15 The illegalities already pointed out above were as a result of procedural irregularities. I have no reason to repeat myself.

20 The National Bank of Commerce was closed and auditors were not immediately appointed in contravention of Section 89(3) of Financial Institutions Act. There was no inventory report upon which the value of assets and liabilities could be ascertained. There is no evidence on record to show how the final decision to liquidate and sale the National Bank of Commerce was arrived at and the basis on which the conclusion that the National Bank of Commerce depositors were at risk was ascertained. The decision making in this regard appears irrational and purely
25 subjective in absence of evidence upon which it was based. It appears from the record that Crane Bank Ltd a competitor in business with the National Bank of Commerce determined the value of the liabilities and assets of the National Bank of Commerce the basis of which the sale was concluded. The first respondent ought to have instructed an independent person or body to determine the value of those
30 assets and liabilities.

35 The first respondent under Article 1.0 of the sale agreement paid Crane Bank shs. 285,133,824/= being value of liabilities in excess of the assets transferred. This was irrational in view of the fact that the National Bank of Commerce required only less than shs 1 billion to satisfy the minimum statutory core capital requirement. The said amount could have capitalised the National Bank of Commerce under the management of the first respondent. Instead Bank of Uganda paid to Crane Bank the buyer!

40 There is no evidence to show on what basis the above amount shs.285,133,824/= was determined on record. One can only assume that, it was a gift.

45 —There is no evidence to show that the first respondent considered all available alternatives and assumptions before it took the simultaneous actions it did on 27th September 2012.

5 I have been able to obtain a copy of a memorandum on the report of the committee on commissions Statutory Authorities and State Enterprises (COSASE) on the special
audit report of the Auditor General on defunct Bank which was presented to
parliament by the Hon. Ministry of Finance, Planning and Economic Development,
10 December 2019.

This document was not available at the hearing of this petition. However, this Court
takes judicial notice proceedings of Parliament under Section 56 of the Evidence Act.
~~I will therefore take liberty to refer to it.~~

15 Let me state from the onset that the finding of COSASE, in many aspects mirror
those already set out in this Judgment. One aspect which is of particular relevancy in
this petition is the role of a liquidator appointed by the first respondent upon the
take over the National Bank of Commerce. In that regard the committee made the
20 following observations at pages 14-15:-

Committee observations

The Committee observes that:-

- 25
1. *Whereas the GTB and NBC discount percentages of 20 and 3C"70 respectively appear reasonable, the 93"70 discount In respect of the loan portfolio of ICB, Greenland Bank and Co-operative Bank acquired by M/s NRAC was incredibly outrageous.*
30
 2. *Whereas it could be difficult to establish with certainty and precision the prospects of sale and recoverable amount. the decision by BoU to undertake a desktop valuation of properties which had been mortgaged to the various banks more than eight years does not represent the realistic values at the time of sale.*
35
 3. *The consultant. M/s JN Kirkland and Associates employed by BoU to implement the exit strategy identified the purchaser of the loan portfolio M/s Octavian Advisors which incorporated M/s Nile River Acquisition Company in Mauritius as a special purpose vehicle for purposes of entering into contract with BoU on 5th December 2007. The said IN Kirkland and Associates ended up as the local agent of the M/s Nile River Acquisition Company with for example, the rights to run an*
40

5 account in Citi Bank in which all recoveries loan portfolio are deposited

10 4. The committee obtained evidence from Uganda Registration Services Bureau that M/s Nile River Acquisition Company, was not registered in Uganda as a local or foreign company Which is violation of sections 369 and 370 (1) of the Companies Act: Octavian Advisors Plc was also never registered in Uganda

15 5. Records available to the committee indicate that the then Director Commercial Banking Bank of Uganda, Mr. Ben Ssekabira, who was the agent of the Liquidator Receiver of the three defunct banks (ICB, Greenland Bank and co-operative Bank) was up to the 12,h August 2009 the agent of M/s Nile River Acquisition Company. It is further noted that between 20 12'h and 16th February 2007, Mr Ben Ssekabira together with Mr. Kakembo Katende of IN Kirk and Associates travelled to the United States of America to meet the management of M/s Octavian Advisors p/c. However, while appearing before the committee he stated that he did not know the purpose for his travel to the USA.

25 6. BoU vide a letter dated 25th September 2007 herein mentioned from the then Executive Director Bank Supervision, Mrs. Justine Bagyenda, to the Governor, the committee observes that BoU granted had granted exclusivity at pre-bidding stage as she thus wrote "hence upon confirming its interest in writing, Octavion Advisors Plc requested exclusivity **from any competitors, a request which BoU granted**". "This grant did not allow any competition that would return the highest possible bidder. BoU as a liquidator owes a distressed financial institution a duty to marshal the greatest amount from its assets. The action of the then EDS as communicated in the above letter is contrary and In breach of the fiduciary duty owed a financial institution in distress which ultimately shoulders he burden of the liquidation costs. Besides, the Governor Bank of Uganda being the Chief Executive and ultimately the decision maker was only briefed for his information of a decision already take by subordinate officers. The letter ends thus" ... **the brief is submitted for your information**"

40 7. The committee observes that by time a delegation of IN Kirkland together with Mr. Ssekabira travelled to the USA to

5 meet the prospective purchaser M/s Octavian Advisors had
already made a deposit of USD 5m on an escrow account with
Citi Bank, New York It IS here before, mind boggling that only
10 USD 200,000 would later be paid added to construe the full
purchase price US 5.2m as the full consideration for a portfolio
whose original offer was USD 10M. The exclusivity that had
already been granted meant that M/s Octavian Advisors plc
had no impetus to up or meet their earlier offer.

15 8. The committee further notes that in all the business
transactions involved in this transaction ion, the purchaser
and her agent have not paid the requisite tax.

20 9. The loan portfolio sold to M/s Nile River Acquisition Company
IS now being managed on their behalf by M/s SIL Investments
Ltd. M/s SIL investment has been charging an Interest rate
varying between 27 and 250;0 on the loan portfolio and
recovering monies from different debtors.

25 10. While appearing before the committee BoU and M/s SIL
Investments Ltd, when tasked failed to produce evidence on the
legal existence of M/s Nile River Acquisition Company at he
time of making this report This notwithstanding, a quick
Internet search reveals that M/s NRAC, company No COT 4673,
30 incorporated on 26th September 2007 (over eleven years ago),
company type limited by shares, Jurisdiction Mauritius, status
'defunct' Source of information IS the Mauritius, Ministry of
Finance and Economic Development, companies division at
<https://portalmns.mlcbris-name-search>.

35 11. Nile River Acquisitions Company's agent, SIL Investments Ltd, IS not
VAT registered and accordingly has never remitted tax derived from
the Income earned on heir commission.

35 **Recommendations**

40 1. The committee concludes that the transaction between BoU and
M/S Octavian Advisors Plc and her agents lacked transparency and
the officers involved should be held responsible for commissions and
omissions which resulted in not marshalling the greatest amount
from the assets of the distressed financial institutions.

5 2. *The committee further recommends that the officers involved should be held responsible for conflict of Interest.*

10 3. *The fraudulent business activities being conducted by M/s SIL Investments on behalf of a non- existent M/s NRAC should immediately cease and;*

15 (a) *The Inspector-General of police is required to immediately, on the adoption of this report, seize all the land titles in the possession of Mr Kakembo Katende of M/s JN Kirkland and Associates and M/s SIL Investments arising from their management of tire loan portfolio sold to M/s NRAC by Bank of Uganda.*

20 (b) *M/s SIL Investments and Mr. Kakembo Katende should render an account to the public trustee of all monies received from the time M/s NRAC ceased to exist.*

25 4. *The agency of M/s SIL Investments Ltd cannot legally exist upon dissolution of the Principal (M/s NRAC).*

30 5. *Uganda Revenue Authority should take interest in the tax activities of Mis Nile River Acquisition Company and its agents M/S JN Kirkland and M/s SII Investments Ltd, to recover unpaid tax*

35 Mr. Ben Ssekabira named in that report is the same person who deponed the affidavit in answer to this petition. He is the same person appointed by the first respondent as liquidator of the National Bank of Commerce. At the time of filing this petition he was a Director Commercial banking with the respondent. COSASE found that he was involved in fraudulent business activities involving sale of assets of defunct Banks. He was placed under police investigations, on various criminal offences related to sale of assets of defunct banks. The long and short of this that officials of the first respondent were profiteering from closure, liquidation and sale of banks themselves having failed to supervise them. The first respondent should have appointed an independent agency as liquidator in order to avoid conflict of interest. It failed to do so. It cannot be farfetched to conclude from the above that, the first respondent's officials were indeed profiteering for sale and liquidation of banks including the National Bank of Commerce.

40 The conflict of interest in respect of officials of the first respondent and their arbitrary use of statutory authority was cited by the COSASE in the sale of all

5 defunct banks. This vice appears therefore to be deep rooted to the level of having become institutionalised.

10 In *Legal Brains Trust vs Bassajjabalaba and others Constitutional Petition No. 04 of 2012* this Court found that the Governor of the first respondent acted in contravention of *Article 162* of the Constitution when he issued guarantee to a number of Commercial Banks with the approval of Parliament.

15 In *Chandi Jamwa vs Uganda Court of Appeal, Criminal Appeal No.77 Of 2011*, the Court of appeal and Supreme Court upheld a conviction of the managing Director NSSF on charges of abuse of office and causing financial loss in a transaction that involved Central Bank officials and two commercial Banks.

20 From the foregoing I have no hesitation in finding that the first respondent committed a number of procedural irregularities in the impugned decision to liquidate and sale the National Bank of Commerce. It appears to me that, the first respondent's officers, misdirected themselves in law by misunderstanding the statutory language of the Financial Institutions Act reading into it unchecked discretion to act as they desired. They acted without sufficient evidence and took a view of facts which could not reasonably be explained. In so doing the first respondent failed to implement the purpose of the Financial Institutions Act by
25 Parliament.

The Constitution does not confer upon any person or body unfettered powers. There is nothing in law as absolute discretion. As *Lord Denning held in Breen vs Amalgamated Engineering Union [1971] 1 All E.R. 1148*.

30 "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this. The statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless the decision will be
35 set aside."

Lord Green in Associated Provincial Picture Houses Ltd vs Wednesday Corporation (supra) observed that "a decision is irrational when it is so absurd . . . that no sensible person could even dream that it lay within the powers of the authority."

5 I have no hesitation in finding that the decision by the first respondent to revoke the licencing of the National Bank of Commerce on 27th September 2012, take over its operations, apparent a liquidation, negotiate and conclude its sale to a Crane Bank a competitor in business all on the same day and proceed to publish notices later was irrational and an abuse of discretion.

10 I have read the authorities cited to me by the first respondent specifically *Kimani Waweru & 4 Others vs Central Bank of Kenya and 7 others (2018) e KLR*. The facts of that petition are distinguishable from the one at hand. I am unable to follow it on that account. The principle stated therein are of general application and clearly in application to facts in this petition. It is a Judgement of the High Court of Kenya
15 sitting as Constitutional Court. It does not bind me.

I find merit in this petition which I hereby allow.

I find that the petitioner and other shareholders of the now defunct National Bank of Commerce are entitled to redress in form of damages. I am however unable to ascertain the damages from the record before me.

20 I now make the following orders and declarations.

1) The act, manner and conduct of the first respondent cancelling the banking licence of the National Bank, taking over its management, appointing a liquidator, negotiating its sale to Crane Bank Ltd a competitor in business all in simultaneous transaction concluded on
25 one day 27th September 2012 contravened Articles 2, 28, 26, 27 40(2), 42,44,162 of the Constitution.

2) The Registrar of this Court is directed to send the file to the head of the commercial division of the High Court within 7 (seven) days from date, for the High Court to determine the quantum of damages payable
30 under Article 137 (4) of the Constitution.

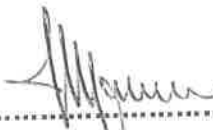
3) The 1st respondent shall pay the costs of this petition.

I would so order.

- 5 In the final result, this appeal by majority 4 and 1 fails and is dismissed with an order that each party bear its own costs.

Dated at Kampala this 4th day of Nov 2020.

10


Kenneth Kakuru
JUSTICE OF APPEAL