THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

APPLICATION FOR JUDICIAL REVIEW

THE JUDICATURE (JUDICIAL REVIEW RULES) 2009

MISC CAUSE NO 27 OF 2012

CANAF GROUP INC. } ……..…..……..APPLICANT

VERSUS

1. **ATTORNEY GENERAL }**
2. **KILEMBE MINES LIMITED} ……..……...….. RESPONDENTS**

BEFORE JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant applied for judicial review under rules 3 (1) (a) and 3 (2) of the Judicature (Judicial Review) Rules 2009, section 98 of the Civil Procedure Act and section 33 and 37 of the Judicature Act. The application seeks an order that time is extended for the application for judicial review. Secondly that an order of mandamus issues requiring the first and second Respondents to abide by the terms of an arbitral award by Hon. Retired Chief Justice S.W.W. Wambuzi dated 27th of October 2008 pursuant to arbitral proceedings between the Applicant and the second Respondent. The award directed the second Respondent to permit the Applicant to re-enter Kilembe mines and resume mineral exploration works and thereby qualify for a 70% concession in the mine upon obtaining a positive feasibility study. The first Respondent's application to set aside the arbitral award was dismissed on 12 October 2011 and the award became a binding decree of the High Court under section 36 of the Arbitration and Conciliation Act. Thirdly it is for an order of prohibition to issue prohibiting the first Respondent from taking any steps, preliminarily or otherwise, towards the divestiture of the second Respondent contrary to the arbitral award as all of the second Respondent's assets are the subject of the award. Fourthly it is for an injunction to issue to restrain the first Respondent pending the hearing of the application and on a permanent basis, from the divestiture of the second Respondent in contravention of the arbitral award. Lastly it is for an order that costs of the application are provided for.

The grounds of the application set out in the notice of motion and are that:

i) The Applicant is a limited liability company incorporated on 27 March 1996 in Alberta Canada and is quoted in the Toronto foreign exchange (TSX – Venture). It was formerly known as Uganda Gold Mining Ltd but changed its name first to CANAFRICAN METAL AND MINING CORPORATION on 7 June 2006 and later on 3 May 2007 to its present name CANAF GROUP INC.

ii) The Applicant and the second Respondent entered into a mineral exploration and feasibility study agreement (MEFSA) under which the Applicant was to finance and carry out detailed prospecting and exploration works for copper, cobalt and gold at Kilembe to be completed within a three (3) year period in the special mining lease area number 2151 and the surrounding exclusive prospecting area both of which the second responded warranted it had title over. It was agreed that if the Applicant were able through financing and carrying through the prospecting exercise to establish a positive feasibility study then the Applicant would then acquire a 70% stake on agreed terms in the second Respondents mineral assets and property under a public-private partnership.

iii) A dispute arose between the parties in the course of carrying through the MEFSA caused principally by the second respondent not having a valid title and licence for the area to be explored for a substantial duration of the exploration period being two years and two months out of the three-year period. This diminished the Applicants finance raising activities for the project in Canada and its effective utilisation of the exploration period. The dispute resulted in arbitral proceedings before retired Chief Justice S.W.W Wambuzi which commenced on 24th of January 2007 before the three-year exploration period lapsed and eventually concluded by a consent award dated 27th October 2008 which provided for the Applicant to re-enter the second Respondents mine and resume work under the MEFSA subject to its revision as would be requested for by the second Respondent.

iv) The first Respondent applied to set aside the arbitral award without success and its application was dismissed by her Lordship justice Mulyagonja on 12 October 2011 by reason of which dismissal, the award was by section 36 of the Arbitration and Conciliation Act constituted into a decree of the High Court.

v) The first Respondent has in spite of the dismissal of its application which upheld the award proceeded to disregard the award and commenced the divestiture of the first Respondent in spite of all the first Respondents assets, being subject to the award and the concession therein and in spite of the first and second Respondent being duty bound by law to abide the award.

vi) By the letter of its lawyers dated the 1 July 2012 addressed to the director privatisation unit, the Applicant demanded of the first Respondent that it abide the award and that they do indicate which provisions, if any, of the MEFSA they sought to revise and confirm a date for a meeting to agree on the revisions but in spite of that the first Respondent has not reverted on the matter and thus the original MEFSA stands.

vii) The purported divestiture process, without the first Respondent having dealt with and resolved the Applicants entitlement under the award, is an illegality and should be quashed, prohibited and restrained by injunction.

viii) The Applicant and the first Respondents had been invited for discussions in an effort to amicably resolve this matter including meetings with inter alia the Solicitor General and the Attorney General and there was every indication that the agreement would be reached and for that reason the Applicant has desisted from filing enforcement proceedings on the award and in the circumstances, it is fair and just that time is extended for this proceedings to be taken.

The evidence in support of the application is contained in the affidavit of David Way while that of the Attorney General is contained in the affidavit of the acting Solicitor General Harriet Lwabi. Finally the affidavit in rejoinder is sworn by Bwogi Kalibbala of MMAKS Advocates.

The evidence in support of the application in the affidavit of David Way is that the Applicant was incorporated on 27th of March 1996 and it changed its name on 7 June 2006 and 3 May 2007. Under the mineral exploration and feasibility study agreement the Applicant was to finance and carry out detailed prospecting and exploration works for Copper, Cobalt and Gold at Kilembe to be completed within a three-year period in the special mining lease area number 2151 and the surrounding exclusive prospecting area both of which the second Respondent warranted it the title thereof. If the prospecting exercise was positive, the Applicant would acquire a 70% stake in the second Respondent's mineral assets and property on agreed terms under a public-private partnership. The deponent more or less repeats all the grounds reproduced above of the notice of motion and it is no need to repeat it here.

In reply the acting Solicitor General Harriet Lwabi avers that in December 2008 the first Respondent acting on the instructions of the Privatisation Unit filed MA No. 702 of 2008 seeking to set aside the consent arbitral award. The grounds of the application was that the second Respondent acted in contravention of the Public Enterprise Reform and Divestiture Act by executing a consent arbitral award in defiance of the decision of the Divestiture and Reform Implementation Committee and the Privatisation Unit that the award would interfere with the planned divestiture of the second Respondent and that the arbitration should be heard on merits.

In 2009 the Applicant filed civil suit number 83 of 2009 seeking a declaration that the arbitral award is final and binding and for a permanent injunction stopping the second Respondent from participating in its own divestiture to dispose of its assets relevant to the agreement. The Applicant obtained a temporary injunction pending disposal of the suit. The Applicant’s lawyers wrote several letters to the first Respondent proposing a financial settlement of both MA No. 702 of 2008 and HCCS No. 83 of 2009 and quantifying the Applicants claims in Kilembe Mines. During discussions it was agreed that on the basis and in return for a monetary settlement the Applicant would withdraw the suit and the temporary injunction would lapse. This would allow the divestiture process to proceed unhindered. In 2011 it was established that the arbitral award

had been signed as a consent agreement by the parties without the second Respondent seeking the consent of the Attorney General under article 119 of the Constitution. The second Respondent filed a supplementary affidavit to that effect in MA No. 702 of 2008. The Applicants counsel was advised that there would be no settlement made on the basis of an illegal award and the Attorney General would challenge the legality of the award in court. Miscellaneous application number 702 of 2008 to set aside the arbitral award was dismissed on the ground that the affidavit in support of it was incurably defective.

On 5 November 2011 the Applicants lawyers proposed in a letter dated 5th November 2011 financial settlement of HCCS No. 83 of 2009 to enforce the award. The second Respondent obtained leave to file an amended written statement of defence to specifically plead the issue of illegality of the award. The Attorney General filed an application to strike out the plaint and set aside the injunction. On 27 June 2012 Honourable Justice Geoffrey Kiryabwire struck out civil suit number 83 of 2009 and the temporary injunction lapsed. On the 1 July 2012 the Applicants lawyers wrote to the Director Privatisation Unit copied to the Solicitor General demanding that the Applicant is allowed to resume work under the arbitral award and requesting for renegotiation of the MEFSA agreement.

The Attorney General's position is that the application for mandamus, prohibition and the interim and permanent injunction in the absence of extension of time is incompetent. Secondly under article 119 (5) of the Constitution the agreement relied upon by the Applicant was concluded without the legal advice of the Attorney General contrary to the above article. The consent arbitral award which permitted the Applicant to resume exploration was an agreement in which the government had an interest because firstly the second Respondent is a statutory public enterprise in which the government has controlling interest. Secondly under article 244 (3) of the Constitution exploration of minerals shall take into account the interests of government. Thirdly the consent award purported to allow the Applicant resume performance of an agreement in which it was granted the exclusive right to acquire a 70% interest in the second Respondent’s assets including mineral deposits in the event of a positive mining feasibility study. The award dealt with the transfer of public assets which the Respondent holds in trust for Ugandans to a foreign company. Fourthly the privatisation unit informed the second Respondent of its interest in the agreement and in particular its view that the Applicant should not be allowed to resume work as it would negatively affect the interest of the government in the planned divestiture of the second Respondent. By the time of the consent award on 27 October 2008 the period granted in the agreement between the Applicant and the second Respondent had expired. The consent award provided that the Applicant would resume work subject to a new agreement to be concluded between the parties within 30 working days. The second Respondent was directed to file a certificate of due execution of the new agreement within 30 days with the arbitrator in order to conclude this settlement. But never complied with the agreement to negotiate or file a certificate of due execution of a new agreement and 30 days expired. In any case the revised agreement would be subject to article 119 of the constitution which requires approval of the first

Respondent who was not a party to the award. The Attorney General is not ready to grant the consent required by article 119 because the arbitral award was executed by consent of the parties without the permission of the Attorney General. The parties are purporting to authorise the specific performance and revision of an agreement which had earlier been terminated by the Applicants for breach of contract and whose specified duration had expired. Resuming exploration by the Applicant would be in disregard of government policy on the second Respondent. The divestiture of the second responded commenced and is proceeding in accordance with government policy and stopping it would cause the government financial and economic loss. Ongoing divestiture of the second Respondent is through competitive open international bidding. The Applicant represented to the public that it wrote off the second Respondent's property in 2005 – 2006 and does not intend to invest in the mines but hopes for a financial settlement of its claims.

The divestiture of the Respondent proceeded on the ground that the award expired and is unenforceable. On 20 September 2012 the government acting through the privatisation unit executed the contract appointing an international consortium as the transaction adviser for implementation of the divestiture programme. The Adviser's assignment formally commenced on October 10, 2012. On 1 November 2012 the privatisation the unit issued the public advertisement requesting confirmation of expressions of interest from potential bidders. Secondly the divestiture also commenced because of representations made by the Applicant that it had written off the property of the second Respondent. The Applicant will not suffer any irreparable damage from the ongoing divestiture proceeding as scheduled as it can be compensated in damages. The consent arbitral award arose out of the Applicants arbitral claim for quantified damages for alleged breach of contract. The Applicant sought financial settlement of the matter and quantified the claim. Finally the deponent avers that stopping or halting the ongoing divestiture of the second Respondent would cause great financial and economic loss to the government of Uganda and the people of Uganda at large.

In rejoinder Bwogi Kalibbala avers that the arbitral award does not contravene article 119 (5) of the Constitution which has no bearing on matters of adjudication. Secondly the first Respondent has not denied the binding nature of the mineral exploration and feasibility study agreement dated 27 September 2004 or the validity of the arbitration clause. There is no denial by the first Respondent that under the arbitration clause an award would be final and binding upon the parties. That the arbitral award was entered by consent of the parties and is similar to a consent judgment and did not require the legal advice of the Attorney General. Furthermore the Applicant argues in the affidavit of Bwogi Kalibala that counsel who has instructions to conduct a case does not require the consent of the Attorney General to bind his client. Furthermore the dismissal of High Court civil suit number 83 of 2009 occurred because the Applicant was described as "Uganda Gold Mines Ltd" instead of the correct name of "Uganda Gold Mining Ltd". Secondly the place of incorporation of the Applicant had been misstated as Kampala instead of Alberta, Canada. Consequently the Applicant's entity was held to be a non-existent

entity and the suit was dismissed with costs on that basis. Counsel avers that the arbitral award clearly and unequivocally provides that the Respondent shall allow the claimant to enter the Respondent's premises to resume work. It also required the second Respondent to put forward amendments to the agreement and file a certificate of due execution of the agreement with the revised amendments within the stipulated time. The initial agreement had not expired and would subsist as governing the party's rights and obligations in the absence of any amendment. The remedy sought by the Applicant is a permanent injunction and not a temporary injunction and the question of irreparable injury which cannot be atoned for by an award of damages does not arise. The Applicants mining concession is a property right and cannot be written off by its statement that it would accept monetary compensation.

At the hearing of the Application, the Applicant was represented by Counsels Masembe Kanyerezi and Apollo Makubuya of Masembe, Makubuya, Adriko, Karugaba and Sekatawa Advocates while the first and second Respondents were represented by Principal State Attorney Patricia Mutesi.

The enabling law under which the application was brought was amended to include section 37 of the Judicature Act and the Applicant abandoned ground A of the application.

Applicants Submissions

The grounds of application are as set out in the notice of motion and supporting affidavits which evidence has been set out at the beginning of this judgment. The Applicant and the 2nd Respondent executed a mineral exploration and feasibility study agreement dated on 27/9/2004 under which the Applicant was to finance and carry out prospecting and exploitation works for Copper, Cobalt and Gold at Kilembe to be completed within a 3 year period in the area known as the special mining lease area 2151 and surrounding exclusive prospecting area of 5 kilometres. The Applicant has interest in the surrounding 5KM exclusive prospecting area.

Under the agreement, if the Applicants were able through the financing and carrying out the prospecting exercise to establish a positive feasibility study then it would acquire a 70% stake in the 2nd Respondent mineral assets and property on agreed terms under Private Public Partnership.

A dispute arose between the parties in the course of carrying out the agreement. The primary cause of the dispute was the reason that the 2nd Respondent did not have valid titles and license for project for a substantial duration of the exploration period 2 years and 2 months out of the 3 year period. The agreement commenced on the 27/9/2007 but the requisite licenses were not obtained until the 10/11/2006. A period of 2 years and 2 months out of a 3 year exploration period was wasted without commencement of the exploration and study. It also diminished the Applicant’s ability to raise finances in Canada for effective utilization of the exploration period. They were unable to demonstrate to potential investors that they held a valid license. The remaining 10 months period was too short to achieve a positive feasibility study. This generated a dispute which became the subject of arbitration before the agreed arbitrator retired C.J. S.W.W.

Wambuzi. Arbitration proceedings were commenced before the 3 year period lapsed. Counsel emphasised that the 2nd Respondent participated in the arbitral proceedings. Upon discussion of the case before the arbitral tribunal, the parties agreed on the fairest way to resolve the dispute and entered a consent arbitral award. Additionally there was agreement that the parties would revise the terms of the original agreement. Clause 5 provided that Kilembe Mines Ltd would file a certificate of due execution of the new agreement to conclude the settlement within the 30 days from the date of award. The award was endorsed by the arbitrator and became a binding and valid arbitral award.

The Applicant filed an application to set aside the award and the application was struck off on the 12/10/2011 whereupon the award became enforceable as a decree of the High Court. Counsel contended that the enforceability of the award was critical to the arguments being made about article 119 (5) of the Constitution on whether the consent of the Attorney General was necessary before execution of the consent arbitral tribunal. He submitted that the award can only be set aside on an application to set it aside under the Arbitration and Conciliation Act.

There were proceedings before Hon. Justice Kiryabwire to enforce the award by ordinary suit but counsel submitted that the right procedure in any case for enforcement of an award was by application for judicial review. In any event there was a suit to enforce it which was dismissed because the plaintiff was wrongly described as Uganda Gold Mines Ltd when it was Uganda Gold Mining Ltd and wrongly described as incorporated in Uganda whereas not and therefore the plaint struck off. Counsel submitted that it cannot be contended that because the case was dismissed, a mandate was given for the divestiture to proceed. It was open for the Respondent to bring further applications because the matter had not been dismissed on the merits and was not res judicata.

Counsel further submitted that the Respondents can only raise issues on the competence or legality of the award in an application to set it aside. At the time this application was filed, the Applicant's concern was an advertisement by PU inviting bids for technical advisory services for the concession of assets of the second Respondent, Annexure E (i) and the standard bidding Document for Procurement of consultancy services for the concession of assets of the second Respondent annexure E (ii) to the application.

Counsel submitted that the arguments put forward in the affidavit in response ask the court to consider the merits which it should not do. This is because Mandamus deals with the process and answers to it must relate to the process being challenged.

Submissions of the Attorney General in reply

Patricia Mutesi Principle State Attorney opposed the application on two grounds. Firstly she contended that the arbitral award is illegal and cannot be enforced or recognized as final and binding by any court of law. Secondly it is unenforceable as it amounts to an agreement to agree

which was not implemented within the agreed time in order to conclude the settlement as a binding award. The time to agree expired and there is nothing in law under the award.

On the question of illegality, the arbitral award was entered by the 2 parties without seeking the consent of the AG. The consent agreement leading to the award falls under the mandate of the AG under article 119 of the Constitution and in particular because one of the parties (second Respondent) is a statutory public enterprise in which government has controlling shares. The award was in respect of minerals and under article 244 (3) of the Constitution must be exploited after taking into account the interest of government. The award purported to allow resumed performance of an agreement which granted a 70% interest in the Applicant in the event of a positive visibility study. It was in effect a potential transfer of public assets of government which Kilembe held and holds in trust for Ugandans to a foreign company.

The Applicant is a limited liability company in which government has controlling shares. Government had informed the second Respondent of its interest in the agreement in particular that the Applicant should not be allowed to resume work as it could affect the planned divestiture. Counsel relied on the case of **Nsimbe Holdings ltd vs. Attorney General and IGG Constitution Petition No.02/2006** on the legal effect of entering into any agreement without consent of the AG as required by article 119 of the Constitution where it was held that an agreement was null and void because it contravened article 119. Where the agreement leading to the formation of the company was unconstitutional, the company did not exist.

Secondly counsel submitted that a consent judgment is a contract between the parties as held in the cases of **Goodman Agencies vs. AG MA 34 of 2011**, and **Tropical Commodities Suppliers Ltd vs. ICB (In Liquidation) MA 647 of 2002**.

On whether the issue of illegality can be raised except in an application to set aside the award, counsel submitted that there was an application to set aside the award filed by the first Respondent against the Applicant and the second Respondent at that time. It was dismissed on the grounds of having a defective affidavit in support. It was not dismissed on the merits and whereas the second Respondent was at liberty to reinstate the application, under section 34 of the Arbitration and Conciliation Act, such applications have to be made within one month. Consequently the Respondents were locked out of the processes of the Arbitration Act. Because illegality is an issue of law, it cannot be restricted on procedural basis. In the case of **Makula International versus Cardinal Nsubuga [1982] 11** the Supreme Court held that it could interfere with an order even though an appeal is incompetent because a court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including admissions..

The High Court has unlimited original jurisdiction in all matters and causes under section 14 of the Judicature Act. Secondly under section 98 of the Civil Procedure Act the High Court retains

its inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Once illegality is brought to the attention of the court, determination of the issue cannot be limited by the rules of procedure.

In response to the submission that article 119 of the constitution of the Republic of Uganda cannot apply to an arbitral award, the Attorney Generals Counsel submitted that a consent judgment is an agreement and article 119 applied to it. Because the agreement was illegal, null and void, the arbitrator's endorsement of the award based on the settlement of the parties cannot cure the illegality. In the case of **Nsimbe Holdings** (supra) court quoted article 2 of the Constitution which provides that anything that is inconsistent with the Constitution is null and void and of no legal effect. The question before the arbitrator is not whether counsel was validly conducting the matter of his client but rather whether the client who instructed counsel had any legal authority in the absence of consent of the Attorney General under article 119 to execute a contract. The fact that the arbitrator need not consult the Attorney General is irrelevant because the illegality is based on the capacity of the parties to enter into the settlement without authorisation and which is the root of the illegality.

The Respondents counsel further submitted that by the time arbitration commenced, the agreement was still existent but by the time the award was endorsed by the arbitrator, the three year period provided for under the original agreement had expired. Under the award it is provided that the Applicant will resume works subject to renegotiation of the agreement. The award purports to bind the government without its knowledge to renegotiate an agreement which had already expired. Counsel submitted that among the grounds for setting aside a consent judgment is if it is contrary to the policy of court and the policy of court has been established in the case of **Nsimbe Holdings versus Attorney General** (supra).

Secondly the jurisdiction of the court has to be exercised in accordance with the law under section 14 of the Judicature Act. The High Court also applies principles of common law. The agreement to resume performance and renegotiate the award was fundamentally in contravention of established principles of contract law. It's a fundamental principle of contract law that where an innocent party treats a breach as discharging the contract, that election is final and cannot be reversed. The statement of claim in the arbitration of the applicant showed that the Applicant treated the Respondent's breach as a material breach and sued for damages. The contract was treated by the Applicant as having been discharged. Consequently in law the agreement does not exist.

As far as the award was obtained by an agreement contrary to law on specific performance of an agreement, the Applicant had sued for damages for material breach of the agreement. It was an agreement to revise the terms of an agreement which had expired.

The second Respondent had been informed by the Permanent Secretary Ministry of Finance and officials of the Privatisation Unit that the settlement would affect the divestiture of the second

Respondent. This position had been communicated to the chairman of the board of the second Respondent.

Counsel submitted on the enforceability of the award. She contended that the award amounted to an agreement to agree. The Respondent was given a right to re-enter the premises and resume work subject under clause 3 of the award to revision of the original agreement between the parties. Counsel contended that this was because that agreement had expired since it had a timeframe of three years and by the time of the award the three years had run out. There has never been any revision or renegotiation within 30 days as provided for in the award. In effect there was no settlement because what was agreed upon to be done under the settlement was not done. Counsel submitted that both parties where required to renegotiate. Because renegotiation was not done at all, the settlement was not concluded in law and does not exist. The award is explicit that the parties would go back to agree on what would govern the resumption of the work under the agreement.

Counsel submitted that an agreement to agree in the future is not a contract. Such an agreement is uncertain and cannot be enforced. She relied on the case of **May & Butcher Ltd v R [1934] 2 KB 17** for the proposition that there must be a concluded bargain and contract which settles everything that is necessary to be settled. A contract would be unenforceable if it lacks the necessary certainty. In any case counsel contended that any other agreement would be subject to the requirement to obtain the consent of the Attorney General. The Attorney General was not a party to the award and was not bound to agree to whatever was agreed between the parties to the award. The affidavit in reply shows that the Attorney General would never agree to such an agreement in light of government policy. Consequently the agreement might have been well intended but was not enforceable. It was not enforceable on the ground that it was impracticable. Counsel further emphasised that the original agreement had expired.

The agreement was executed on 27 September 2004 and under clause 8.1 and 9.1, 9.2 there was a time limit for the Applicant to produce a feasibility study. Upon the presentation of the feasibility study report and in the event that it was positive, it would give rise to the interest or the right of the Applicant to acquire 70% in the second Respondent. Counsel further referred to the annual statement of the Applicant which indicates in publications that the company has written of the Kilembe asset and had no further interest in investing in it.

When the arbitral claim was filed, the Applicant had already discharged the agreement and sued for damages for material breach. Counsel further submitted that the Applicant cannot claim that it has a concession when it has not undertaken the feasibility study which is a prerequisite to the concession. In any case the agreement on which it is based was terminated and does not exist. The divestiture of the second responded proceeded on the basis of the public representation of the Applicant that it had written off the property and did not intend to invest in it. This was confirmed by conduct of the applicants counsel by seeking compensation on behalf of the Applicant.

Finally as far as principles upon which mandamus may be granted are concerned counsel submitted that they were stated in the case of **Goodman Agencies Ltd versus Attorney General MA No 34 of 2011**. These were that Applicant has to demonstrate a clear legal duty owed to him or her, a specific right enjoyed by the Applicant and if there was doubt about that right, there was no obligation to the Applicant. The award does not indicate a clear legal duty on the part of the Respondents especially the Attorney General who is the final authority on any agreement and therefore the claim for an order of mandamus does not arise. Secondly as far as the claim for injunction is concerned, counsel referred to the principles upon which temporary injunctions may be granted such as the need to demonstrate a prima facie case with a probability of success; that irreparable damage would be suffered by the Applicant which cannot be atoned for by an award of damages if the injunction is not granted. In case the court is in doubt an injunction may be granted or refused on the balance of convenience. As far as the prima facie case is concerned counsel contended that because of the illegality under article 119 of the Constitution, there was no prima facie case. Secondly because the Applicant sought damages which can be quantified, it would not suffer irreparable damage. Thirdly on the balance of convenience, one company should not be permitted to hinder the divestiture of a public asset.

Rejoinder of the Applicant's Counsel

As far as illegality is concerned counsel Masembe contended that there was a fundamental misconception about the status of the second Respondent which led to the wrong application of article 119 of the Constitution. He contended that the issue is whether the second Respondent is a statutory Corporation or a private limited liability company governed by the Companies Act. The government of Uganda chose to hold its interest in the second Respondent as shares in a private limited liability company and not a statutory Corporation. Consequently the Memorandum and Articles of Association governed the powers of the directors. A company can only be controlled through a general meeting. Otherwise the powers of management are vested in the board of directors.

It cannot be said that the government has an interest in an arbitral award or an agreement to which the second Respondent is a party. The only entity which has an interest is the 2nd Respondent who is a party to the award. Counsel contended that this is deferent from a statutory Corporation such as NSSF.

Secondly under article 119 (5) of the Constitution there are four categories of things. It provides that no agreement, contract, treaty, convention or document to which the government is a party or in respect of which the government has an interest shall be concluded without the legal advice of the Attorney General. The argument is premised on the fact that the award is a contract. In order to set aside a consent judgment, one is required to file an application in the proceedings where it was entered. A consent judgment is not appealable and can only be set aside in the suit itself. A consent judgment is not merely a contract but a judgment. The efficacy of the consent judgment derives from the hand of the registrar judge who enters it as a judgment of the court

and an award derives its efficacy from the hand of the arbitrator who enters the award. It is enforceable as a decision of the arbitral tribunal and not a decision of the parties. It is executable as a decree of the court.

As far as article 244 of the constitution is concerned, it deals with minerals subject to article 26 which protects property rights and provides that all minerals and petroleum under any land or water in Uganda is vested in the government. That is why the second Respondent applied for a mineral licence and it has the power to dispose of that asset through a transfer. Because the second Respondent has a mining licence, the issue of article 244 does not arise. Counsel reiterated submissions that the award can be challenged under the Arbitration and Conciliation Act through an application to set it aside.

As far as the argument about illegality is concerned, counsel submitted that there was no illegality. He submitted that the starting point in the dispute was that in the present case the Applicant had a Public-Private Partnership concession agreement which was frustrated by the absence of the requisite licence. In the arbitral proceedings compensation was sought for the wrong and in lieu of pursuing compensation the second Respondent compromised and agreed that it will extend time and that the Applicant should resume possession. Thereafter the Respondents raised the question of illegality. As far as other investors are concerned, there is no difference with the Applicant and to invite other investors would be contrary to the principles of justice.

As far as the contention that the award amounts to an agreement to agree is concerned, the argument does not apply to adjudication. Where the adjudication is unclear and there are no remedies in the Arbitration and Conciliation Act, the parties can go back to the arbitrator to set aside or change the terms. They cannot however treat the adjudication as a simple contract and try to avoid it on the basis that it is an agreement to agree. The Applicant's application is for judicial review and does not deal with the merits of the award but with enforcement. In the case of **Livercot Impex Ltd and Uganda Investment Authority versus the Attorney General and another High Court MA No. 173 of 2010** it was held that judicial review is not concerned with the decision in issue per se but with the decision-making process. It involves an assessment of the manner in which the decision is made. It ensures that public powers are exercised in accordance with the basic standards of legality, fairness and rationality.

As far as the annual statement of the Applicant is concerned, it is an accounting principle to say at some point that one must write off the value of an asset because the matter has been in contention since 2005. The arbitral award deals with particular assets and to that extent the divestiture of the second Respondent cannot be permitted to proceed and an order of mandamus would lie.

Counsel submitted that it was unjust for the Applicant to enter into an agreement for an award with the Respondent so that the Applicant does not claim compensation and thereafter the

Respondent turns around to challenge its own arbitral award. The basis for disowning the award is because a certificate which was supposed to be issued by the Respondent has not been issued.

Ruling

The gist of the application for issuance of orders of mandamus, prohibition and injunction is meant to have the first and second Respondents abide by the terms of an arbitral award dated 27th of October 2008. Secondly to prohibit the first Respondent from taking any steps, preliminary or otherwise towards the divestiture of the second Respondent contrary to the award.

The basis of the relationship between the Applicant and the second Respondent is the Mineral Exploration and Feasibility Study Agreement executed on the 27th of September 2004. Under the agreement the second Respondent is described as a body corporate duly incorporated under the laws of Uganda. The Applicant on the other hand is a body corporate incorporated under the laws of the province of British Columbia and Alberta in Canada. The citations/preamble to the agreement provide that the second Respondent was the legal and beneficial owner of a special mining lease number 2151 and surrounding exclusive prospective licence for known and unknown mineral deposits delineated in a map and assets scheduled in the agreement. The Applicant agreed to finance and carry out exploration to increase the resources of copper, cobalt and gold according to an exploration program attached to the schedule. It provides that following a positive feasibility study of the project in consideration, the second Respondent had agreed to transfer to the Applicant undivided 70% interests in the project on the terms and conditions contained in the agreement.

For two years and two months from the commencement of the agreement the Respondent did not possess a valid title and licence for the area to be explored. The agreement commenced on the 27th of September 2004 when it was executed but the requisite licences were only obtained on 10 November 2006. The agreement had a three-year period and clause 33 of the agreement provides that time is of essence. Under clause 8.1 of the agreement the exploration and feasibility study was to be conducted within 36 months. The Applicant was granted a sole and exclusive right and option to acquire 70% “rights, title and interest” in the project by concluding the work upon a positive feasibility study under clause 9.1. The work is described in schedule 2 of the agreement and comprised of the description of the exploration program, study of the economic feasibility of the project and environmental impact assessment.

The Applicant alleged that because of failure of the 2nd Respondent to acquire/possess a valid title and licence for two years and two months, its ability to raise funds for the project in Canada where adversely affected and impaired. A dispute arose between the parties to the agreement whereupon the Applicant commenced arbitration proceedings against the second Respondent.

The statement of claim in the arbitral proceedings annexure “C i” was signed by the Applicants counsel on 24 January 2007 commencing arbitration proceedings for breach of contract. It discloses a claim for loss of profits, general damages for loss of reputation and special damages

for expenditure pursuant to execution of the agreement. The Applicant claimed **US$2,370,368** in special damages and general damages for loss of profits in excess of **US$8 million**. The Applicant also claimed 25% interest per annum from the date of the award till payment in full.

The defendant's statement of claim denied the claim and sought to have it dismissed with costs. The second Respondent's defence contains a counterclaim for breach of contract and alleges that the Applicant had abandoned execution of its obligations under the agreement. The Applicant claimed special damages of **Uganda shillings 998,600,042/=**, interest on special damages at 23% per annum from the date of filing the counterclaim till payment in full. In reply the Applicant denied in the counterclaim and sought to have it dismissed.

The arbitrator chosen by the Applicant and 2nd Respondent was his Lordship retired Chief Justice S.W.W. Wambuzi. The arbitration cause was not heard on merits and an award on agreed terms was signed by the arbitrator on 27 October 2008 in the following terms:

> "...

1. ***That the parties shall settle this matter amicably without arbitrating the merits before the Arbitrator the Honourable retired Chief Justice S.W.W. Wambuzi.***
2. ***That the Respondent shall allow the claimant to re-enter the Respondent's premises to resume work.***
3. ***That the resumption of work by the claimant would be subject to revised terms of the Mineral Exploration and Feasibility Study Agreement (MEFSA).***
4. ***That the revised MEFSA shall be completed and concluded within 30 (thirty) working days from the date of the award by the Arbitrator.***
5. ***That the Respondent shall file a certificate of due execution of the new Mineral Exploration and Feasibility Study Agreement with the arbitrator, to conclude settlement within 30 days from the date of the award.***
6. ***Each party to bear its own costs. ..."***

Subsequent to the award, the Attorney General applied to set it aside in the High Court, Commercial Division MA No. 702 of 2008. The grounds of the application included inter alia allegations that the second Respondent acted irregularly and in contravention of the Public Enterprise Reform and Divestiture Act and in disregard of the decision of the Divestiture and Reform Implementation Committee in the signing the settlement leading to the award. Secondly that it was against public policy to reach a settlement for the award. The application was struck out by Honourable Lady Justice Irene Mulyagonja Kakooza on 12 October 2011 subsequent to striking out the affidavits in support of the application upon a preliminary objection raised by the Applicant. The court held that the application to set aside the award was unsupported by affidavit evidence as required by the mandatory provisions of section 34 of the Arbitration and Conciliation Act.

The application to set aside the award had been filed by the Attorney General in December 2008. After the Attorney General filing the application to set aside the award, the current Applicant to this application filed High Court CS No. 83 of 2009 against the second Respondent. In that suit the Applicant sought declarations that the arbitral award was final and binding and that the second Respondent was obliged to fulfil its obligations under the award. The plaint was filed in March 2011. Subsequently the Applicant applied for a temporary injunction against the second Respondent in miscellaneous application number 125 of 2009. On 1 April 2009 Honourable Justice Geoffrey Kiryabwire issued an order of a temporary injunction restraining the second Respondent from participating in the privatisation process pending final disposal of the suit. The suit had been filed by Uganda Gold Mines Ltd. The Attorney General subsequently filed miscellaneous application No. 312 of 2012 seeking for orders that the plaint of the Applicant be struck out. On 27 June 2012 honourable justice Geoffrey Kiryabwire struck out the plaint on the ground that it had been filed by a nonentity.

The Applicants subsequently filed this application on 22 October 2012 and summons was issued by the registrar on 25 October 2012. The Applicant herein seeks to enforce the arbitral award. This application was made under rule 3 (1) (a) and 3 (2) of **The Judicature (Judicial Review) Rules 2009**, section 98 of the **Civil Procedure Act** and section 33 and 37 of the **Judicature Act.**

The first order sought is for extension of time for the judicial review application. An application for judicial review has to be made within three months from the date when the grounds of the application first arose unless the court considers that there is a good reason for extending the period within which the application shall be made in terms of rule 5 of the rules. Under rule 5 (3) of the Judicature (Judicial Review) Rules, 2009 the limitation period applies without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made. The rule makes provision for an application for an order of mandamus and prohibition by way of an application for judicial review. In this case however, the Applicant seeks enforcement of an arbitral award signed in October 2008. Section 36 of the Arbitration and Conciliation Act provides that an award shall be enforced in the same manner as a decree of the court. Consequently the Applicant's application is for enforcement of the award and is not subject to the limitation period provided for under the Judicature (Judicial Review) Rules 2009. The limitation period applicable should be that concerned with the limitation for enforcement of decrees. Section 35 of the Civil Procedure Act prescribes a limitation period of 12 years from the date the decree issued to be executed as the limitation period for enforcement. Because section 36 of the Arbitration and Conciliation Act provides that an award shall be enforced in the same manner as a decree of the court, the limitation period for enforcement of the decrees of the court would apply. Consequently there is no need for extension of time within which to bring an application for an order of mandamus meant to enforce the award and the applicant abandoned this ground.

The first issue to be considered is whether the arbitral award is enforceable as a preliminary point of law. Counsel for the Attorney General contended that the award was an agreement to agree

and therefore unenforceable. She based her attack on two main grounds namely; that the parties were supposed to revise the terms of the agreement and revert to the arbitrator within 30 days from the date of the award which they have not done. Secondly as far as common law doctrine is concerned, an agreement to agree is not enforceable. Corollary to that argument is the contention that that the original agreement which the arbitral award seeks to have revised had expired.

Paragraph 5 of the arbitral award provides that the Respondent shall file a certificate of due execution of the new Mineral Exploration and Feasibility Study Agreement with the arbitrator to conclude settlement within 30 days from the date of the award. The arbitrator signed the award on 27 October 2008. Subsequently as is demonstrated by subsequent events summarised above, no progress was made in the revision of the Mineral Exploration and Feasibility Study Agreement by any of the parties. Paragraph 4 of the award explicitly provides that the revision shall be completed and concluded within 30 working days from the date of the award.

I have tried my best to analyse the applicable law and arguments on this point. The court will first proceed on the assumption that the award is a decree of the court and enforceable without first considering whether the agreement forming the settlement embodied in the award is illegal in terms of article 119 and 244 of the Constitution. This is to deal with a point of law as to whether the agreement as it is could be enforceable as a decree of court as contended by the Applicant.

The starting point for analysis is the Arbitration and Conciliation Act and particularly provisions applicable to settlements. An "arbitral award" is defined by section 2 (1) of the Arbitration and Conciliation Act to mean any award of an arbitral tribunal and includes an interim arbitral award. Section 30 of the Arbitration and Conciliation Act provides that where the parties settled the dispute, the arbitral tribunal shall terminate the proceedings and if requested by the parties, record a settlement in the form of an arbitral award on agreed terms. It reads as follows:

> “30. Settlement.
>
> (1) ***If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.***
>
> ***(2) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.***
>
> ***(3) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.”***

The section provides that where the parties settled the dispute the arbitral tribunal shall terminate the proceedings and upon request of the parties record the settlement in the form of an arbitral award. An arbitral award shall be made in accordance with the provisions of section 31 of the

Arbitration and Conciliation Act. Furthermore section 32 provides that arbitral proceedings shall be terminated by the final arbitral award. The mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings (see section 32 (1) & (4)). Last but not least on the same point, an award by consent of the parties has the same status as an award by decision of the arbitral tribunal.

In this particular case can it be said that there was a final award? Secondly, in terms of section 32 (4) can it be said that the mandate of the arbitral tribunal terminated? Section 33 prescribes a period of 14 days within which a party may apply or request the arbitral tribunal to correct the award whether for any computational errors, clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the arbitral award, otherwise in terms of section 32 (4), the mandate of the arbitral tribunal terminates upon the issuance of the final award.

The wording of the award itself shows that it is an interim award subject to final settlement after revision of the Mineral Exploration and Feasibility Study Agreement. In the wording of clause 3 of the award, "the resumption of work by the Claimant will be subject to revised terms of the Mineral Exploration and Feasibility Study Agreement…". I have duly considered clause 2 of the arbitral award which provides that: "the Respondent shall allow the Claimant to re-enter the Respondent's premises to resume work." The clause specifically allows the claimant to re-enter the premises. The purpose for the re-entry is the resumption of work by the claimant. However, clause 3 of the award makes the resumption of work by the claimant subject to revised terms of the Mineral Exploration and Feasibility Study Agreement. In other words the work will resume upon revision of the agreement. Such a revision was to be completed within working 30 days from the date of the award. After revision, the Respondent had an obligation under clause 5 of the award to file a certificate of due execution of the new mineral exploration and feasibility study agreement with the arbitrator, to conclude settlement within 30 days from the date of the award. Last but not least clause 1 of the award is of special mention. It provides that the parties shall settle the matter amicably without arbitrating the merits before the arbitrator. It does not indicate in clear terms that the award by consent of the parties was a final settlement of the dispute.

The award was executed by counsels for the parties and endorsed by the arbitrator. Inasmuch as a settlement embodied in an arbitral award is enforceable as a decree of the court under section 36 of the Arbitration and Conciliation Act, the settlement itself operates as a contract between the parties. The fact that it is endorsed by the arbitrator only lends to it the solemnity of an award by an arbitral tribunal enforceable under the Arbitration and Conciliation Act. In other words the agreement of the parties contains obligations which are enforceable as a decree of the court. Firstly the award imposes a duty on the 2nd Respondent to permit the claimant/Applicant to re-enter the Respondent's premises to resume work. Secondly, the parties were supposed to revise the terms of the Mineral Exploration and Feasibility Study Agreement. This obligation to agree on new terms is on both parties and its enforceability can be determined on the basis of common

law precedents. Neither of the parties agreed on any revised terms of the Mineral Exploration and Feasibility Study Agreement which is to form the basis of the resumption of work. Secondly the revisions were supposed to be completed within 30 days from the 27 October 2008. No revision was done or completed within the 30 working days stipulated in the award.

The Respondent did not file a certificate of due execution of a new mineral exploration and feasibility study agreement with the arbitrator to conclude the settlement. My understanding of the phrase "conclude the settlement" as spelt out by the award is not a term that specifically puts a duty on the Respondent only. It does not suppose that the filing of a certificate of due execution would conclude settlement. It is open to the interpretation that it is the arbitrator to conclude settlement by issuing a final award in terms of section 32 (1) of the Arbitration and Conciliation Act.

If an order is made for mandamus to issue against the second Respondent who is a party to the award, would it correct the failure by the parties to revise the terms of the agreement and file the revised agreement with the arbitrator within 30 days? Moreover the parties have not engaged the provisions of section 33 of the Arbitration and Conciliation Act which provides for correction, interpretation of the arbitral award and additional award. Section 33 (4) provides that the party may within 30 days after receipt of the arbitral award request the arbitral tribunal to make an additional arbitral award as the claims presented in the arbitral proceedings but omitted from the arbitral award. Furthermore under section 33 (6) of the Arbitration and Conciliation Act, the arbitral tribunal may extend, if necessary, the period of time within which it may make a correction, give an interpretation or make an additional arbitral award.

There was ample provision within the Arbitration and Conciliation Act as referred to above for the parties to revert back to the arbitrator either for interpretation, corrections, or additional awards. From an analysis of the above provisions of the Arbitration and Conciliation Act, the first conclusion that can be made is that there was no final arbitral award as the parties had to revert back to the arbitrator to conclude the settlement. Secondly, the parties were under obligation to revise the terms of the Mineral Exploration and Feasibility Study Agreement. Thirdly, the Applicant is equally responsible for the revision of the Mineral Exploration and Feasibility Study Agreement. Fourthly, the resumption of the feasibility study and exploration of minerals was subject to the revision of the Mineral Exploration and Feasibility Study Agreement. In other words, the contract cannot be enforced as far as the resumption of work is concerned without a revision of the original agreement. Last but not least on this point, they learned Principal State Attorney addressed the court on common law principles on agreements to agree.

The contention of the Respondents counsel is that an agreement to agree is not enforceable under common law. The contention of the Applicants counsel on the other hand is that the arbitral award is an adjudication and enforceable as a decree of the High Court under section 36 of the Arbitration and Conciliation Act. I have considered the arguments of the Applicant's counsel that the arbitral award is enforceable as a decree of the court. I agree that an award is enforceable as a

decree of the court. However the very nature of the orders sought i.e. an order of mandamus is meant to compel the Respondents and particularly the second Respondent to carry out its obligations under the agreement. Those obligations are contractual notwithstanding that the award has the solemnity of an enforceable decree of a court of law. Consequently the fact that it arose from adjudication because it was endorsed by the arbitral tribunal, only relates to its enforceability as a decree of the court. In other words, the nature of the award gives it the weight of the decree of the court that may be enforced in like manner as a decree issued by the court. That is the end of the relevance of the nature of the award under section 36 of the Arbitration and Conciliation Act.

When the question is asked as to what is enforced, the obvious answer is the terms of the agreement or the terms of the award. The award itself relates and refers to the revision of an agreement between the parties. In other words it relates to the agreement between the parties in addition to the award. Consequently principles of common law to determine whether it is an enforceable agreement are relevant because they deal with the agreement of the parties to do certain things which they have not done and to do certain things in the future i.e. revise the terms of the agreement. I have already held that the parties ought to have reverted back to the arbitral tribunal to sort them out or even issue an additional award if they had failed within 30 days to revise the terms of the Mineral Exploration and Feasibility Study Agreement. In any contract the question of Consensus Ad Idem is at the core of the question of enforceability of the contract. Can the court make a contract for the parties? The very essence of the agreement between the Applicant and the Respondent is to resume the performance of the original agreement by the resumption of the exploration and feasibility study which the award made to be subject to the revision of the terms of the mineral exploration and feasibility study agreement. A similar question arose where essential elements of a contract were left to be agreed to after future negotiations and was considered by the House of Lords in **Scammell v Ouston [1941] 1 All ER 14.** In that case the Respondents entered into negotiations with the appellants to acquire from the appellants a lorry and in exchange they would partly give an old lorry in part payment for it. They agreed on the price of the new lorry and that the balance of the purchase price was to be paid on hire-purchase terms over a period of 2 years. The terms of the hire-purchase agreement were not settled. The appellants subsequently repudiated the transaction, on the ground that there never was any concluded agreement between the parties because the proposed hire-purchase agreement had not been settled.

Viscount Simon LC held at page 16:

> "***Apart from the objection that, if the contract is treated as a contract of sale in the terms suggested above, there is no signature by the appellants, as the party to be charged, accepting the condition, it appears to me that the crucial sentence, "This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years," is so vaguely expressed that it cannot, standing by itself, be given a definite meaning. That is to say, it requires further***

> ***agreement to be reached*** **between the parties before there would be a complete consensus ad idem. If so, there was no contract, and, therefore, no breach. I move that the appeal be allowed." (Emphasis added)**

Lord Russell of Killowen held on the same question at pages 20 – 21:

> "***However, in view of the numerous forms of hire-purchase transactions, and the multiplicity of terms and details which they involve, the plaintiffs are faced with what appears to me to be a fatal alternative,—namely, either (i) this term of the alleged contract is quite uncertain as to its meaning, and prevents the existence of an enforceable contract, or (ii) the term leaves essential contractual provisions for further negotiation between the parties, with the same result."***

Lord Wright at page 26:

> "**There are many cases in the books of what are called illusory contracts—that is, where the parties may have thought they were making a contract, but failed to arrive at a definite bargain.** ***It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain*****. In my opinion, that requirement was not satisfied in this case." (Emphasis added)**

The Applicant's Counsel submitted that the arbitral award should not be construed as a contract but rather as an order of the court resulting from adjudication. In this particular case an order of mandamus would amount to an order for specific performance. Yet the courts cannot order the parties to agree to any terms since contracts are consensual. The background to the various applications between the parties shows that they have not reached any consensus. Even if the court were to order the second Respondent to permit the Applicant to occupy the premises, the works of exploration and feasibility study cannot commence without the revised terms of an agreement.

Something should be said about the nature of an order of mandamus and prohibition. According to Halsbury's laws of England 4th edition 2001 reissue volume 1 (1) paragraph 119 at page 268:

> "***A mandatory order is in form a command issued from the High Court, directed to any person, Corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command, and which appertains to his or their office and is in the nature of a public duty. A mandatory order will lie to any person or body in respect of anything that appertains to his or its office and is in the nature of a public duty. The order of mandamus (as the mandatory order was formerly known) has never been limited to, or indeed primarily concerned with, persons or bodies whose office is***

judicial or have a duty to act judicially. The breach of duty maybe a failure to exercise a statutory discretion, or a failure to exercise it according to proper legal principles."

"A prohibiting order is an order issuing out of the High Court and directed at an inferior court or tribunal, public authority or other body susceptible to judicial review which forbids that body to act in excess of its jurisdiction or contrary to law."

The order of mandamus is available to enforce public duties. This is distinguishable from contractual duties. **H.W.R. Wade** in the textbook "**Administrative Law**" **5th edition at page 635** notes that a distinction needs to be clarified between public duties enforceable by mandamus which are usually statutory and duties arising merely from contract. Contractual duties are enforceable as a matter of private law by the ordinary contractual remedies of damages, injunction, specific performance and declaration.

Consequently it would be necessary to establish a specific public duty owed to the Applicant prior to the grant of the remedy. In the case of **Padfield and Others v Minister of Agriculture Fisheries and Food and Others [1968] 1 All ER 694,** Lord Reid at 701 – 702 summarised some authorities on the need to establish a duty owed under an enactment for mandamus to issue:

"***Lord Penzance said that the true question was ([1874–80] All ER Rep at p 51; (1880), 5 App Cas at pp 229, 230.)***

> ***"whether regard being had to the person enabled, to the subject matter, to the general objects of the statute, and to the person, or class of persons, for whose benefit the power may be intended to have been conferred, [the words] do or do not create a duty … "***

and Lord Selborne said ([1874–80] All ER Rep at p 54; (1880), 5 App Cas at p 235.) that the question was *whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty*. So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended."

Lord Morris of Borth-Y-Gest at page 706 emphasises the right of the Applicant and the duty owed to him or her:

"***Where some legal right or entitlement is conferred or enjoyed, and for the purpose of effectuating such right or entitlement a power is conferred on someone, then words which are permissive in character will sometimes be construed as involving a duty to exercise the power."***

In the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER Page 935** House of Lords at page 949 Lord Diplock considered what would qualify as a subject for judicial review in the following words:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation', in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences. ...

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph." (Emphasis added).

The facts of this case are that second Respondent is scheduled under the Public Enterprise Reform and Divestiture Act cap 98 laws of Uganda as a public enterprise. Secondly the basis of the claim for mandamus is an arbitral award based on a contract between the Applicant and the second Respondent. Thirdly the arbitral award seeks enforcement of obligations imposed on the second Respondent by the award. Fourthly, the Applicant seeks to prohibit the privatisation of the second Respondent. Privatisation is a statutory program enacted by Parliament. Section 22 of the Public Enterprise Reform and Divestiture Act schedules companies in which the government is supposed to divest itself. Section 22 (c) reads as follows:

22. ***Divestiture.***

(1) Subject to this Act, the enterprises specified in the First Schedule to this Act shall be dealt with as follows— … (a) … (b)

(c) as to the enterprises specified in class III of that Schedule, the State shall totally divest itself by disposal of all the shares in each enterprise to persons other than the State in accordance with this Act; and …

(3) The divestiture under this section shall be carried out in accordance with the divestiture guidelines set out in the Second Schedule to this Act.

Under Section 1 (g) of the PERD Act, "divestiture" means:

> ***"The transfer of the proprietary interest in, or operational control of, a public enterprise or its assets from the State or that enterprise to private persons utilising one or more of the methods referred to in paragraph 7(1) of the Second Schedule to this Act, and includes where appropriate the winding up or dissolution of that enterprise;"***

However for the second respondent divestiture under section 22 is supposed to be by transfer of proprietary interest. The second Respondent is scheduled in class III and the state is required by the enactment to totally divest itself by disposal of all the shares in each enterprise to persons other than the state in accordance with the Act. In other words, the privatisation of the second Respondent will be by sale of shares. Can it be said that the first Respondent owed a duty to the Applicant not to privatise the second Respondent under the Public Enterprises Reform and Divestiture Act? Should a private contract between the second Respondent and the Applicant override the duties imposed upon the Privatisation Unit by Parliament under the PERD Act? Can the disposal of shares in a limited liability company affect contractual obligations? The foundation of the Applicants claim is the 70% stake in the project which the Applicant would be entitled to upon a positive feasibility study under the Mineral Exploration and Feasibility Study Agreement. No feasibility study has been resumed because the parties have failed to agree on the revised Mineral Exploration and Feasibility Study Agreement.

The 70% interest is not in the shares of the second Respondent. The 70% interest is catered for in paragraph B of the preamble. According to paragraph "A" to the preamble the second Respondent is the legal and the beneficial owner of the special mining lease number 2151 and surrounding exclusive prospecting licence, then known and unknown mineral deposits in the area delineated on the map attached to the agreement and assets outlined in schedule 1 which are collectively called "the project". In paragraph "B" of the preamble it is provided that the Applicant agreed to finance and carry out exploration to increase the resource of Copper, Cobalt and Gold according to the exploration program attached thereto after completion and following a positive feasibility study of the project whereupon the second Respondent would transfer to the Applicant undivided 70% interest in the project on terms and conditions contained in the agreement. The contributions of the parties to the project is provided for by clause 4.1 which indicates that the Applicant would be entitled to recoup their risk capital invested in exploration and feasibility study of the project from 50% of available profits of a future joint venture company. In other words the 70% interest in the project does not include shares in the second Respondent which would continue to be a separate entity and a partner in the future joint venture Company.

The conclusion is that the 70% interest has nothing to do with divestiture or privatisation which would do with the transfer of shares. To make the case more difficult the applicant argued that the 2nd respondent was a private limited liability company bound by its articles of association. On the other hand, the question of the assets and liabilities of the second Respondent can be considered in the evaluation of the second Respondent for purposes of divestiture. The statute commands transfer of shares and it is doubtful whether it permits transfer of assets per se, a matter not relevant to my conclusion. In theory therefore the submission that divestiture would affect any contract entered into by the second Respondent would be erroneous. Divestiture itself is a process that evaluates the assets and liabilities of the company to be divested. As pointed out above section 22 of the Public Enterprises Reform and Divestiture Act cap 98 makes it clear that divestiture is through the sale of shares (all shares) held by the government in a company in class III of schedule 1 to the Act. Section 22 (1) uses mandatory language to the effect that the enterprises shall be dealt with as spelt out in the section. The PERD Act came into force on the 8th of October 1993 before the Applicant and the 2nd Respondent made the MAFESA agreement in 2004. The applicant by this application is claiming an interest in the assets of the 2nd Respondent without reference to the PERD Act. Secondly the second schedule to the PERD Act paragraph 1 (1) (g) provides that no special class of potential purchasers shall be excluded. Under Para 1 (1) (h) transactions are to be conducted in an open and transparent manner and in 1 (1) (i) all aspects of the transaction are to be made public through various means specified therein such as applying fair and equitable bidding procedures; disclosing the names of purchasers, the price paid and valuations of assets and details of offers.

As far as the prayer for an order of mandamus and prohibition of the privatisation process of the second Respondent as prescribed by Parliament is concerned, it is doubtful whether the court has jurisdiction to interfere with the powers of the Minister or the privatisation unit to carry out their statutory functions on the basis of a private contract between the second Respondent as a private limited liability company and the Applicant. Secondly the Attorney General who represents the government or the department known as the privatisation unit was not a party to the agreement or the award. Supposing the court took the view that the contract is binding on the second Respondent and therefore the award is enforceable against the second Respondent, would that be sufficient to bar the privatisation unit from carrying out the mandatory privatisation of the second Respondent and in the manner prescribed and as spelt out in the 2nd schedule to the Act? The answer is definitely not as privatisation is directed by Parliament in mandatory language and in the manner prescribed.

I have carefully considered the argument that the arbitral award is enforceable as a decree of the High Court. That argument fails on account of the court not being able to compel the parties to agree to any terms of a new Mineral Exploration and Feasibility Study Agreement. The court cannot make a contract for the parties. There is simply no enforceable contract giving definite terms or obligations which may give rise to an order compelling the Respondents to comply to obligations. Even the question of acquiring 70% interest in “the project” was subject to a future

unknown event of a positive feasibility study. A positive feasibility study would be based on the resumption of work under terms which have not been agreed. In any case the 70% provided for has nothing to do with the ownership of the second Respondent.

It is Parliament which commanded that Kilembe Mines Ltd which is listed as number 25 in Class III of the first schedule to the Public Enterprises Reform and Divestiture Act is a public enterprise from which the state is to fully divest from. I agree with the submissions of the Attorney General made on a separate issue of whether consent was necessary under article 119 of the constitution of the Republic of Uganda that that the jurisdiction of the High Court should be exercised in accordance with law as expressed in section 14 of the Judicature Act.

Irrespective of the contracts which the second Respondent could have entered into and their validity, the court cannot prevent the Privatisation Unit from carrying out the functions prescribed by Parliament unless it is shown that the Privatisation Unit acted contrary to the principles of natural justice, acted capriciously, arbitrarily, maliciously or not in accord with the principles of rationality and fairness among other things. It is an Act of Parliament that commands the privatisation of the second Respondent. Furthermore there is no allegation that the privatisation unit in the process of carrying out its functions unfairly, irrationality or without regard to law. The Applicant is not barred from bidding for ownership of the 2nd Respondent. The second schedule to the PERD Act commands open bidding and access to members of the public in that regard to acquire shares. Section 14 (2) of the Judicature Act provides that the jurisdiction of the High Court shall be exercised in conformity with the written law.

The inconclusive arbitral award which in any case ought to have been referred back to the arbitral tribunal and the parties having failed to revise the terms of the Mineral Exploration and Feasibility Study Agreement cannot form the basis for interfering with the privatisation process prescribed by Parliament. Last but not least the powers of the Minister of Finance or the Privatisation Unit in carrying out their duties of divestiture does not depend on the memorandum and articles of Association of any scheduled company or public enterprise meant to be divested from by the State. The fact that they could have entered into contractual obligations under the powers of the directors cannot circumscribe the powers of the Minister or the Privatisation Unit from carrying out their statutory functions under the Public Enterprises Reform and Divestiture Act. Any assets or liabilities are dealt with in the privatisation process itself.

In the premises, an order of mandamus or prohibition cannot aid the parties to reach consensus on revision of the Mineral Exploration and Feasibility Study Agreement. There are no definite obligations in the absence of a definite contract that may be enforced against the second Respondent. The order sought would interfere with the privatisation process prescribed by Parliament on the basis of an agreement to which the government is not a party. The state is entitled to carry out the privatisation process under the Public Enterprises Reform and Divestiture Act cap 98 laws of Uganda. Last but not least, the Applicant had other remedies i.e.

the Applicant ought to have referred the matter back to the arbitral tribunal within a reasonable time enabled by the Arbitration and Conciliation Act.

The final result is that the application for an order of mandamus, prohibition and injunction is not the appropriate remedy in the circumstances of this case. On the above grounds, there is no need to consider the other arguments for and against the Applicant's application and in the premises the Applicant's application lacks merit and is hereby dismissed with costs.

Ruling delivered in open court this 25th day of January 2013

Hon. Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Charles Okuni: Court Clerk

Masembe Kanyerezi appearing for the applicant

Ms Patricia Mutesi Principal State Attorney for respondent

Hon. Christopher Madrama Izama

Judge
25th January 2013