THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO 63 OF 2008

SPECIOZA KALUNGI}

AND 61 OTHERS} ……PLAINTIFFS

VERSUS

1. **ATTORNEY GENERAL}**
2. **THE DIVESTITURE REFORM AND}**

IMPLEMENTATION COMMITTEE}……..…. DEFENDANTS

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

Civil law and procedure – cause of action

Civil procedure – limitation of cause of action

JUDGMENT

The plaintiffs filed this suit on 7 March 2008 for declarations that the defendants must pay the plaintiffs claims from the divestiture account; for an order directing the defendant to seek a budgetary contribution from the relevant authority and pay the plaintiffs; for aggravated damages for the oppressive and unconstitutional behavior of the government of Uganda officials; for interest to be allowed at commercial lending rates since 1994; for costs of this suit with interest from the date of filing of this suit; for order that the respondents to pay up within 15 days from the date of judgment; and for any other relief that the court may deem fit to grant.

The plaintiffs are proven creditors of Uganda Transport Company (1975) Ltd according to a liquidation of the company carried out by Mr. F. Mungereza and G. Egadu. The plaintiffs rely on the Liquidators Statement of Account dated 20th of July 1999 filed with the Registrar of Companies on 2 August 1999 which lists the plaintiffs as creditors with the respective amounts they are owed against their names. The plaintiffs case is that the defendant owes a statutory duty to pay the plaintiffs claims under section 2 and 34 of the Public Enterprise Reform and Divestiture Act (PERD), and also section 21 of the PERD (Amendment) Statute 2000 and article

1.02 (z) of the Development Credit Agreement. The plaintiffs contend that this agreement was incorporated by reference into the Public Enterprise Reform and Divestiture Statute 1993 by section 2 thereof. It is alleged that the Minister of Finance and the Divestiture Reform and Implementation Committee (DRIC) refused to pay them after the Solicitor General and Attorney General/Ministry of Justice General advised that they should be paid. The defendant denied the claim and in its amended written statement of defence filed on behalf of the first and second Defendants, which defence was consented to by the plaintiff's counsel and filed on 18 April 2011 they contend that the plaintiff's suit is barred by law and was improperly brought before court. In the further alternative that the plaintiffs claim were fully settled ex gratia through their lawyers.

At the hearing the Attorney General was represented by Mr. Mwabutsya State Attorney while the plaintiffs were represented by Mr. E Mugabi.

On the 3rd of March 2011 when the case came for scheduling, the parties agreed on the facts as presented in their joint scheduling memorandum signed by both parties and containing a bundle of documents agreed upon by the parties. They also agreed to make submissions from the agreed evidence and not to adduce any further evidence. It was agreed that the plaintiff could submit first on his case generally whereupon the Attorney General would reply and also raise his objection to the suit. The plaintiff's counsel will them submit in rejoinder to his earlier submissions and also reply to the Attorney General's objection to the suit. Thereafter the Attorney General would make a rejoinder to his objection to the suit only.

The plaintiff's counsel filed written submissions while the Attorney General's representative replied and raised preliminary objections to the suit orally. It is necessary as stipulated under order 15 rule 2 of the Civil Procedure Rules, that where points of law having the effect of either wholly or substantially disposing of the suit are raised, they shall be determined first. I will therefore first determine the preliminary objections to the suit.

The preliminary objections raised by Counsel Mwagutsya, counsel for the defendant are on three grounds namely that:

1. Plaintiff's suit discloses no cause of action against the defendants.
2. That the suit is time barred
3. That the matter is wrongly before this court.

On the first issue as to whether the suit discloses a cause of action, the State Attorney submitted that the plaintiff brought a suit against the defendants for failure to pay ex gratia payments. In short he submitted that the plaintiff's plaint is based on an ex gratia settlement by the defendant. He referred to annexure 7 to the plaint being a letter whose subject reference is: "RE: CLAIM BY CREDITORS OF UTC 1975 LIMITED IN LIGUIDATION RE: AUTHORITY FOR EX GRATIA PAYMENT." It's a letter relied on to bring this matter to court. He also referred to annexure "H", an agreed document, which makes reference to the matter of ex gratia payments being referred to the Attorney General for review and consideration. He argued that ex gratia

means out of kindness and referring to Black's Law Dictionary 6th edition page 573 where it is defined as "out of grace as a matter of grace; favour; or indulgence". He submitted that it is a term applied to anything accorded as a favour or distinguished from that which may be demanded ex debito or as a matter of right. He contended that ex gratia is not a legal right but merely a consideration on compassionate grounds. One cannot sue for money given on compassionate grounds.

He contended that because the plaintiffs have no legal rights, they have no cause of action. In the alternative that the plaintiffs were paid ex gratia in full and final settlement of their claim and as such they have no right whatsoever to demand for payment from the Defendants.

The Defendant's counsel further submitted that the second defendant is not a body corporate and section 3 of the PERD Act does not give the second defendant corporate status and as such the second defendant cannot sue or be sued. He cited **Gordon Sentiba and 2 other versus IGG SCCA 6 of 2008**. Furthermore he contended that defendants cannot be liable in a matter where there was liquidation. He cited the case of **Priamit Enterprises Ltd vs. AG. SCCA 10 of 2001** and contended that the court held that once there is liquidation you do not pursue the government but go against the liquidators and the plaintiffs cannot proceed against the Government.

On the second objection, the defendants contended that the plaintiff's suit is time barred. He contended that the cause of action in the plaint is contained in paragraphs 9 and 14 wherein is refers to the cause of action as negligence. That in paragraph 5 it is averred that there was failure or neglect to perform and that under paragraph 10 of the plaintiff the cause of action arose in 1994. The suit was filed on the 7th of March 2008 and is barred under section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act cap 72 2000 edition of the Laws of Uganda which provides that no action founded on tort shall be brought against the government after the expiration of two years from the date the cause of action arose. He prayed that the plaint should be struck out with costs under order 7 rule 11 (d)

On the third objection counsel contended that the suit wrongly before this court.

He submitted that the plaintiffs are seeking for orders to force government or Government officials to do what they should have done in their official duties. He referred to prayers in plaint paragraph 21 (a) thereof which is seeking a declaration that the defendants should pay their claims from the divestiture account and paragraph 21 (b) seeking an order directing the defendant to seek a budgetary contribution. He contended that these orders are orders for judicial review. It is an order for mandamus. That it cannot be obtained by way of a plaint but should be sought under the Judicature (Judicial review) Rules by notice of motion and affidavit. Therefore he concluded that the matter was wrongly before court and should have proceeded by way of judicial review. Last but not least the defendants counsel contended that the objections have the effect if decided of wholly disposing of the suit.

In reply to the Attorney General's preliminary objections, Enoch Mugabi counsel for the plaintiffs contended that the plaintiffs do not rely on any ex gratia payment to bring this suit. Their claim was proved in the liquidation of Uganda Transport Company 1975 Limited (UTC). That the plaintiffs were simply demanding what they proved in liquidation. Counsel submitted that the plaintiffs are claiming under the PERD statute namely sections 21 and 34 thereof. He submitted that section 21 of the said Act gives Ministry of Finance powers to use finances in the divestiture account to pay liabilities of divested companies. Section 34 expressly states that no person should suffer any loss as a result of the divestiture process. The plaintiffs are claiming their legal rights under the PERD statute and their claim is not based on ex gratia payment of the defendants. The plaintiff's counsel agreed with the defendants counsel that the term "ex gratia" means it is a free gift. He contended that some of the plaintiffs were given this gift freely and compassionately and others were denied this gift.

Counsel further submitted that this being a gift freely given, the defendant cannot turn round and call it a bar to a legal claim. A gift cannot estop the plaintiffs from claiming their rights against the Government. He submitted that whereas the law was available for the defendants to use and pay the plaintiff on the divestiture account, they chose not to. The law had provided that if divestiture account is empty they should seek budgetary support to pay the creditors. He submitted that this did not depend on the kindness of the defendants and in fact it was tantamount to defrauding the plaintiffs. That it is a fraud on Parliament which passed the PERD statute. The plaintiffs were blinded by this gift but woke up and pursued their rights in this suit.

He submitted that he anticipated this preliminary objection. The defendants acknowledge the plaintiffs claim but only used a misnomer "ex gratia" to call it. As far as time bar is concerned he submitted that the liquidation process is still ongoing up to today and time does not start to run against the plaintiff until the liquidation is completed. He further submitted that according to the provisions of section 41 (2) PERD Act cap 98 where any provision of any enactment conflicts which any provisions of the Act, the Act shall prevail over the other enactment.

Counsel submitted that the provisions of the Civil Procedure and Limitation (Miscellaneous Provisions) Act do not apply to cases brought under the PERD Act section 21, 34 and 2 of the Act which incorporate the Development Trade Agreement into the Act. The PERD Act is a later Act than the Limitation Act. He referred to the judgment of Hon. Justice Kiryabwire in HCCS 4 of 2007 UNIDRON AND 25 OTHERS VS ATTORNEY GENERAL. That the court held in that case that unless and until the Divestiture process is concluded and all creditors are paid the plaintiffs cannot be time barred. He further referred to Mugenyi and Company Advocates vs. AG. Secondly learned counsel for the defence cited Priamit Enterprises vs. AG, SCCA NO 10 of 2001. He submitted that it was this very decision which encouraged the plaintiffs to sue the Attorney General. At page 21 starting at page 20 the court held that the plaintiffs had three choices namely: (a) to prove their claim at the liquidation (b) to sue UTC for the debt and (c) to wait until UTC is sold and if Government does not settle the debt, to sue for it. He contended that

the plaintiffs followed the advice to sue. The case was decided in December 2002. That the question of limitation does not arise where the divesture process has not been completed.

Counsel for the plaintiffs further referred to the case of **Baguma and Others vs. DRIC** where the defendant had to apply for budgetary support in accordance with section 2 and the development credit agreement. He submitted that they paid the plaintiffs because UTC had no money, and if in Baguma's case payment was made what of the plaintiff's?

He contended that DRIC has turned the divesture account to its own cow to milk without allowing other people access. He submitted that the plaintiffs are seeking money they proved in Liquidation and seeking declaratory judgment against the AG. Firstly the plaintiffs attempted to obtain an order of mandamus and they were directed to file a formal suit. That this arose in UNIDRON Ltd and 26 others vs. Minister of Finance and DRIC. MA 401 of 2008 Commercial Court where Hon. Justice Kiryabwire ordered the plaintiffs to file a formal suit against defendants and get their claims quantified before proceedings with mandamus. This together with the Supreme Court judgment proves that the question of seeking prerogative orders is premature.

Counsel submitted that according to the PERD statute and PERD ACT, the duty to put it into effect lies with DRIC. Every power and duty is vested in DRIC which is supposed to perform and effect provisions of the Act. There is evidence on record that DRIC disobeyed the AGs advice and refused to pay. AG wanted them to pay the full amount but DRIC because of its recalcitrance chose to pay 20% to some even not to all. The Plaintiffs were forced to sue DRIC which is the only body with power to put into effect provisions of the Act. It is vested with all powers normally vested with a corporate body. He concluded that if a person is vested with all corporate powers it can be sued. He contended that all accounts are vested in DRIC under the Act. This is a sad case. Incidentally the Attorney General is a member of DRIC but DRIC choose to ignore the advice of the Attorney General which was wrong.

The plaintiff's counsel contended that his learned friend accepted his written submissions as wholly justified. He pointed out the letters annexed to defendant's amended written statement of defense had no legal effect against the plaintiffs claims because (1) the defendant was using them to create estoppels against the plaintiffs claims on the ground that the 20% the plaintiffs received was in full and final settlement. He emphasized that it was a fraudulent Act by the Privatization Unit to force 20% through the mouths of the plaintiffs so that they keep quiet about the rest of their claims. A gift cannot be turned into a full and final settlement of the claim. He agreed that some plaintiffs were paid 20% of their total claim but others had not been paid anything since divestiture. He prayed that I dismiss the preliminary objections as misconceived and grant the plaintiffs prayers.

In rejoinder Counsel for the defendant reiterated his earlier submissions and added that on the question whether there was a cause of action paragraph 16 of plaint is to the effect that the claim

is for ex gratia. He has admitted that it is a suit for an ex gratia claim. That an ex gratia settlement does not necessarily mean that the plaintiffs does not have a claim but for some legal reason the claim does not stand in law. I.e. it could be time barred and it may be on compassionate grounds that the Government looks into the claims. The plaintiff has not discharged their burden of proving that they have a cause of action. In the case of Mugenyi and Co Advocates vs. AG Civil Appeal 43 of 1995 Lead judgment of Oder at page 19 describes a cause of action under section 23 (a) of the PERD Statue. "It must aver that the debtor public enterprise has been sold and proceeds of sale are on the divesture account"

He pointed out that the in the defense the defendant pointed out that there are no monies on the account. The burden is on the plaintiff to prove that the proceeds of the plaintiff's money are in that account and they have not discharged this burden.

Referring to the Supreme Court case of Mugenyi and Co vs. Attorney General Counsel contended that the holding was that a limited liability company was only responsible for its debts so long as they were proved and could be paid in liquidation. This means that the Government cannot be liable for debts of UTC not paid in liquidation. Paragraph 2 of plaint states that plaintiff's are unpaid creditors of UTC. UTC was a limited liability company.

As far as DRIC is concerned the defendants counsel contended that if Parliament had wanted it to have a corporate status, they would have expressly legislated so. In the lead judgment of **Gordon Sentiba** he submitted that it was held that one cannot infer corporate status by interpretation per Odoki CJ a corporate body is a creature of statute.

With permission of court Enoch Mugabi submitted that that section 23 referred to in the judgment of Oder in Mugenyi case was repealed by the PERD Statute amendment Act 2000 while the defendants counsel in reply contended that liquidation took place before the repeal and law cannot Act retrospectively.

I have carefully considered the submissions of Counsels for the parties together with the preliminary objections of the defendant and the authorities cited and I am grateful for their assistance in resolving this long standing controversy. On the first issue on whether there is a cause of action, order 7 rule 11 (a) provides that the plaint shall be rejected where it discloses no cause of action. The plaint shall also be rejected where it appears from the statement in the plaint to be barred by any law under order 7 rule 11 (d). In this case however, evidence has already been agreed upon. The law is that the determination of whether the plaint discloses a cause of action requires an examination of the plaint only. The plaint must allege all facts necessary to disclose a cause of action (See **AG V Oluoch 1972 EA 392** and **Sullivan V Ali Mohamed Osman (1959) EA 239**.). The court peruses the plaint and any document/s attached to it and assumes that all the facts alleged are true to establish whether the plaint discloses a cause of action. In **Attorney General vs. Oluoch (1972) EA.392** per Spry VP at page 394 it was held by the Court of Appeal that:

> "In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint (Jeroj Shariff & Co Vs Chotai Family Stores (1960 EA 374) and assumes that the facts alleged in it are true."

The provision that a plaint be rejected for disclosing no cause of action under order 7 rule 11 of the Civil Procedure Rules is mandatory. A plaint which discloses no cause of action is a nullity and cannot be amended. Neither will an amendment be allowed as to defeat a defence of limitation. (See **Auto Garage versus Motokov (1971) EA 514**)

As far as the cause of action is concerned the defendant submitted that the plaintiff could not sue on the basis of an ex gratia settlement. He based his analysis on the definition of the word ex gratia. The plaintiff's counsel agreed with the defendant's definition of what ex gratia is and that it was a free gift, that somebody freely bestows on another. I agree that an ex gratia payment is exactly what it says. It is a payment without consideration of the legal merits. It assumes that the person settling is not legally liable for the payment. This is because it relies on the favour of the grantor of the ex gratia payment. Someone with legal rights which are enforceable does not need an ex gratia settlement or payment. In other words, an ex gratia, promise or favour cannot form the basis of a suit. In the first place it assumes that there are no legal rights bestowed in the person who is being favoured. Secondly, it is based on the favour and discretion of the person paying or granting the favour. It cannot found the basis of a suit because it is the favour of the person who wants to pay whether to give or not to give. A court of law cannot compel anybody to favour another.

The plaintiff's counsel submitted that the basis of the plaintiffs claims in this suit is not the ex gratia payment made or allegedly made to the plaintiffs. Perusal of the plaint shows that this suit is for the payment of creditors whose claims had been proved in liquidation pursuant to the divestiture of a public enterprise under the Public Enterprise Reform Divestiture (PERD) Statute. The cause of action in the plaint is pleaded in paragraphs 10, 11, 12, 13 and 14 where it is averred that there was failure by the defendants to pay from the funds in the divestiture account. It is averred in paragraph 14 of the plaint that the Privatization Unit paid 20% of the plaintiff's claims in August 2005. As far as the plaint is concerned it is not based on ex gratia promises but on amounts that the plaintiffs seek to enforce through court after prove in liquidation. As to whether the plaintiffs enjoy a right to monies in the Divestiture Account for the claim in the plaint requires a consideration of the evidence and it is a question on the merits which cannot be determined on a preliminary point of law.

As far as the objection to the suing of the Divestiture Reform and Implementation Committee **(**DRIC) is concerned, this involves a point of law that no cause of action can accrue against a department which has no corporate status to sue or be sued. It is also a submission that all suits against any department of Government can only be instituted by or against the Attorney General under the Government Proceedings Act. The defendant's objection on the corporate status of DRIC was made under the general premise that the plaint discloses no cause of action. I have

considered the authorities submitted by the defendant's counsel on this point and I am bound to follow the judgment of the Supreme Court in **Gordon Sentiba, Ambassador Paul Etiang and Engineer Zikusooka vs. Inspector General of Government Civil Appeal No. 06 of 2008** on whether a court can infer corporate status on a government department established by law**.** The judgment of the Supreme Court was delivered by Odoki CJ and at pages 19 and 20 he states:

> "There is no provision in the constitution, the Inspectorate of Government Acts or any other law which confers corporate status on the respondent and it will be wrong for the Court to confer such status on the respondent when Parliament in its wisdom did not find it necessary to do so for effective enforcement of the powers of the respondent. However, parliament has power to review the matter and confer corporate status on the Inspectorate of Government…
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> At page 20:
>
> Therefore the respondent is not correct in submitting that it can intervene or take over a case where the Attorney General has decided not to take action or taken a different action in order to save the Government from losing colossal sums of money. The respondent is a creature of the Constitution and Statute and its functions and powers are clearly laid down in those legal instruments. It is not the function of the Courts to confer corporate status or legal capacity or similar powers on public institutions of bodies which are not specified in the parent or enabling laws."

It is clear from the above authority that unless Parliament has deemed it fit to specifically confer corporate status on a Government Department; such status cannot be implied by court as submitted by the plaintiff's counsel. In those circumstances DRIC is merely a department of government and does not have corporate status. It cannot sue or be sued. A suit cannot be maintained against a nonentity and the same is accordingly struck out as against DRIC.

The above holding does not finally resolve the question of whether the claimant's are entitled to claim under the PERD Statute in the circumstances of this case. A final resolution of the first objection of the defendant requires an appreciation of the background of this suit as evidenced by the correspondence agreed upon by the parties.

As far as the question of time bar is concerned, the argument of the defendant's is that the cause of action in the plaint is founded on tort and under the Civil Procedure and Limitation (Miscellaneous Provisions) Act, an action has to be commenced within two years from the date the cause of action arose. I was referred by or in the plaintiff's counsel to the case of **UNIDRON & 25 ORS VS ATTORNEY GENERAL HCCS NO. 04 OF 2007** the Ruling of Hon. Justice Geoffrey Kiryabwire on a similar objection. In that case the counsel for the Attorney-General had submitted that the cause of action in the suit was breach of a statutory duty which was in the nature of a tort, and a suit in respect thereof had to be instituted within two

years under section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 laws of Uganda. The learned Judge held at page 4 of his ruling:

> "Secondly, clearly this is a dispute resulting from the PERD statute of 1993. I think that it would take some time to operationalise the statute and the question of when time should run would be a question of fact depending on how the divestiture was carried out. Indeed section 41 of the PERD statute provides:
>
> 1) Anything duly done under the authority of this Act for the purpose of giving effect to the Government policy on reform and divestiture of Public Enterprises shall have effect notwithstanding any other enactment.
> 2) Where any provision of any enactment conflicts with any provision of this Act, the latter shall prevail over the former.'
>
> It is my reading of this provision that the Government Policy on Reform and Divestiture of state owned enterprises prevails over all other laws so as to give the policy a chance and time to be operationalised. It is my view that time can only run for purposes of limitation where the divestiture process has been completed. When such a time can be said to begin is a question of fact that has to be ascertained by court for which the preliminary objection cannot be raised at this time. Simply that a cause of action arose in 1994 one year after the PERD statute came into force.
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> That does not mean that the objector waives the objection but that the question of time is a question of fact that must be determined by trial."

In this case, no witnesses were called and evidence was agreed to and it can be assumed that the trial has taken place because the parties have agreed on the facts and documents as evidence. What remains to be resolved are the issues of law and interpretation of fact. Correspondence show that refusal to pay arose around 2004 as per paragraph 14 of the plaintiffs plaint. However annexure "E" is the letter of the Solicitor General advising the Privatization Unit to pay Messrs Mugenyi and Company Advocates from the Divestiture account. This letter is dated 20th May 1997. The cause of action is the alleged refusal of the defendant's servants to pay out of the Divestiture Account. This refusal continued until when some claimants were paid sometime in 2005. However the Defendant relied on annexure "H" which is the letter of the Minister of State for Finance, Planning and Economic Development dated 16th July 2004 referring the matter back to the Attorney General for review of the ex gratia payment, to compute when time begun to run. On a question of fact, this letter was not the last definitive letter refusing payment of the claimants claim. One of the last definite communication from the Attorney General's office is the letter of Hon. Amama Mbabazi dated 4th January 2005 which letter referred the question of ex gratia payment back to the Ministry of Finance for their action. The Attorney General made it clear that the Privatization Unit had refused payment of the claimants out of the divestiture account. That the recommendation of his office was that the claimant's are paid out of the

divestiture account. The letter further states that it was the duty of the Minister of Finance to determine how funds from the divestiture account are to be utilized. What the Minister decided thereafter is not clearly averred or proved in evidence and should not be assumed.

The amended written statement of the defendant which has attached documents admitted by the plaintiff's counsel who did not object to them for use in evidence shows that the Privatization Unit agreed to pay 20% of the claimants individual claims as full and final settlement of their claims in a letter dated 26th May 2005. Apparently this payment was effected soon thereafter as evidenced by the letters of Kampala Associated Advocates attached to the defence which documents are admitted. The plaintiff's counsel in his written submissions relied on section 28 (2) of the Act to submit that the process is still ongoing and the claims are not time barred. Section 28 of the PERD Statute however deals with formation of successor companies and is not applicable. As far as time bar is concerned this suit was filed on the 7th of March 2008. It is averred in paragraph 18 of the plaint that the refusal of the Minister of Finance and DRIC to pay the plaintiffs constitutes a breach of the principles of natural justice, equity, good conscience and good governance. That the "Privatization Secretariat in August 2005 paid on 20% to some of the plaintiffs and have since refused to pay the balances due to them…"

The cause of action averred in the plaint is inter alia alleged breach of the Ministry of Finance to pay out of the divesture account the full entitlement of the plaintiffs claims proved in liquidation. The final refusal to pay the full claim out of the divestiture account was made sometime in August 2005 when Privatization Unit agreed to pay 20% ex gratia. I am not satisfied that if the claims were not barred on other grounds, they would be time barred. First of all there are several plaintiffs, and it cannot be proved from the evidence on record that each of them made a claim and the same was refused. So long as there was ongoing dialogue and fresh claims being made, the plea of time bar should not be entertained. If the right accrued, the Government would still be in the process of ascertaining the claims and should the claim be permitted the same may still be paid. I agree with the plaintiffs submissions that limitation cannot be raised against a claimant who is pursuing his claims pursuant to the Privatization of a Public Enterprise. I also agree with the Judgment of this court in **UNIDRON & 25 ORS VS ATTORNEY GENERAL HCCS NO. 04 OF 2007** the Ruling of Hon. Justice Geoffrey Kiryabwire on a similar objection where he held that section 41 (2) of the PERD Act gave primacy to PERD Act over any other statute in conflict with it. Where any conflict arises the PERD Act overrides the conflicting enactment and is to be preferred over the conflicting enactment. I agree with the plaintiffs submissions that the Civil Procedure and Limitation (Miscellaneous Provisions) Act which bars actions on causes of action founded on torts or breach of contract committed filed after a period of 2 or 3 years for tort and contract respectively from the date the cause of action to be in conflict with the divestiture process.

I am also doubtful whether time bar can be raised against a claim of this nature when the divestiture process remained ongoing. Moreover evidence shows that the claimants have continued to make claims even up to 2008. The plea of time bar does not indicate which of the

claimant's cause of action accrued at which time. Without a definite period stated, and proved the situation remained fluid and time bar is not available to the Defendant in the circumstances of this case. Document No. 37 filed with the joint scheduling memorandum is a letter of the Minister of State for Finance dated 26th June 2008. It clearly spells out that some creditors were paid 20% of their claim as ex gratia and some who had not been paid had appealed to be considered for the same ex gratia treatment while some have filed suits for the same in the courts. It is not indicated when these other people appealed and whether some of the 62 plaintiffs are included. For the above reasons the preliminary objection on the ground that the suit is time bared is overruled.

This leaves me free to determine on merits whether the plaintiffs have a case for payment of the claim out of the Divestiture account which issue also finally will resolved the question of cause of action after consideration of evidence. The facts of this case are that the liquidation of Uganda Transport Company (1975) LTD was completed in 1999. This is evidenced by document 11 which is a voluntary winding up resolution filed by the liquidator dated 20th of July to 1999. It was filed by the liquidator pursuant to section 288 of the Companies Act and addressed to the Registrar of Companies. It reads in part:

> "I, Flugensius Mungereza being a joint liquidator of Uganda transport company (1975) LTD have to inform you that a general meeting of the company was duly summoned for the 14th of May, 1999 pursuant to section 288 of the Companies Act (Cap 85 laws of Uganda) for the purpose of having an account of (a copy of which is attached hereto) laid before it showing have the winding up of the company has been conducted and the property of the company has been disposed of, and that no quorum was present at the meeting."

At page 12 of the agreed documents the details of the liquidation exercise filed with the Registrar of Companies states as follows:

> "The main issues which arose in the liquidation were as follows:
>
> 1. No statement of assets and liabilities was obtained at the commencement of the liquidation. An inventory of the assets and liabilities was however compiled at the inception of the liquidation.
> 2. The balance of shillings 45,190,529/= appearing in the accounts has been paid to the liquidators as expenses of liquidation.
> 3. No surplus funds were available for payment into the company's liquidation account.
> 4. Creditors have not been paid in default due to lack of funds if (list attached).
> 5. No declaration of solvency was obtained in accordance with section 28 (1) of the companies act in so far as the liquidation was effected pursuant to the provisions of the Public Enterprises Reform and Divestiture Statute, 1993."

The defendant submitted that the plaintiff can only be paid out of the liquidation proceeds or divestiture account. In other words the government is not liable beyond the liability of UTC had it still been in existence. It should be noted that the parties in the joint scheduling memorandum agreed on all the facts and documents to be relied upon. Among other documents the plaintiff relies on is annexure E to the plaint which is a letter dated 20th of May 1997 addressed to the acting Director Privatization Unit Ministry of Finance and Economic Development by the Solicitor General. This letter concerns High Court civil suit number 660 of 1994 between Mugenyi and Company Advocates and the Attorney General. The letter reads in part

> "We acknowledge receipt of your letter PES 0900 of 6 to May 1997. We have studied the contents and annexure thereto very carefully. The government is legally bound to settle Messrs Mugenyi and Company's debts. It is immaterial whether government settles this debt either from the consolidated fund or the divestiture account. It is regrettable that the decision to pay was not taken much earlier. While Messrs Mugenyi and Company Advocates were initially entitled to shillings 30 million, the amount now due is shillings 50 million which includes interest and charges. I will wish to take this opportunity to advise that, it is in the interest of the government that the liabilities of government to creditors of all Public Enterprises whether under liquidation or receivership or otherwise should be settled as soon as possible under the provisions of section 23 of the PERD statute".

It must be appreciated that this letter was written and concerns another suit and not the plaintiffs matter. The next letter of interest is annexure "G" to the plaint which is a letter dated 12th of August 2002 and addressed to Messrs Joweria Sekabira, Lukambai and Nambale written by the Solicitor General which reads:

> "Your letter of 7th of August 2002 has been noted. Please be informed that this office has finalised all matters relating to the above claim and have requested Privatization Unit to pay. From now on, check with the Director, Privatization Unit, Ministry of Finance, Planning and Economic Development."

The caption of the letter reads "payment of the balance for UTC creditors" and it was signed for the Solicitor General. By letter dated 26th July 2004 the Minister of State for Finance Planning and Economic Development wrote a letter addressed to the creditors of Uganda Transport Company (1975) Ltd wrote with the caption "Ex gratia payments to the creditors of UTC, PDC, and UGML. Which reads:

> "This is to advise that the matter above has been referred to the office of the Attorney General for further review and consideration. I kindly ask you in the meantime to be patient and wait while we seek ways of amicably addressing your concerns."

It appears from the correspondence attached to the plaint that the Attorney General had recommended an ex gratia payment of the plaintiffs. Put in context a letter of the Minister of

Finance, Planning and Economic Development dated 20th of July 2003 and annexure "I" and addressed to the honourable Attorney General and Minister of Justice and Constitutional affairs Kampala shows the genesis of the suit. It reads:

> "EX GRATIA PAYMENTS TO UTC (1975) LTD CREDITORS"
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> "I am in receipt of your letter MJ/AG/21 of March 13, 2003 on the above subject.
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> I have considered your advice therein, and it is my opinion that the policy you are proposing, if endorsed, would prove very costly for Government.
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> As DRIC has rejected the proposal to allow the above payments made from the divestiture account, and you have stated that the compensation fund cannot be used to meet this payment, it is now my intention to originate a Cabinet paper for Cabinet to guide us, once and for all, where the ex gratia has to come from. By copy of this letter, I am requesting the Minister of State for Finance, Planning and Economic Development (Privatization) to originate the requisite Cabinet paper for Cabinet consideration."

Although the parties agreed on the documents in the scheduling memorandum, the letter of March 13 2003 is not on court record. What is very clear is that the correspondence between the Attorney General's office and that of the Minister of State for Finance, Planning and Economic Development (Privatization) have all captioned their subject matter as "***ex gratia payments to the creditors of UTC (1975) Ltd.”*** A deduction of facts from the documents show that the Attorney General recommended an ex gratia payment to the plaintiffs and also indicated that the money could not be paid from the compensation fund of the Attorney General's office.

The correspondence between the parties spans a period of several years. On 16 April 2002, the Solicitor General in a letter to the Permanent Secretary/Secretary to the Treasury Ministry of Finance, Planning and Economic Development Kampala gives a detailed background to this matter which letter reads as follows:

> "This is to acknowledge receipt of your letter referenced EDP 13.01.00, dated 14th March 2002, addressed to the Solicitor General, attention to Mr. Deus Byamugisha and captioned as "claim by creditors of UTC 1975 limited in liquidation and authority for ex gratia payment".
>
> Consequent upon the receipt of your letter, we have started receiving a big number of people seeking for their various payments from this ministry. As a result of this influx I have been compelled to examine some of the documents of the claimants and at the same time I have also had to consult the attorneys in the Civil Litigation Directory. As a result of this dual approach and in a bid to understand the matter under reference, I wish to draw the following facts to your attention.

1) That some of the claimants/creditors of UTC (1975) Ltd, have court judgments which were made against UTC (1975) Ltd, before the Government decided to sell it under the auspices of the Ministry of Finance, Planning and Economic Development. For instance there is a matter of the widow by the name of Jowera Sekabira whose husband was killed by a UTC bus in an accident. His widow took UTC to court. UTC lost and agreed to compensate her. By the time UTC was wound up she had been paid a total payment of shillings 1,800,000/= leaving an outstanding balance of shillings 2,699,980/=. There are also cases of oil companies that sold fuel on credit to UTC.

2) The directorate of Privatization unit (a Parastatal of your Ministry) which took over UTC (1975) Ltd is responsible for both the assets and liabilities of the said company. The onus to settle all the outstanding liabilities therefore lies squarely with this unit.

3) At the time when UTC (1975) Ltd, consumed the goods and services and committed certain commissions it was a legal corporate body. Even when the widow cited above took UTC (1975) Ltd, to court, it was sued in its own right and nowhere was the name of Attorney General mentioned in the plaint. Because of this very fact there is no way the commission and omissions of UTC (1975) Ltd can now be transferred to the Attorney General to settle through damages.

4) Suffice it to say, that the compensation funds, which are appropriated under the Ministry, are purely meant for meeting both the legal expenses as well as settling the damages arising from the commissions and omissions of government institutions (which are not legal corporate) as well as government employees/Agents. In this regard there is no ground upon which this ministry can either budget or apply for a supplementary for funding an activity outside its mandate. This notwithstanding, the Minister of Finance may however channel the appropriate funds to us for management.

Arising from the above, I wish to advise that the creditors of UTC (1975) Ltd, be paid by the Privatization Unit. Sending the affected individuals and organisations to this ministry for payment of their claims is not helpful at all."

This communication did not end the matter and apparently more efforts were made to engage the Attorney General's office in the controversy. Document number 24 of the agreed documents indicates that on 4 January 2005 the Attorney General wrote to the Minister of State for Finance (Privatization) Ministry of Finance, Planning and Economic Development Kampala. From paragraph 2 thereof he states as follows:

"In the said letter you advise the creditors that the matter had been referred to the office of the Attorney General for further review and consideration.

Information available with us indicates that:

1) An ex gratia payment was recommended with the request that the matter be placed before DRIC for consideration (letter ref: MJ/AG/21 of April 25, 2002).

2) DRIC at its 285th meeting rejected the settlement of the claim from Divestiture Account and instead recommended that the government should make a budgetary provision to settle the claims. (Letter reference PUSRP 13th of July 2000 of May 17, 2002 from the Minister of State for Finance, privatization)

3) The matter was referred by the Attorney General to the Minister of Finance who is specifically charged with the responsibility of determining the use of proceeds of divestiture by the PERD Act with a further recommendation that the claims be settled out of the Divestiture Account. (Letter ref: MJ/AG/21 August 5, 2002).

4) The Minister of Finance while agreeing with the above opinion sought clarification on the application of ex gratia payments. (Letter ref: PURSP 13.17.00 of November 15, 2002 from the Minister of finance).

5) Clarification was made by the Attorney General in letter referenced MJ/AG/21 of March 13, 2003.

Unless there are new issues that you specifically want this office to attend to, the clarification above referred to should suffice."

In addition on 8 February 2005, a letter from Kampala Associated Advocates annexture to the amended written statement of defence addressed to the Director Privatization Unit Ministry of Finance, Planning and Economic Development by the said advocates indicating that they acted on behalf of the creditors of Uganda Transport Company (1975) in liquidation address the director on the following:

a) That the ex gratia payments to the creditors of the above-mentioned company have been endorsed and we have been reliably informed by the Attorney General that Privatization Unit shall be responsible for effecting these payments;

b) That the Creditors in question are well known to you, and if further and or better particulars are required as to the composition of these Creditors together with the amounts owed to each Creditor we shall and immediately provide the same at your request;

c) That is the legal representative of the Creditors of Uganda Transport Company (1975) in liquidation; the payments in question shall be made through Kampala Associated Advocates.

We await your speedy response and action."

On 26 May 2005 the Director Privatization unit wrote to Messrs Kampala Associated Advocates as follows: "Re-: ex gratia payments to the creditors of Uganda Transport Company (UTC)

"We refer to yours dated 18th of February, 2005 on the matter above.

Following the Attorney General's advice that the proven creditors of UTC be paid an ex gratia payment, we duly sought the sanction of the Treasury and the Divestiture Reform and Implementation Committee (DRIC) who has instructed us to advise you as follows:

a) That government would be each of the creditors a total of 20% of their individual claims as ex gratia;

b) That this payment shall be in full and final settlement of the claims and the creditors would be required to sign discharge forms on the terms above.

We also wish to advise that we have been receiving individual claimants who have told us that you do not represent them. With therefore ask you to provide us with a list of the creditors who instructed you together with proof of their instructions so that we can forward their payments to you."

Kampala Associated Advocates reacted in a letter dated 31 May 2005 addressed to the Director Privatization unit. The letter is referenced "Acceptance of 20% ex gratia payments to the Creditors of UTC:"

"Reference is made to yours dated 26 May 2005 and referenced PURSP 13.07.00.

On the 25/5/2005, a meeting of UTC creditors was convened by us wherefore the UTC creditors unanimously agreed to accept payments of 20% and in the same meeting. They reiterated their instructions to us to receive the said payments on their behalf.

This is therefore to request that you pay us the said 20% payment of the total of USHS 826,881,804/= as indicated in our letter of 17th of February 2005 (a copy attached for your ease of reference).

As for the individuals who may approach you for direct ex gratia payment, please indicate to them that all the work leading to this settlement was carried out by ourselves and we acted on explicit instructions of the UTC Creditors as a group."

There are two provisions that have to be analyzed in this matter. These are sections 23 (4) of the PERD Act and section 26 of the same Act cap 98 Laws of Uganda. Section 23 deals with the sale and transfer of a public enterprise. In this case the Government divested itself through winding up and liquidation of the assets of UTC (1975) Ltd. Section 23 (4) provides:

> (4) All proceeds of divestiture of a public enterprise, including, for the avoidance of doubt, any proceeds to which, but for this subsection, the enterprise concerned would be entitled, shall be deposited in the divestiture account to be maintained in commercial banks and development banks designated by the Minister responsible for finance in consultation with the committee and used solely in accordance with this Act.

It is explicit that this provision of the Act provides that the proceeds of the sale or liquidation shall be paid into the divestiture account. Evidence on record shows that there was no money ever paid to the divestiture account from the liquidation of Uganda Transport Company Limited. The little money there was was used to pay the expenses of the liquidation. The propriety of the money being used in this fashion has not been questioned or challenged by the plaintiffs and should be taken not to be in issue. Uganda Shs 45, 190,529/= had been realized in the liquidation exercise. On a question of fact, no money was ever contributed by UTC to the divestiture account established under section 23 (4) of the PERD Act.

As far as the PERD ACT is concerned, the money in the divestiture account can only be used in the manner specified by section 26 of the Act. Section 26 provides as follows:

> **26. Use of proceeds of divestiture.**
>
> (1) The Minister responsible for finance may use the proceeds of divestiture in the divestiture account to meet—
>
> (a) costs and expenses associated with termination of contracts of employment between a public enterprise specified in class II, III or IV of the First Schedule to this Act and its employees as a result of the divestiture of that enterprise;
>
> (b) liabilities of a public enterprise specified in any of the classes referred in paragraph (a) which—
>
> (i) for the purposes of divesting the enterprise in the manner approved by the committee require satisfaction before that enterprise's divestiture; or
>
> (ii) given the mode and terms of divestiture, are directly or indirectly assumed by the Government at the time of divestiture;
>
> (c) Costs and expenses incurred in the process of preparing a public enterprise specified in any of the classes referred to in paragraph
>
> (a) for divestiture; and

(d) Costs and expenses of divestiture.

(2) Any costs and expenses associated with termination of contracts of employment between a public enterprise and its employees shall be paid from the proceeds of divestiture of that enterprise in priority to all other liabilities, costs and expenses referred to in subsection (1).

(3) Proceeds of divestiture of an enterprise in the divestiture account which, in the opinion of the responsible Minister, are not required to meet any present or future costs, expenses or liabilities of the type mentioned in subsection (1), whether relating to that enterprise or otherwise, may, if so determined by the Minister, be transferred, wholly or partly, to the redundancy account and, subject to the foregoing, shall be used for promoting Ugandan entrepreneurs for agricultural and industrial development."

Section 26 (1) gives the responsible minister discretionary power on how to utilize this money. Whether this discretion has been exercised or has been judicially exercised is not specifically the subject of the plaintiff's suit as far as evidence was by admitted documents. I will further comment on this factor later. The plaintiffs in the suit are seeking a contribution from the tax payer for the payment of the creditors of UTC. Should the plaintiffs be paid out of monies in the Divestiture Account or through a budgetary allocation by Parliament?

In support of the plaintiffs case, I was referred to the case of **Geoffrey Baguma and 35 Others vs. The Executive Director PERD Miscellaneous Application No. 759 of 1999** decided by Hon. Mr. Justice Okumu Wengi where it was held that the Director of the Privatization Unit had breached the Statutory duty to seek budgetary contribution from the relevant authority to pay the applicants claims. A careful perusal of this judgment shows that it is distinguishable from the facts of this case. In the first place the case was brought by an application for mandamus to enforce several judgments namely in HCCS No. 490 of 1991; 506 of 1992; 509 – 516 of 1993; 91 of 1994 and GK 350 of 1990. In the application for mandamus, the respondent (Director of PERD) never put in a reply and the case was decided on the basis of the applicant's evidence only. On the other hand the Supreme Court has already interpreted the provisions of the PERD Act In **Mugenyi and Company Advocates vs. The Attorney General Civil Appeal No. 43 of 1995;** and in **Priamit Enterprises Ltd vs. Attorney General Supreme Court Civil Appeal No. 10 of 2001**. In both cases the Supreme Court dealt with the issue of whether Government is liable for the debts of Uganda Transport Company Limited. In **Mugenyi and Company Advocates** (Supra), the court sought to determine whether Uganda Transport Company (1975) Ltd was a company for purposes of determining whether the veil could be lifted as against the government which was a sole shareholder and whether the Government was liable for its debts. It was submitted that the Government being the sole shareholder was liable for the debts of the company. The submission failed because it was held that the company was a limited liability company properly incorporated. Hon. Mr. Justice Oder in **Priamit Enterprises Ltd vs. Attorney**

General Civil Appeal No. 43 of 1995 and at page 16 paragraph 2 thereof referred to the case of Mugenyi and Company Advocates (Supra) when he stated:

> "The first part relates to the application of the decision in the case of Mugenyi &Company advocates (Supra) to the instant case. This is that UTC was an incorporated company with limited liability, and had a capacity to sue and be sued. As such it was an independent legal personality separate from the Uganda Government, which was its sole shareholder. As a result of the Government was not and could not be liable for UTC's debts it owed to the appellant. The appellant's plaint therefore disclosed no cause of action.
>
> I entirely agree with that holding."

The learned Judge of the Supreme Court further considered the lead judgment of the Court of Appeal particularly the judgment of Justice Twinomujuni J.A. Wherein he had set out the provisions of section 23 of the PERD statute. He stated at page in 19:

> "In my judgment, I would agree with the learned trial judge that section 23 PERD statute –
>
> (a) authorizes government through its agents to pay the creditors of the public enterprise from the divestiture account;
>
> (b) the money to be paid must be from the proceeds of the sale of the debtor public enterprise;
>
> (c) to pay or not to play is in the discretion of government through its agents.
>
> It follows therefore, that for a plaint to disclose a cause of action on the basis of section 23 (a) PERD statute, it must aver that the debtor public enterprise has been sold and the proceeds of the sale are on the divestiture account. If no such averment is made in the plaint, then the plaint does not disclose a cause of action.'

Hon. Justice Oder referring to the above judgment of the Court of Appeal held *"I agree with the interpretation of section 23 (a) of the statute."* Again at page 21 of his judgment he states:

> "Given the construction of section 23 of the statute made by the learned justice of appeal and the application of that construction to the appellant's pleadings in his plaint, with which I agree as correct, it is inevitable to conclude that even under section 23 of the statute the plaint it disclosed no cause of action. This in my view, is because, the plaintiff did not pleaded facts to necessitate the application of that section of the appellants allegations in the plaint."

The judgment of the Court of Appeal mentioned above has not been overturned and is binding on me. It is affirmed by the highest court in the land. Firstly it establishes that creditors have to be paid from the divestiture account. Secondly, the money that is to be claimed has to be from the proceeds of the sale of the public enterprise in question. Last but not least, it holds that it is the discretionary power on the part of government whether to pay. The Supreme Court affirmed this interpretation. The case of the plaintiffs can only be founded on a question of fact that money from the divesture of the particular Public Enterprise has been paid to the Divesture Account.

In the plaintiff's case, the liquidator made it clear that there was no money from the liquidation of Uganda Transport Company (1975) limited. In other words, if no money was ever paid to the divesture account by the liquidators then following the judgments of the Court of Appeal and Supreme Court no money was available to be paid. In the very least the case of **Priamit Enterprises** (Supra) establishes that the fact that money was paid into the Divestiture Account from the divested public enterprise has to be averred in the plaint. This court has no powers to depart from the binding decisions of the Court of Appeal or Supreme Court. The plaintiff's plaint clearly avers in paragraph 8 thereof that there was liquidation and the liquidators filed a report with the Registrar of Companies. The Liquidators report was annexed and proved that money realized met the expenses of the liquidation only and there was no balance left over. Secondly Paragraph 9 of the plaint avers that the liquidators requested the PERD secretariat and Minister of Finance to remit funds to pay the creditors. Paragraph 13 avers that the defendant owed a statutory duty to seek budgetary contribution to make these payments.

All the correspondence on record, both by advocates of the claimants and officials of the defendant have consistently referred to the claim, as a claim for ex gratia payment. The minister has discretionary powers whether to pay the Creditors or not and is only accountable to Parliament under section 40 of the PERD Act. In the absence of an application for judicial review of the Minister's actions and in the absence of evidence in this suit that the Minister acted contrary to the principles of natural justice, equity or good conscience and governance, or that the exercise of the Minister's grace to pay ex gratia the claims of the appellants was exercised arbitrarily, selectively or discriminatorily, the current suit and evidence adduced on record lacks merit.

Before I wind up this matter, I must say that the Minister may still if he or she deems fit extend ex gratia payment of the claimants claims in settlement of proven debts. He or she may only be approved or censored by Parliament through the usual processes of checks and balances or by the electorate by not voting him or her in power. In the meantime as representatives of the people, I have no mandate to compel the Minister either way in the absence of grounds for judicial review. Counsel for the defendant submitted that the claimants ought to have applied for judicial review. Obviously an application for judicial review has to be commenced within 3 months from the date the cause of action arose. I however do not have to decide whether there was a need to apply for the same. There is no evidence on record as I have stated above that the minister did not act judicially in approving 20% ex gratia. Moreover there are other pending applications for ex

gratia payment and it cannot at this stage be said that other people have selectively been left out of the 20% grace. The Minister is not precluded by this judgment from approving move ex gratia settlement of the claimants claims.

For the reasons given above the plaintiffs suit is dismissed with no order as to costs.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Martin Mwabutsya State Attorney for defendant,

Augustine Kibuuka Musoke holding brief for Mugabi for the plaintiffs also present in court,

Ojambo Makoha Court clerk

Hon. Mr. Justice Christopher Madrama

27th/05/2011