

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**HCCS NO 240 OF 2012**

**ATTORNEY GENERAL}.....PLAINTIFF**

**VERSUS**

**NIKO INSURANCE UGANDA LTD}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Attorney General initially filed this action by summary procedure for recovery of US\$489,650 under a performance bond issued by the Defendant. Upon the Defendant's application for unconditional leave to appear and defend the suit, on 12 October 2012 the court granted the Defendant conditional leave to defend the suit upon depositing in court security for due performance of the bond in the sum of US\$489,650.

Subsequently on 29 October 2012 the Defendant filed a written statement of defence denying liability under the performance bond and alleging that it was entitled to refuse payment on the ground of fraud of Government officials.

Subsequently a joint scheduling memorandum was endorsed by counsels agreeing to the basic facts. In the joint scheduling memorandum it is agreed that the Ministry of Local Government and Messieurs Amman Industrial Tools and Equipment Ltd Uganda limited entered into a contract where Amman Industrial Tools and Equipment Ltd agreed to supply the Plaintiff with 70,000 bicycles. The Defendant issued a performance bond guaranteeing that it would pay 10% of the contract sum, on receipt of the first written demand without cavil or argument should Messieurs Amman Industrial Tools and Equipment Ltd fail to perform its obligations under the contract. The Ministry of Local Government paid 40% of the contract price to the contractor/supplier who failed to perform its part of the contract. The Ministry of Local Government wrote several letters to the Defendant pursuant to the provision of the performance bond making a demand for US\$489,650. The Defendant initially agreed to meet its contractual obligation but has since argued that the performance bond is unenforceable because it was vitiated by fraud committed by Amman Industrial Tools and Equipment Ltd Uganda Ltd and the Plaintiff's officials. The Public Procurement and Disposal of Public Assets Authority conducted an investigation into the procurement of 70,000 bicycles by the Ministry of Local Government and recommended disciplinary action against the accounting officer Ministry of Local Government, the Valuation Committee Ministry of Local Government, the Principal

Procurement Officer Ministry of Local Government, the Contract Manager Ministry of Local Government, the Contracts Committee Ministry of Local Government, and the Principal Internal Auditor Ministry of Local Government.

Following the investigations into the procurement process, the then Permanent Secretary Ministry of Local Government, John Muwanguzi, Kashaka, the Principal Accountant Henry Bamatura, the Assistant Commissioner in Charge of policy planning Sam Emorut Erugot, the Principal Procurement Officer Robert Mwebaza and the then Internal Auditor Helen Jenny Owechi were interdicted. Similarly the Director of Public Prosecutions instituted criminal proceedings in the anticorruption court against several officials for causing financial loss, abuse of office and neglect of duty. On 19 February 2013 the High Court ruled that each of the accused persons had a case to answer. Counsels also agreed on the documentary evidence which were admitted and exhibited in the trial bundle.

The agreed issues are:

1. Whether the officials of Government in collusion with Amman Industrial Tools and Equipment Ltd were fraudulent with regard to the underlying procurement process and the contract concluded as a result thereof.
2. If so whether the alleged fraud vitiates the performance bond; and
3. The remedies available to the parties.

At the hearing of the suit, the Attorney General was represented by George Kalemera Senior State Attorney, assisted by Ellison Karuhanga State Attorney while the Defendant was represented by Moses Adriko of Messrs Masembe, Makubuya, Adriko, Karugaba and Sekatawa Advocates. Counsels agreed to address the court in written submissions on the basis of the agreed facts in the joint scheduling memorandum. However when the matter proceeded for submissions, the Defendant reviewed its agreement and Counsel applied to court to adduce evidence of two witnesses. By consent two witnesses were allowed to testify on behalf of the Defendant without objection from the Plaintiffs.

1. Whether the officials of Government in collusion with Amman Industrial Tools and Equipment Ltd were fraudulent would regard to the underlying procurement process and the contract concluded as a result thereof.

On the first issue the Plaintiff's case is that the Government of Uganda on 26 November 2010 awarded to Amman Industrial Tools and Equipment Ltd a contract to supply 70,000 bicycles for the Chairpersons of Parish and village councils. The contract for supply of 70,000 bicycles for chairpersons of parishes and village councils was exhibited as exhibit "P1". Section 8 of the general conditions of the contract in part 4 of section 7 clauses referenced 18.1 provided that Amman Industrial Tools and Equipment Ltd would cause to be issued a performance security of 10% of the contract price. Pursuant to the provision, a performance bond in favour of Amman Industrial Tools and Equipment Ltd was issued on 25 November 2010 whereby the Defendant

affirmed that they would be guarantors of up to a total of US\$489,650 which will be payable on the first demand upon the provider being in breach of the contract without cavil or argument. The performance bond issued by the Defendant on behalf of Amman Industrial Tools and Equipment Ltd is exhibit P2. The wording of the performance guarantee was that the Defendant on behalf of the provider affirmed to be:

*"Guarantors and responsible on behalf of the provider, up to a total of US\$489,650 and we undertake to pay you, upon your first written demand declaring the provider to be in default under the contract, without cavil or argument, any sum or sums within the limits of US\$489,650 as aforesaid, without you needing to prove to show grounds or reasons for your demand of the sums specified therein."*

The Plaintiff counsel contends that the Defendant's case is that the officials of Government in collusion with Amman Industrial Tools and Equipment Ltd were fraudulent with regard to the underlying procurement process and the contract concluded as a result thereof and as such the alleged fraud should absolve them of their payment obligations under the guarantee. The Plaintiff's counsel relies on the definition of fraud by Honourable Justice Katureebe JSC in the case of **Frederick JK Zaabwe verses Orient Bank and Five Others Supreme Court civil appeal number 4 of 2006** in which the court relied on the dictionary definition in Black's Law Dictionary 6th edition at page 660 of fraud as:

*"an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or gesture... As distinguished from negligence, it is always positive, intentional."*

From the definition counsel contends that the fraud must be intentional, dishonest and deliberate and must be distinguished from negligence. In the cross-examination of DW 2, the Defendant failed to produce any evidence of the alleged fraud and informed court that the Defendant company refused to honour their obligations under the performance bond due to "suspicion of fraud" from various media reports and that he could neither recall nor specifically point out. He did not clarify that he did not have any examples in this long-standing experience as an insurance professional where an insurance company refused to honour a bond basing on media reports.

The fraud relied upon by the Defendant is contained in the charge sheet filed in the Anticorruption Court against the accused persons/Government officials whose particulars are spelt out in the facts. The charges are for abuse of office, causing financial loss and neglect of duty according to exhibited D3. The Defendant also relies on the PPDA investigation and report alleging that the procurement procedures were not followed and the report was marked as exhibit D5.

Counsel submitted that in criminal trials and investigations, accused persons are presumed innocent until proven guilty. Secondly fraud is not an ingredient of any of the offences the Government officials have been charged with before the Anticorruption Court. Neither the PPDA report nor charge sheets level allegations of fraud against the accused. Allegations of breach of duty, neglect of duty, abuse of office and causing financial loss are not in and of themselves allegations of fraud. The central ingredient of any allegation of fraud must show that it is intentional, dishonest and deliberate and must be distinguished from negligence. In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd Supreme Court Civil Appeal Number 22 of 1992** Wambuzi Chief Justice as he then was held that fraud must be proved strictly, the burden being heavier than on the balance of probabilities generally applied in civil cases. It must be proved strictly to a high standard that the fraud was committed by the Plaintiff. In the circumstances the Plaintiff's counsel submits that the Defendant merely illustrated allegations of negligence that are yet to be proved. In the case of **Edward Owen Engineering Ltd versus Barclays Bank International Ltd [1978] 1 QB 159** Lord Browne held at page 173 that it is not certainly enough to allege fraud; it must be established and in such circumstances "I should say very clearly established."

The Defendants are clearly demonstrated that they refused to honour their obligations under the performance bond due to a suspicion of fraud from various media reports that could neither be recalled nor specifically pointed out. Furthermore it is clear that the Defendant is trying to avoid liability for an action that they clearly guaranteed under the contract. The contract was awarded in accordance with the law and there was no collusion whatsoever by the Plaintiff's officials to carry out any fraud in collusion with Amman Industrial Tools and Equipment Ltd as alleged by the Defendant. Counsel therefore prayed that the court finds in favour of the Plaintiff on the first issue and that the court holds that the Defendant has not adduced any evidence to show that the officials of Government were fraudulent in collusion with Amman Industrial Tools and Equipment Ltd regarding the underlying procurement process and the contract concluded as a result thereof.

Issue number two

If so whether the alleged fraud vitiates the performance bond?

On this issue the Plaintiff's counsel reiterated submissions that there is no evidence to show that the officials of Government have been implicated in any fraud whatsoever. The Defendant has failed to adduce reports of fraud that implicated Government officials in defrauding acts. According to Paget's Law of Banking 13th edition at page 870, the beneficiaries demand is fraudulent if the beneficiary has no right to payment under the underlying contract. Secondly the demand would be fraudulent where the beneficiary has no genuine belief in such a right.

It is the Plaintiff's contention that the Plaintiff clearly has a right to payment under the underlying contract and is of the genuine belief of that right. In the case of **Edward Owen**

**Engineering Ltd versus Barclays Bank International Ltd [1978] 1 QB 159 at page 171** Lord Denning MR held that a bank which gives the performance guarantee must honour the bond according to its terms. The bank is not concerned with the relations between the supplier and the customer. The bank must pay according to its guarantee, on demand, if so stipulated without proof or conditions. The only exception to the general rule is fraud from which the bank has notice. Counsel contended that the two tests must be established namely that there was a clear fraud and secondly that the bank had notice of the fraud. Counsel further submitted that the Defendant must show a clear fraud by the beneficiary (the Plaintiff) and that they had notice of such fraud.

Counsel again reiterated the evidence of DW 2 that the Defendant refused to pay the Plaintiff on suspicion of fraud. According to Paget's Law of Banking (supra) at page 871, the beneficiary must normally be given an opportunity to answer the allegation when evidence of fraud comes to the knowledge of the bank. Counsel contends that the Defendants ought to have brought whatever allegations they had about fraud to the attention of officials of the Ministry of Local Government and ensure that the allegations are clearly explained. The Defendant instead hid behind technicalities to avoid obligations. The Defendant did not carry out investigations into the suspicion of fraud. Miscellaneous Application Number 791 of 2012 which is an application for discovery of documents is an attempt by the Defendant to confirm the fraudulent allegations against the Plaintiff. Without an investigations report, the Defendant could not have been able to sustain a claim of fraud of whatever nature against the Plaintiff. In the case of **Society of Lloyds versus Canadian Imperial Bank of Commerce (1993) 2 Lloyds Reports 579** if proof of no fraud could be an answer to the defence, the effect of the defence would be to impose on the beneficiary a burden of disproving fraud. Counsel consequently submitted that both the Defendant's knowledge of the fraud and evidence of fraud must be established. Fraud was not in any way proved by the Defendant. The Defendant did not take any steps to prove allegations of fraud as they were required to do. Counsel reiterated submissions that the negligence cannot be relied upon by the Defendant to forego the obligations under the performance bond. Furthermore counsel submits that for the Government through its officials to be adjudged fraudulent, evidence would have to be led to show the entire Government machinery while appropriating and paying out this money did so fraudulently. It was illogical and untenable in law to hold that the Government is liable for a fraud when it was the primary victim.

In the case of **Belmont Finance Corporation versus William's Furniture [1979] 1CH 250** Buckley LJ held at page 261 that where an agent commits fraud against the principal, the knowledge of the agent is not to be imputed on the principal. In this particular case counsel submitted that the Plaintiff was the victim of a breach of contract and suffered loss of US\$1,719,454.58. It will be preposterous to allege that the Plaintiff incurred a benefit from this fraud by Amman Industrial Tools and Equipment Ltd when it incurred loss of taxpayer's money due to breach of contract. In conclusion the Defendant failed to establish clear fraud by the

beneficiary or notice of such fraud to be able to allow him to avoid its obligation to pay on their unequivocal guarantee to the Plaintiff.

## Remedies

As far as remedies are concerned, the obligation of the Defendant is to pay a sum of US\$489,650. In the case of **United City Merchants versus Royal Bank of Canada [1982] 2 All ER 720**, the Defendant rejected this shipment and so to avoid his obligation by relying on the fraud exception. Lord Diplock dismissed the defence and at page 726 held that:

*“It would be strange from the commercial point of view, although not theoretically impossible in law, if the contractual duty owed by confirming and issuing banks to the buyer to honour the credit on presentation of apparently conforming documents despite the fact that they contain inaccuracies or even are forged were not matched by a corresponding contractual liability of the confirming bank to the seller/beneficiary (in the absence, of course, of any fraud on his part) to pay the sum stipulated in the credit on presentation of apparently conforming documents.”*

Counsel contends that the fraud exception must be applied in very limited circumstances where a fraudster tries to enrich himself which is not the case in this matter. He prayed that the court finds the Plaintiff is entitled to the guarantee being honoured by the Defendant as a contractual obligation. Counsel prayed that the Plaintiff is awarded interest at commercial rate of 28% per annum until payment in full and costs of the suit.

Defendants written submissions

**Whether the officials of Government in collusion with Amman Industrial Tools and Equipment Ltd were fraudulent with regard to the underlying procurement process and the contract concluded as a result thereof.**

The Defendant's case is that fraud is the only exception to the enforcement of the performance bond such as was issued by the Defendant in the suit. In the case of **Edward Owen Engineering Ltd versus Barclays Bank International Ltd [1979] 1 All ER page 976** Lord Denning reaffirmed the principle that the only exception to the law that a performance guarantee must be honoured by the bank according to its terms, is fraud. The bank is not concerned in the least with the relations between the supplier and customer and is not even concerned with the question of whether the supplier is in default or not. The bank must pay according to its guarantee on demand without proof or conditions.

Fraud vitiates the right of the beneficiary to enforce the performance bond if such fraud is brought to the notice of party with the obligation to pay before payment is made against the performance bond. The Plaintiff's officials who acted on behalf of the Government in the

impugned procurement process were fraudulent and the fraud binds the Government and as a result the Defendant is not bound to honour the performance bond in question.

The Defendants counsel agreed with the definition of fraud referred to by the Plaintiffs in their submissions according to Black's Law Dictionary 6th edition. It contended that as distinguished from negligence, fraud is always positive, intentional, it comprises of all acts, missions and concealment involving a breach of a legal or equitable duty and resulting in damage to another. It includes anything calculated to deceive, whether by a single act or combination of circumstances, whether by suppression of truth or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, by word of mouth, or by look or gesture.

The elements of fraud were pleaded by the Defendant in its written statement of defence and proved by the actions and/or omissions of the indicted officials of Government acting in their respective capacities. Counsel listed the particulars of fraud as follows:

- (a) Fraudulent award of contract by officers of Minister of Local Government to Amman Industrial Tools and Equipment Ltd who were not part of the 14 bidders who issued with solicitation documents;
- (b) Fraudulent alteration of the bid solicitation documents by Ministry of Local Government officials with intention to favour an award to Amman Industrial Tools and Equipment Ltd.
- (c) Fraudulent consideration by Ministry of Local Government of the deed tendered by Amman Industrial Tools and Equipment Ltd based on documents of Amman Impex, an independent entity with no joint-venture agreement or relationship with Amman Industrial Tools and Equipment Ltd.
- (d) Fraudulent omission by officers of Ministry of Local Government to hold a pre-bidding meeting before the award of the contract.
- (e) Fraudulent award of contract by Ministry of Local Government to Amman Industrial Tools and Equipment Ltd who were not compliant with the technical specification and compliance sheet issued with the invitation for bids.
- (f) Fraudulent omission by officers of Ministry of Local Government to conduct a due diligence on the authenticity of the bid security provided by Amman Industrial Tools and Equipment Ltd.
- (g) Fraudulent award of contract by Ministry of Local Government to Amman Industrial Tools and Equipment Ltd who offered different payment terms to those provided in the solicitation document.
- (h) Fraudulent amendment of the contract awarded to Amman Industrial Tools and Equipment Ltd by the officers of Ministry of Local Government.
- (i) Fraudulent amendment by the officers of Ministry of Local Government of the terms of the letters of credit opened up with Bank of Uganda with the intention to facilitate the fraudulent activities of Amman Industrial Tools and Equipment Ltd.

- (j) Fraudulent confirmation of receipt of the bicycles in the agreed quality and quantity from Amman Industrial Tools and Equipment Ltd by the officers of Ministry of Local Government, thereby fraudulently inducing payment to Amman Industrial Tools and Equipment Ltd by Bank of Uganda.
- (k) Fraudulent non-compliance by the officers of Ministry of Local Government with the Public Procurement and Disposal of Public Assets Act 2003 and the regulations made there under with the intention to facilitate the fraudulent activities of Amman Industrial Tools and Equipment Ltd.

Counsel submitted that the fraudulent actions and omissions are so clear that it triggered an investigation by the Public Procurement and Disposal of Public Assets Authority (PPDA) into the procurement process. The investigation followed press reports, parliamentary investigations and the recommendations by the Ministry to suspend the company from participating in public procurement and disposal proceedings. The evident controversy of the procurement process is not a baseless suspicion. The evidence thereof is exhibit D8 at page 157 of the joint trial bundle and corroborated by the subsequent letter dated 3rd of November 2011 by the insurance regulatory authority to the Permanent Secretary Ministry of Local Government advising that the performance bond could be successfully resisted for fraud and advising the Ministry to stay further actions towards recovering of the face value of the performance bond until the opinion of the Solicitor General is sought. Furthermore the fraudulent actions/or omissions are documented by the PPDA in their investigation report exhibit D5. The Defendant's evidenced is further supported by the testimony of Cornelia K Sabiti, the Executive Director of PPDA in her witness statement filed on the 10<sup>th</sup> of May 2013. The acts/omissions are the basis of the indictment of the responsible officials of Government in the Anticorruption Court. They were charged for abuse of office, causing financial loss and neglect of duty. The criminal offences all incorporate elements of fraud. All the officials were found to have a case to answer for the offences charged. In the absence of a robust and credible defence, it is likely that those officials would be convicted for the offences in the court where the standard of proof is beyond reasonable doubt.

Is the Defendant's case that the standard of proof for fraud in civil proceedings is higher than that on the balance of probabilities but not so high as to impose a burden to prove the fraud beyond reasonable doubt held in the case of **Bater versus Bater [1950] 2 All ER 458** at page 459. Counsel concluded that the Defendant has proved fraud on the part of the Plaintiffs officials to the required standard on the following grounds.

Firstly the particulars of fraud as pleaded and proved by the Defendant have not been denied by the Plaintiff. Secondly the evidence tendered before this honourable court namely the PPDA investigation and report exhibit D5 and the testimony of the Executive Director of PPDA prove that the acts/omissions of the Government officials were deliberate, dishonest and fraudulent. The officials directly confirmed the delivery of the contract supply of bicycles in the right quantity and quality despite been cautioned by the Bank of Uganda over discrepancies in the documents presented before it. The falls confirmation triggered the disbursement of money to the



supplier on a letter of credit opened with the bank of Uganda. The indicted officials are evidently liable for the loss occasioned to the Government. The Government can be compensated through restitution orders by moving the court upon securing a conviction to exercise powers conferred by section 35 (1) of the Anti Corruption Act, Act 6 of 2009. The actions of the indicted Government officials merely constitute fraud and counsel prayed that the honourable court finds that fraud has been proved to the required standard and the first issue answered in the affirmative.

On the second question of remedies

The Defendant's case is that the case of **Owen Engineering Ltd versus Barclays Bank International Ltd** (supra) gives the common exception to payment upon demand on a performance bond on the ground of fraud which vitiates enforceability of a performance bond. On the submission of the Plaintiffs that fraud of the Government officials does not bind the Government which is a victim of the actions of its officials, and with reference to the case of **Belmont Finance Corporation versus Williams Furniture [1979] 1 CH 250**, the case was quoted out of context. The case involved a suit brought by a company against its former directors for fraud committed by them against the company while directors of the company. The defence of the directors was that the acts of the directors were in fact acts of the company. It was in that context that the court held that imputing knowledge of the directors on the company would be absurd as the conspirators cannot allege that the victim was part of the conspiracy so as to be disentitled to recover the loss suffered as a result thereof.

Counsel submitted that the application of the ratio in the Belmont case (supra) can only be restricted to cases where an injured company brings an action against its own directors for wrongs committed against it. First of all the company is an artificial entity similar in its operation to the Government and cannot act by itself but rather acts through natural persons who are an embodiment of the company itself. Counsel relied on the case of **Tesco Supermarkets Ltd versus Natress [1972] AC 153 at 170**. This is for the proposition that the mind of the company is the mind of its directors. The guilty mind of the company is the guilty mind of the directors.

The above decision applies to the current case and counsel prayed that the Government should be held bound by the fraudulent actions of its officers so as to make the performance bond unenforceable against the Defendant. Counsel further submitted that the Government should be treated as an equal person before the law like any other person and relied on the case of **Attorney General versus Osotraco Ltd Civil Appeal Number 32 of 2002**. The Government enjoys no special status to negate the enforcement of the law whether it is the common law or statutory law. Consequently fraud as the common law exception to the enforcement of the performance bond applies with equal force to the Government as it would to a natural person.

In further support of the above proposition, the Defendant's case is that the procurement process was initiated and supervised by Government officials acting on behalf of the Government.

Counsel further submitted that the situation is similar to that of agent/principal relationships. The acts of the agent bind the principal even if those acts turn out to be fraudulent. Counsel further relied on the text book "**the General Principles of Insurance Law by ER Hardy Ivamy** on the effect of fraud by an agent.

An act which falls within the agent's authority does not cease to bind the principal because it was done fraudulently. It is immaterial whether the agent was acting in his own interest and in fraud of the principal. Where the principal successfully repudiates responsibility for the acts on the ground that it was unauthorised, it must account to the third party for any benefits which he may have received. The principle cannot benefit from the evident fraud and at the same time repudiates what the agent has done. The Defendant relies on the House of Lords case of **Lloyd versus Grace Smith and Company [1911 – 1913] All ER Rep page 51** for the holding that the principal is liable for the fraud of the agent committed in the course of the agents employment and not beyond the scope of this agency, whether the fraud is committed for the principles benefit or not.

In Halsbury's laws of England 4th edition (1996 reissue) volume 7 (2) paragraph 1117 and on the question of the company's liability in the contract for the agent's acts it is stipulated that the company is generally liable. This is where the agent acts within the scope of the authority and provided the contract is within the company's powers. The company is not liable for acts or representation not within that scope. The issue of whether the act or representation was committed on made by the agent for his benefit or for the benefit of the company is irrelevant.

It is the Defendant's case that the cited authorities are of direct relevance to the Plaintiff's case. The indicted officials of Government at all material times acted within the actual/or ostensible authority bestowed upon them by the Government and accordingly the fraudulent actions are in fact acts of Government from which a Government cannot divest itself. Counsel further submitted that the court should apply the Maxim *ex turpi causa non oritur actio* (fraud unravels all). The Plaintiff should not be permitted to the benefit from the performance bond vitiated by the fraudulent actions and omissions of its officials. In other words, the Plaintiff cannot obtain compensation or indemnity arising out of its own fraudulent actions through its appointed officials. The Government should be held bound by actions of its officials and the performance bond should be held to be unenforceable.

#### Remedies

The Defendant's prayer is that the appropriate remedy is that the Plaintiff's suit is dismissed with costs because the Plaintiff is not entitled to the sums provided for in the performance bond on the ground of fraud.

#### Judgment

I have carefully considered the agreed facts, the written submissions, the testimony of the Defendant's witnesses and authorities cited and availed to court.

The First Issue submitted upon is **whether the officials of Government in collusion with the supplier were fraudulent with regard to the underlying procurement process and the contract concluded as a result thereof.**

Both counsels relied on the definition of fraud adopted by the Supreme Court in the case of **Frederick Zaabwe verses Orient Bank Ltd and others Supreme Court Civil Appeal Number 04 of 2006**. In that case the Supreme Court relied on the definition of fraud in the Black's Law Dictionary 6th edition at page 660 which inter alia defines fraud to mean:

*"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right..."*

*"A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury..."*

The Supreme Court looked at the elements of fraud in that particular case. I would like to highlight some of these elements. The first is an intentional perversion of truth. In other words there has to be falsehood or deceit. The second element that is present is that the perversion of the truth or the false representation of a matter or question of fact in issue should be calculated to induce another person to part with some valuable thing. I must emphasise that in theory, the person who parts with some valuable thing is the victim of the fraud or the third party who has a cause of action against the principal and agent. The victim might be induced to surrender a legal right. Common elements of the term fraud may be identified in other definitions of the term "Fraud".

The term "fraud" or "to defraud" was defined in the case of **R v Sinclair and Others [1968] 3 All ER 241** where James J held at page 246 that:

*"To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person's proprietary right. In the context of this case the alleged conspiracy to cheat and defraud is an agreement by a director of a company and others dishonestly to take a risk with the assets of the company by using them in a manner which was known to be not in the best interests of the company and to be prejudicial to the minority shareholders."*  
(Emphasis added)

According to Oxfords Dictionary of Law 5<sup>th</sup> Edition the word "Fraud" is:

*"A false representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage. If the fraud results in injury to the deceived party,*

*he may claim damages for the tort of deceit. A contract obtained by fraud is voidable on the grounds of fraudulent misrepresentation.” (Emphasis added)*

More definitions and illustrations may be found from **Words and Phrases Legally Defined** **third** Edition London Butterworth’s 1989 Volume 2 D – J for the words “Fraud”, “Fraudulent” and “Fraudulent Misrepresentation”. Accordingly the term "fraud" usually takes the form of a statement of what is false or a suppression of what is true. In *Re Companies Acts ex parte Watson* (1888) 21 QBD 301 at 309 the term "fraud" should be reserved for something dishonest and morally wrong and much mischief is done and unnecessary pain inflicted by its use where "illegality" and "illegal" are the appropriate expressions. In *Bailey versus Peak* (1889) 14 Appeal Cases 337 at 374 it was held that it has to be shown that a false representation has been made knowingly or without belief in its truth or recklessly, careless whether it is true or false. In **R vs. Sinclair** Lord Denning MR held that:

*"The general direction as to fraud [in the summing – up in the court below], commences by stating that to amount to fraud the conduct must be deliberately dishonest. That is plainly right.” R v Sinclair [1968] 3 All ER 241 at 246”*

The common elements in the various definitions are as follows. The act has to be done with deliberate dishonesty to the prejudice of another person's proprietary rights. Consequently there has to be deliberate dishonesty, secondly, there has to be prejudice to another person's proprietary rights. Thirdly there has to be an act such as words or other forms of representation. In the case of any statement, the statement has to be made knowingly or recklessly in order to gain material advantage. Consequently all the definitions have one common element namely the prejudice to another person's proprietary rights. Consequently the term "to defraud", incorporates prejudice to another person's proprietary rights.

I have carefully considered the submissions of Counsel and have come to the conclusion that part of the submissions deal with a point of law. The point of law is raised by the Attorney Generals Counsel when he submitted that in any case the Government is the victim of the alleged fraud and the acts of the Government officials for which they were charged cannot be visited on the Government. On the other hand the Defendant submitted that the Government is liable for the fraud of its agents. The point of law could have been argued without prejudice to evidential data of whether actually there was fraud on the part of the Government. Notwithstanding, it would be unnecessary to deal with the question of vicarious liability of the Government without first establishing what the Government is supposed to be liable for.

Therefore the issue of whether something was done fraudulently must first be answered. Was there any fraud? If fraud is established, the question implicit is who in particular was fraudulent as a question of fact? The Defendant relies on the case of **Lloyd versus Grace, Smith & Company [1912] AC 716** for the proposition that the fraud of the agent can be imputed on the principal. Before considering that case, the Defendants counsel relied on a textbook on the

General Principles of Insurance Law by E.R. Hardy Ivamy 4th edition London Butterworth's 1979. At page 568 the Author discusses the effect of the Agent's fraud. In the discussion it is written that:

*"An act which otherwise falls within the agent's authority does not cease to bind the principal because it was done fraudulently. It is immaterial whether the agent was acting in his own interest and in fraud of the principal or for the supposed benefit of the principal. If the principal successfully repudiates responsibility for the act on the ground that it was unauthorised, it must account to the third person for any benefits which he may have received, since he cannot benefit by his agents fraud and at the same time repudiate what the agent has done."*

The footnotes indicate that the learned authors were relying on the case of **Lloyd versus Grace, Smith and Company [1912] AC 716** for the principle that the master may be held liable for the fraud of the agent under the circumstances discussed in that case. I particularly refer to the judgement of Lord Macnaghten where he concluded after reviewing several authorities that:

*"The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate."*

The second case is that of **Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 All ER 344**, which was a Court of Appeal case that followed the House of Lords Case in **Lloyds vs. Grace, Smith & Company** (supra). In that case a solicitor's managing clerk got an advance of a sum of £500 upon a mortgage of property by producing to the society's solicitors a forged deed. On the question of whether the firm of Solicitors was liable for the loss occasioned, the Court of Appeal held that the clerk acted within his ostensible authority and the master was liable. In this case it had been established that the clerk acted fraudulently and the question of fraud was not in issue. Mackinnon LJ held at page 351:

*"In a case like the present, however, or Lloyd v Grace, Smith & Co, the authority of a solicitor's managing clerk to carry through such a piece of business as this is not in fact limited in any such way. There is, therefore, no known limitation of his ostensible authority to carry through a business such as this on behalf of, and with the actual authority of, his employer. That being so, this matter being fully within the ostensible authority of the agent, the employer is bound by it..."*

The issue of whether the clerk was fraudulent was not the matter on trial. What was on trial was whether the principal was liable for the acts of the managing clerk. In the above two cases, the question of whether the agent committed fraud was not in dispute. It was taken for granted

before considerations of whether the principal was liable for the fraud. In other words the resolution of the issue of whether the Government is vicariously liable must depend and be founded on a finding of fact as to whether actual fraud had been committed against somebody in the context of the Plaintiffs case by indicating who was defrauded and by whom before further analysis may be made.

The question of which person the fraud was committed against is relevant. The foundation of the question of fact as to whether fraud was actually committed can be discerned from several authorities considering the question of whether the principal is liable for the fraud of the agent. Apart from the case of **Lloyd versus Grace, Smith and company** (supra), I also refer to the case of **Briess and others versus Woolley and others [1954] 1 All ER 909**. I particularly refer to the judgement of Lord Reid commencing at page 913. At page 915 he considers various authorities including the judgment of Lord Macnaghten in **Lloyd versus Grace, Smith & Company** and other decisions on the question of whether a principal can be held liable for the fraud of the authorised agent. The summary of the principles are that:

- An innocent principal was severally responsible for the fraud of his authorised agent, acting within his authority, to the same extent as if it was his own fraud.
- Any person who authorises another act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.
- It is an elementary principle of law that no person can take advantage of the fraud of his agent.
- When the other party makes the contract to his detriment, a cause of action arises both against the agent and the principal.

The first element that I wish to highlight is that the principal is liable for the fraud of the agent committed within the scope of his employment. However he is liable to third parties. And I must add that the third party should be the injured party. The second element is that the principal is liable if he has taken the benefit of the contract. The foundation for the analysis is therefore whether there was any fraud whatsoever committed in the circumstances of the case. This is a question of fact and ought to be established before inquiry into the principal/agent relationship and the doctrine of vicarious liability.

The background to this controversy is that the Ministry of Local Government and Amman Industrial Tools and Equipment Ltd executed a contract for the latter to supply the Ministry of Local Government with 70,000 bicycles. It was a clause in the contract namely clause 18.1 and 18.2 thereof that the supplier would obtain a performance bond guaranteeing payment of 10% of the contract sum. Accordingly the supplier caused a performance bond to be issued in favour of the Ministry of Local Government guaranteeing that the Defendant would pay 10% of the contract sum on receipt of a first written demand for payment by the Ministry of Local Government without cavil or argument informing the defendant that Amman Industrial Tools

and Equipment Ltd failed to perform its obligations under the contract. Ministry of Local Government paid 40% of the contract price to Messieurs Amman Industrial Tools and Equipment Ltd but the said supplier failed to perform its part of the contract.

The contract is dated 26<sup>th</sup> of November 2010 between the Government of the Republic of Uganda represented by the Ministry of Local Government and Amman Industrial Tools and Equipment Ltd. The Government is described in the contract as the Purchaser while Amman Industrial Tools and Equipment Ltd is described as the Supplier. Clause 18.1 of the General Conditions of Contract provided that the provider/supplier would within 28 days of the notification of the contract award, provide a performance security for the due performance of the contract in the amount and currency specified in the Special Conditions of Contract in a freely convertible currency acceptable to the procuring and disposing entity.

The performance bond issued by the Defendant to the Ministry of Local Government is dated 25<sup>th</sup> of November 2010. The relevant part which is the subject of this suit reads as follows:

*"THEREFORE WE hereby affirm that we as Guarantors are responsible to you, on behalf of the provider, up to a total of US\$489,650 (... In words) And we undertake to pay you, upon your first written demand declaring the provider to be in default under the contract, without cavil or argument, any sum or sums within the limits of US\$489,650 (... In words) as aforesaid, without you needing to prove to show grounds or reasons for your demand or the sum specified therein.*

This security is valid until the 24<sup>th</sup> day of May 2011"

Exhibit P3 is a letter of the Permanent Secretary Ministry of Local Government addressed to the Managing Director of the Defendant informing the Defendant that their client namely Messieurs Amman Industrial Tools and Equipment Ltd failed to execute the contract with the Ministry of Local Government for delivery of 70,000 bicycles for Chairpersons of Parish and Village Councils. Part of the letter reads as follows:

*"In accordance with the terms of the Letter of Credit, execution of the contract was expected to be completed by 25<sup>th</sup> of February 2011, but due to delays on the part of the supplier, the Ministry extended the execution period to 25<sup>th</sup> of March 2011. The extended period also elapsed before Messieurs Amman Industrial Tools and Equipment Ltd could deliver.*

*In accordance with the provisions of clause 18.2 of the General Conditions of Contract, and the undertaking you made in your bond, the Ministry demands payment of US\$489,650 by bank draft in favour of the Permanent Secretary, Ministry of Local Government, without cavil or argument."*

Again on 23 May 2011 the Permanent Secretary Ministry of Local Government wrote to the Defendant's Manager Claims in which he informs the Defendant that the bond was due to expire that week on Wednesday the 25<sup>th</sup> of May 2011. The Permanent Secretary Ministry of Local Government wrote that that the amount was payable before Wednesday the 25<sup>th</sup> of May 2011 was the equivalent of US\$489,650.

About 2 1/2 (two and a half) months later in a letter dated 4<sup>th</sup> of August 2011 exhibited as exhibit P5, the Defendant's manager of claims wrote to the Permanent Secretary Ministry of Local Government and the letter reads as follows:

*"We refer to the above and confirm receipt of the completed and signed discharge subrogation voucher of US\$489,650 earlier sent to you.*

*We have now started on the processing of payment and all our reinsurance partners have been called upon to remit their share of the claim. We shall soon remit the same to URA as advised.*

*We take this opportunity to thank you for the continued Corporation."*

Exhibit P6 is a letter dated 14<sup>th</sup> of September 2011 from the Defendant to the Permanent Secretary Ministry of Local Government which gives the basis of the Plaintiff's action to file a suit in this court. The Defendants wrote as follows:

*"We refer to the above and our attention has been drawn to the recent developments in Parliament (Parliamentary Committee on Local Government and Public Service) and what has been reported in the press in respect of the contract and circumstances surrounding the dealings.*

*Kindly note that the said developments in Parliament have a bearing on the operation of the bond and as such through our lawyers MMAKS, we have sought legal opinion on the operation of the bond in view of the developments before we proceed.*

*We shall remain committed to resolving this issue and look forward to your continued operation."*

Exhibit P7 is the letter of the Permanent Secretary Ministry of Local Government dated 4<sup>th</sup> of October 2011 reminding the Defendant that the bond was guaranteeing the supply of the bicycles up to a total of US\$489,650. That the Defendant undertook to pay upon the first written demand declaring the provider to be in default of the said sum without any arguments the amount guaranteed. On 3 January 2012 in exhibit P8 the Attorney General gave the Defendant 14 days notice of the institution of legal proceedings if the Defendant did not make good the bond amounts.



It is agreed fact number 4 in the joint scheduling memorandum that the Ministry of Local Government wrote several letters to the Defendant pursuant to the provision of the performance bond making a demand for payment of US\$489,650. Secondly that the Defendant initially agreed to meet its contractual obligations but has since argued that the performance bond is unenforceable because it was vitiated by fraud committed by the supplier and the Plaintiff's officials (see agreed fact number 5). Agreed fact number 6 in the joint scheduling memorandum is that the Public Procurement and Disposal of Public Assets Authority conducted an investigation into the procurement of 70,000 bicycles and recommended disciplinary action against the accounting officer Ministry of Local Government, the evaluation committee Minister of local Government, the principal procurement officer Ministry of Local Government, the contract manager Minister of local Government, the contracts committee Minister of local Government, and the principal internal auditor Ministry of Local Government.

Furthermore following investigations into the procurement process, several Government officials have been indicted before the anticorruption court and were also interdicted. The officials were charged for abuse of office, causing financial loss and neglect of duty. The amended indictment of the anticorruption court was admitted in evidence as annexure "D3"

Going back to the elements of fraud, the agreed facts give the inference that principle facts in the alleged fraud relate to the procurement/solicitation of a contract award for the supply of bicycles as far as the officials of Government are concerned. In other words, the Ministry of Local Government which is the procuring entity was induced to award the contract to Amman Industrial Tools and Equipment Ltd. Who then was the injured party? It may be argued that the injured party may be the people for whom the bicycles were being procured. But primarily the final consumers are represented by the Ministry of Local Government which ordered the bicycles. In other words the contract was for the supply of bicycles to chairpersons of parishes and the village councils. There is a second element to the controversy. It is an agreed fact that the Director of Public Prosecutions instituted criminal proceedings in the Anti Corruption court for inter alia causing financial loss and neglect of duty against the Government officials involved in the procurement. I would like to highlight the charge for causing financial loss. The question is, who incurred the financial loss? In other words who was the victim of the alleged fraud? The obvious answer is that it is the Ministry of Local Government.

That however is not the end of the enquiry. Several documents were agreed upon by the parties. The charge sheet which was admitted by consent of the parties and the summary of evidence which the Government intends to adduce in the criminal proceedings alleges that in the financial year 2010/2011 Ministry of local Government made a budgetary provision for 13 billion shillings for the procurement of 70,000 bicycles for chairpersons of parishes and village councils all over the country and the budget was approved by Parliament. This evidence is part of the Executive Summary of the PPDA investigation report exhibited as exhibit D5. However the report lacks the even pages and only has the odd pages photocopied. I will therefore refer to the

summary as contained in the letter of the Executive Director of PPDA which is part of exhibit D5.

The Public Procurement and Disposal of Public Assets Authority in their letter dated 4th of November 2011 exhibit D5 to the Head of Public Service and Secretary to the Cabinet wrote inter alia that the evaluation process was not properly conducted by the evaluation committee. Secondly the contract signed between the Ministry of Local Government and the supplier was materially different from the draft contract that was issued in the bidding document due to irregular changes made by the Ministry at the contract stage. Changes included alterations to the payment terms and structure, the addition of insurance provisions and the weakening of the inspection, warranty and performance security requirements. They indicated that the changes introduced at that stage benefited the supplier with no benefits accruing to the Ministry of Local Government while the Ministry took additional risks. Thirdly the ministry mismanaged the contract by irregularly extending the contract duration, making critical changes to the letter of credit and confirmed receipt and acceptance of goods which had never been received. The ministry authorised payment despite the caution by the bank of Uganda that they were discrepancies in the delivery documents presented. The confirmation allowed 40% payment to the supplier which resulted in a financial loss of US\$1,719,454.58 which is 40% of the letter of credit value to the Government.

Again the question needs to be answered. Who was being defrauded? Who was the beneficiary of the fraud? That question is clearly answered and it is evident that it is alleged that financial loss was caused to the Government of Uganda. In other words, the Government never benefited anything. The Government instead was the victim of the fraud. The same document at page 2 and paragraph 2 thereof recommended legal action against the Defendant for refusal to honour the conditions of the insurance bond issued in favour of Amman Industrial Tools and Equipment Ltd. However I wish to highlight that in the three elements in the summary of the PPDA report two of them dealt with the evaluation process of the bidders and secondly the contract award. In other words a big part of the complaint against the Government officials dealt with procurement of the services of the supplier up to the point of award of contract. At this stage there was no contract under which the services of the Defendant were engaged by the beneficiary of the contract award/supplier to issue a performance bond in favour of Government. The obligation to cause the issuance of an award came after the award of contract. Lastly the third element in the PPDA report deals with the mismanagement of the contract by extension of the contract duration and making critical changes in the letters of credit inclusive of confirming receipt and acceptance of goods without actual receipt thereof.

Whatever the above case scenario, the third-party if any or who are injured would be the beneficiaries of the contract and the Government represents the beneficiaries. It is a general statement of constitutional principle that under the National Objectives and Directive Principles of State Policy of the Constitution of the Republic of Uganda and Principle XXVI (i) all public offices shall be held in trust for the people. Furthermore principle XXVI (ii) provides that

persons in positions of leadership and responsibility shall in their work, be answerable to the people. Lastly all measures shall be taken to expose and combat corruption and abuse and misuse of power by those holding political and other public offices. It is the taxpayer's money or the public coffers which was defrauded by paying out colossal sums of money under a contract awarded to the Supplier.

The principles in **Lloyd versus Smith and company** (supra) do not apply where the principal is the victim of the fraud and there is no evidence of any third party who has been defrauded. In that case the third party was a widow who was defrauded by a clerk of the firm of solicitors who had been sued. I have further considered the case of **Belmont Finance Corporation Ltd versus Williams Furniture Ltd** and Others (supra). In that case the company was the complainant/Plaintiff against the directors who had committed acts of fraud against the company. The principle in that case is analogous to the present case because, the Public Procurement and Disposal of Public Assets Act, 2003 gives the framework for procurement and forbids corrupt practices. Secondly the constitutional principles forbid corrupt practices. Indulging in corrupt practices would be outside the scope of the authority of the agents. Specifically, the third-party in this case is not Messieurs Amman Industrial Tools and Equipment Ltd. It is Amman Industrial Tools and Equipment Ltd which was contractually bound to cause the issuance of the performance bond in dispute. The performance bond was to guarantee that it would supply the bicycles. It failed to supply and the Defendant has not sought any indemnity against the Supplier. Furthermore, it cannot be said that the Government officials defrauded the supplier. The question of who is defrauded is therefore sharply clear and it is the Government which has lost colossal sums of money which it is yet to recover from the supplier/provider. It is the Government which is constitutionally bound to apply the monies in the interests of the people.

As to whether the mind of the government officials is the mind of the government, I disagree on the ground that the mind of the Government just like a Company's Memorandum and articles of association is also reflected in the enacted laws which forbid corrupt practices.

The question has nothing to do with whether the Government is equal before and under the law in terms of article 21 of the constitution and the case of **Osotraco Ltd versus Attorney General** (supra). In that case the Court of Appeal considered the privilege enjoyed by the Attorney General or Government departments under the Government Proceedings Act Cap 77 and particularly the immunity of Government from injunctions and eviction by court order. They found that under the present constitutional system, the Government does not enjoy those immunities which were a prerogative of the crown. The Government was equal under the law. In the current case, there is no question of privilege. The fact that the Government is the victim is based on the facts. Government paid out colossal sums of money. There is no other third-party claimant against the Government. It is only the Defendant who is trying to avoid liability on the basis of the fraud exception discussed here in below.

Both counsels relied on the case of **Edward Owen Engineering Ltd versus Barclays Bank International Ltd [1978] 1 QB 159** for the exception to the general rule. The general rule is that a performance bond is to be honoured on its terms and the only exception being in cases of fraud. In the same case Browne LJ at page 173 said as follows:

*"But it is certainly not enough to allege fraud; it must be "established," and in such circumstances I should say very clearly established.... Further, Barclays bank was fully informed; they knew that they had no default by the Plaintiffs and so they knew that Umma Banks demand on them was fraudulent."*

The correspondence I have referred to above clearly shows that the Defendant never knew whether the demand made by the Ministry of Local Government was fraudulent. Instead the Defendant several months after the demand had been made referred to proceedings in Parliament and press reports and sought the advice of its lawyers on the matter. No fraud had been established to the Defendant's knowledge at the time of refusal of payment upon demand of the Plaintiff's officials under the bond.

This leads me to a corollary point which is that payment under the bond is supposed to be made on demand or upon the written demand of the Ministry of Local Government. This point comes out very strongly in the case relied upon by both parties. I will first make reference to the case of **Edward Owen Engineering Ltd versus Barclays Bank International Ltd [1978] 1 QB 159**. At page 171 paragraph B Lord Denning held as follows:

*"The bank must pay according to the guarantee, on demand, if so stipulated, without proof or conditions."* (Emphasis added)

The time of payment is determined by the terms of the bond. In the Plaintiffs case the performance bond clearly provides that the Defendant undertook to pay the Plaintiffs upon the first written demand declaring the provider to be in default under the contract, without cavil or argument and without needing to prove or show grounds or reasons for the demand. In this case the obligation to pay arises upon the first written demand and failure to pay constitutes breach of the terms of the bond. In the case of letters of credit which have been held to have the same applicable principles as performance bonds, Lord Diplock in **United City Merchants versus Royal Bank of Canada [1982] 2 All ER 720**, held at pages 727 and 728 that the obligations to pay is upon presentation of documents which appear on the face of it to be in order. This is subject of course to the terms of the performance bond itself and the payment terms would depend upon the construction of the document. Consequently in the Plaintiffs case, upon the first written demand and before any knowledge of the Defendant, the obligation to pay had not been honoured by the Defendant. In fact the PPDA Authority recommended that Government takes action against the Defendant for refusal to pay. The allegations of fraud came about after failure of the Defendant to pay upon demand.

Secondly the elements of fraud defined in Black's Law Dictionary and approved by the Supreme Court in the case of **Frederick Zaabwe verses Orient Bank and others** (supra) should be examined critically to establish whether they are available in the Plaintiff's case.

Firstly the element that the principal is a beneficiary is absent. This is because the principal/Government is not a beneficiary but victim of the fraud. The question is whether there was inducement of the Government officials and therefore the benefit, if any, to certain Government officials ought to be imputed on the Government under the doctrine of vicarious liability. Firstly and on a question of procedure, it is contrary to the principles of fundamental justice to impute fraud on officials who have no chance to defend themselves. Moreover the said government officials are undergoing trial before a criminal court and are entitled to the constitutional presumption of innocence in that trial. As far as the civil proceedings are concerned, in cases of civil fraud, it is not permissible to 'besmirch' the reputation of parties not before the court with open allegations of fraud. This was the decision of the Supreme Court in the case of **Kampala Bottlers versus Damanico (U) Ltd Civil Appeal No. 22 of 1992** where Hon. Justice Platt JSC held at page 5 of his judgment on the question of possible fraud of parties not before court as follows:

*“But it is not open for consideration in this case, because of another important procedural lapse. Had that been the Respondent's case, he should have brought the land office officials and Town Council officials before the court. It is important that before some ones reputation is besmirched, he has had an opportunity to defend himself. The officials here might have explained the confusion in their action. Even incompetence might not have been fraudulent. It must be understood from the nature of the defence, that the unspecified fraud must be primarily directed against the party in the case, against whom the defence is made. That is to say, that primarily, the Respondents allegation of fraud must relate to the way in which the Appellant gained registration, as the Appellant was the only other party in the case.” (Emphasis added)*

Notwithstanding the doctrine of vicarious liability, fraud itself requires the individual mind and therefore the reputation of those individuals namely the Government officials is on trial without giving them a chance to give any kind of explanation.

Notwithstanding the absence of the actors in the fraud allegation in this proceeding, the managing director of the Defendant Mr Ronald Zake in his witness statement paragraph 7 thereof testified that in the course of processing payments, the Defendant's attention was drawn to reports of fraud by the officials of Government involved in the procurement process. It was as a result of this discovery that the Defendant halted payment against the performance bond and sought legal advice as to the legality of the performance bond.

The burden of proof is on the Defendant to demonstrate that there was fraud committed by the agents of the Government. Section 101 of the Evidence Act Cap 6 Laws of Uganda provides that

a person who is bound to prove the existence of any fact is the person upon whom the burden of proof lies. Section 102 provides that the burden of proof in a civil suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Furthermore section 103 provides and I quote:

*"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*

Particular facts have to be proved to establish any fraud on the part of the Government officials. Furthermore there are definitional problems. The Defendant seems to take issue with the process of procurement. The process of procurement is governed by law and particularly the Public Procurement and Disposal of Public Assets Act, 2003. Sections 43 to 54 thereof deal with the basic procurement and disposal principles. The begging question is whether the procedures prescribed and principles for procurement were not complied with? Was there not open the bidding?

I have critically examined the particulars of fraud relied upon by the Defendant in the written submissions. The first one is that there was a fraudulent award of contract by officers of the Minister of local Government to the supplier. The words fraudulent are used but no sufficient particulars are provided for. How was the award of the contract fraudulent? The evidence of Cornelia Sabiti the Executive Director of the Public Procurement and Disposal of Public Assets Authority (PPDA) is that in September 2011, the authority launched investigations into the procurement processes by the Ministry of Local Government for the supply of 70,000 bicycles. She relied on the investigation report exhibit D5. The record of issue of solicitation documents did not list the supplier as a bidder. She gives several other illegal practices. At the end of it all, she concluded that taking into account the size of the procurement and the need to safeguard the entity against any risk of loss arising from the 40% payment, the entity should have sought an advance payment security from the supplier. The entity recommended disciplinary proceedings against officials. She recommended legal action against the supplier and against the Defendant. Against the Defendant, it is for the failure or continued refusal to honour the conditions of the insurance bond policy issued in favour of the supplier. Although the irregularities pointed out are breaches of statutory provisions and principles of procurement. They led to the award of contract to the supplier. Nowhere is it suggested that the contract was fraudulently executed or forged. In paragraph 4 (o) of the witness statement, she testified that the ministry mismanaged the contract by irregularly extending the contract duration and making critical changes to the letter of credit and confirmed receipt and acceptance of goods which had never been received. Furthermore the ministry authorised payment despite the caution by the bank of Uganda that there were discrepancies in the delivery documents presented. The confirmation allowed 40% payment of the supplier which resulted in financial loss of US\$1,719,454.58 to the Government of Uganda. In other words the contract ought to have been better managed. The witness was clearly concerned with the procurement processes and procedures for procurement which were flouted.

There is no evidence of deliberate falsification and fraud in the award of contract. Flouting the rules for procurement is breach of statutory provisions and not necessarily fraud. There is no evidence of benefit to the Government officials.

The report of the PPDA is exhibit D5. There are three headings giving the findings of the PPDA investigation which will be quoted in full.

a. "Evaluation Process.

The evaluation was not properly conducted by the evaluation committee and the evaluation did not fully adhere to the criteria in the bidding document. Specifically the committee did not adequately assess the capabilities of bidders to perform the contract with regard to their experience in similar contracts which was one of the requirements in the solicitation document. This led to award of contract to a bidder (M/s Amman Industrial Tools and Equipment Ltd) that was only two months old and did not have any demonstrated experience in such contracts. Further devolution committee relied on documents of another firm, M/s Amman index, which had no legal connection to M/s AMMAN INDUSTRIAL TOOLS AND EQUIPMENT LTD.

b. Contract Award.

The contract that was signed between Minister of local Government and AMMAN INDUSTRIAL TOOLS AND EQUIPMENT LTD was materially different from the draft contract that was issued in the bidding document due to irregular changes made by the Ministry at the contract stage. The changes included alterations to the payment terms and structure, deletion of insurance provisions and a weakening of the inspection, warranty and performance security requirements. The changes introduced at this stage only benefited the supplier with no benefits accruing to the ministry by the ministry took on additional risks which eventually materialised with the ministry making payments for no goods received. The change to the contract out was not the result of any documented negotiations nor were they approved by the Contracts Committee. Further, the alteration of the contract terms disadvantaged other potential bidders awkward of offered better bids if they were aware of such changes in payment and delivery terms.

c. Contract Management.

The ministry mismanaged the contract by irregularly extending the contract duration, making critical changes to the letter of credit and confirmed receipt and acceptance of goods which had never been received. A ministry further authorised payment despite the caution by the bank of Uganda that there were discrepancies in the delivery documents presented. This confirmation allowed 40% payment of the supplier which resulted into financial loss of US\$1,719,454.58 (40% of the letter of credit value) to the Government.

Among other findings in the final report paragraph 6.5.4, the PPDA authority found that the evaluation committee's failure to take a keen interest in several anomalies was negligence of their

duty to the entity from a fraudulent bidder. It also established that the accounting officer exposed the entity to the risk of fraud and financial loss. I have not found any finding that there was fraud on the part of the officials who were subsequently charged. The alterations to the contract is alleged in a letter dated 27 December 2010 indicates that there were certain errors in the letter of credit which was issued to the contractor/supplier Messrs Amman Industrial Tools and Equipment. The changes dealt with the details of the bank where it is written the bank should be Stanbic Bank Uganda instead of Citibank. As far as this detail is concerned it is not clear why changing banking details was fraudulent if at all. Secondly partial shipment was stated to be allowed instead of not allowed. The place of taking in charge of receipt is India instead of China. The Port of loading should read India instead of China. The consignee should be changed to Amman Industrial Tools and Equipment Ltd instead of the Permanent Secretary Ministry of Local Government because the supplier would deliver the goods to the districts. Stanbic bank Uganda is nominated to be the transferring bank instead of Citibank. The changes were notified to the Director Payments and Settlements Department Bank of Uganda. In a letter dated 3rd of March 2011 the Bank of Uganda was again notified that the final destination on the Bill of lading, packing lists and certificate of origin should be Kampala/Uganda instead of parishes and village councils in Uganda.

After the alterations were made, payments were made to the supplier of 40% of the contract price. However the supplier never delivered the bicycles. Was there any deliberate scheme to defraud the Government of Uganda? Was it the supplier who was fraudulent? It must be noted that the performance bond was issued on the request of the supplier Messieurs Amman Industrial Tools and Equipment Ltd. Secondly payment was made against delivery but it is not apparent whether it was against documents of title before receipt of the actual goods. By the time the bond was issued, there was a binding contract for the supply of 70,000 bicycles.

A lot has been said about the irregularities in the entire transaction. Nothing has been established as to whether any inducement or money was received by the Government officials.

Finally I would like to address the question without prejudice to my finding that no clear fraud has been established, as to whether the Government would be vicariously liable if fraud was established. It is not noted that the relationship between the Government officials and the Government is that of the principal/agent or employee/employer.

According to Halsbury's Laws of England 4th edition reissue volume 1 (2) agency is defined in the following terms:

*"The relation of agency arises whenever one person, called 'the agent', has authority to act on behalf of another, called 'the principal' and consents to act. Whether the relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement on the exact circumstances of the relationship between the alleged principal and agent. If an*



*agreement in the substance contemplates the alleged agent acting on his own behalf, and not on the behalf of the principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen. Conversely the relation of agency may arise despite a provision in the agreement that it shall not.... The essence of the agent's position is that he is only an intermediary between two other parties. So it is essential to an agency in the sense that a third party should be in existence or contemplated, and, if a person who is employed as an agent to buy or sell property for another seeks to sell his own property to his principal or to buy the property of his principal, violates the first condition of his employment, and changes the intrinsic nature of the contract between them.*

In paragraph 133 the general rule is that the principal is responsible for all acts of his agent done within the authority of the agent, whether the responsibility is contractual or tortious. A third party dealing in good faith with an agent, who acts within the apparent scope of his authority, and purports to act as agent, is not prejudiced by the fact that the agent is using his authority for his own benefit and not for that of his principal. Concerning the scope of the agent's authority, it is useful to consider the contractual limitation or limitations of law to the authority exercisable by the agent. Paragraph 135 page 95 Halsbury's Laws of England (supra) discusses the effect of limitations on the authority of an agent in the following words:

*"Where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions or limitations on its exercise, no act done by the agent in excess of the conditional or limited authority is treated as the act of the principal as regards such persons as have or ought to have notice of such excess of authority, or have had notice of an irregularity placing them upon enquiry as to whether the agent's authority was being exceeded. In the absence of notice, however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of his authority, by any particular instruction to his agent in the meeting of his authority.*

It is clear that an act done in excess of authority is not binding on the principal except where a third party who has suffered on account of the fraud has no notice of the limitations imposed on the agent. However all public procurement is governed by the Public Procurement and Disposal of Public Assets Act, 2003 (PPDA Act 2003) and bidders and everyone who dealt in the transaction is deemed to have notice of procurement law and procedure. I will highlight just a few provisions on public procurement and disposal law and principles. Section 43 of the PPDA Act, 2003 provides that all public procurement and disposal shall be conducted in accordance with the basic principles set out in section 44 to 54 of the Act. Section 45 provides that all procurement and disposal shall be conducted in a manner which promotes transparency, accountability and fairness. Under section 46 all procurement and disposal shall be conducted in a manner to maximise competition and achieve value for money. Under section 47 a duty is placed or imposed on the procuring and disposing authority except under the order of court not to disclose any information where the disclosure would amount to a breach of the law; impede law

enforcement; prejudice legitimate commercial interest of the parties; inhibit fair competition; or in any way may not be in the public interest until the successful bidder is notified of the award. In other words there is supposed to be fair competition in the bidding process. No one has emerged complaining about unfair award of contract (i.e. there is no third party complainant under than PPDA and the Government in general). Under section 48 all procurement and disposal shall be conducted in a manner which promotes economy, efficiency and value for money. Under section 49 all procurement and disposal shall be carried out in accordance with the Codes of Ethics specified from time to time by the Authority. Under section 51 of the PPDA Act 2003, a procuring and disposal entity shall use open bidding as the preferred method of procurement and disposal. Particularly section 52 of the PPDA Act provides that the contract should be awarded to the bidder with the best evaluated offer ascertained on the basis of the methodology and criteria detailed in the bidding documents. Under section 53 copies of the Act, regulations, guidelines, and forms made under the PPDA Act, standard bidding documents and decisions of the Authority shall be made accessible to the public by the Authority. Under section 55 all public procurement and disposal shall be carried out in accordance with the rules set out in the Act.

Consequently all bidders have notice of the PPDA Act, regulations and guidelines issued by the authority from time to time. Should the Government be held liable where the procurement and disposal entity officials exceeded their authority under the Act or acted contrary to law and procedure? Specifically can it be assumed that the supplier did not have notice? Furthermore the other bidders have not come out to challenge the procurement of the services according to the evidence adduced or agreed upon. Last but not least, the Government cannot authorise signing a procurement contract with the intention that the goods or services to be supplied under the contract, will not be supplied. There is no evidence of such an intention if the minds of the officials are to be examined. If they acted recklessly there is to be prove of financial gain that the officials received. The essence of the fraud that is pleaded is that the procurement was unlawfully and/or irregularly conducted.

However, it is after the award of the contract to the supplier that the performance bond was executed to guarantee the performance of the supplier. It is the supplier who guaranteed the performance. It is the supplier who failed to supply the services. It is the Defendant who was contracted by the supplier to issue the bond the basis of the suit.

Secondly the contract for the supply of bicycles speaks for itself. The contract is not illegal and is binding on the parties thereto. It provided among other things that the supplier would cause a performance bond to be issued in favour of the Government. It is therefore my finding that no fraud has been proved in the execution of the contract. Whatever irregularities were latent or evident in the procurement process, the award will not affect the legal obligations of the principal or the supplier of the goods under the contract which was subsequently executed. The supplier part performed by obtaining a performance bond under the terms of the contract awarded to it. Last but not least, concerning the management of the contract, it is the Defendant's case that

there was a fraudulent amendment of the terms of the letters of credit by officers of the Ministry of Local Government obtained with the bank of Uganda we did the intention of facilitating to the fraudulent activities of Amman Industrial Tools and Equipment Ltd. Furthermore there was fraudulent confirmation of receipt of the bicycles in the agreed quality and quantity from Amman Industrial Tools and Equipment Ltd by officials of the Ministry of Local Government for purposes of inducing payment to Amman Industrial Tools and Equipment Ltd.

It is suggested but not proved and not specifically addressed in the written submissions that there was fraud intended against the Defendant. This is the submission that there was collusion between officials of Government and the supplier to defraud the Defendant. The suggestion or the inference from the submissions would be pure theory that has not been proved by evidence. No evidence has been adduced that the intention of the award of the contract was calculated by officials of the Ministry of Local Government to make a demand on the bond. Every bond is secured by security provided by the contractor or supplier who is obliged under the contract to secure a bond in favour of the buyer of the services or goods. At least it is the best practice that the performance bond should be secured by the insurance company or the bank through an arrangement with the supplier or contractor as the case may be who is obliged to cause the issuance of the bond. Furthermore, there is no evidence produced of gratification or inducement by way of payment of some gratification of the officials of the Ministry of Local Government involved in the procurement process and in the alterations to letters of credit and terms of the contract. In the absence of such evidence, allegation of collusion or fraud is an inference drawn from the proceedings in the criminal trial against the officials. Even then, I agree with the Plaintiffs counsel that what could be evident from the PPDA report is that the Government officials were negligent or grossly negligent with elements of criminal culpability for which they have been indicted.

The crux of the Plaintiff's case is that the supplier failed to supply and the Government is entitled to call on the Defendant to make good the amount guaranteed. The Government is entitled to insist on the contract with the supplier. The Defendant is not concerned with the underlying dispute between the Government of Uganda and the supplier. In the premises therefore, the Plaintiff's suit succeeds.

### **Remedies**

The remedy of the Plaintiff is to get paid according to the terms of the bond. The Plaintiff made the demand as permitted by clause 18.2 of the contract which provides that the proceeds of the performance security shall be payable to the procuring and disposal entity as compensation for any loss resulting from the providers failure to complete its obligations under the contract. Secondly the terms of the bond is to pay the Plaintiffs namely the procurement and disposal entity upon the first written demand declaring the provider to be in default under the contract without argument. I have duly considered the Defendant's submissions that the Government officials have been found by the Anti-Corruption Court to have a case to answer on the charges

in issue. The submission is that the Government can move under section 35 of the Anti-Corruption Act, 2009 upon conviction of the Government officials to recover the money. Section 35 (1) of the Anti-Corruption Act provides as follows:

*"Where it is proved to the satisfaction of the court that a principal whose agent has been convicted of an offence under this Act has suffered loss as a result of the commission of the offence, the court may order any sums standing to the credit of the convicted person or any property which the court is satisfied was acquired directly from any gratification obtained by the agent to be applied in making good the loss; and in the case of property which is not money, the court may order the sale of the property and the proceeds of sale paid to the principal."*

First of all it has to be proved to the satisfaction of the court that any money of the officials was acquired directly or any gratification obtained by the agent in the financial loss or loss suffered by the principal. And this has to be after conviction. It has not been established that any of the officials have obtained any gratification. Secondly having a case to answer simply means that a prima facie case has been established and the accused persons have been put on their defence. Until and unless they are heard in defence, it cannot be assumed that they would be convicted. Moreover the basis of the finding that there is a case to answer does not involve adducing any evidence to the effect that any of the officials received any gratification. There is simply no evidence before this court. Last but not least, the parties concerned have not been made parties to this suit and hence the conclusion cannot be fairly made about their liability whether civil or criminal in these proceedings without giving them a hearing.

In the circumstances the Plaintiff is entitled to the remedies sought in the plaint namely the payment of US\$489,650 under the performance bond dated 25th of November 2010 issued for the benefit of the Ministry of Local Government by the Defendant.

On the question of the claim for interest by the Plaintiff the relevant law is found under section 26 (2) of the Civil Procedure Act which provides that:

*"Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."*

The Plaintiff is entitled to interest from the date of the refusal to pay to the date of the decree at the rate of 21% per annum on the basis of commercial bank interest rates. Secondly because payment was to be made upon demand under the terms of the performance bond, it is just that delays in payment should attract interest as if they money had been invested in a bank or lent out

at a fixed rate of interest per annum. In paragraph 8 (c) of the plaint, the Plaintiff claims interest at 28% per annum from 24<sup>th</sup> May 2011 till date of judgment. However no evidence of interest rates was adduced or submitted on.

In the premises the Plaintiff is awarded what I deem is reasonable interest on the principal sum from June 2011 until the date of filing the suit. Further interest is awarded at 21% from the date of filing the suit until the date of judgement. Finally the Plaintiff is awarded interest at 21% from the date of judgement till payment in full.

Under section 27 of the Civil Procedure Act, costs shall follow the event unless otherwise ordered by the judge. To refuse to award costs has to be based on justifiable grounds which have to be considered by the court. In this case, the Plaintiff having succeeded in the suit, costs shall follow the event and therefore costs are awarded to the Plaintiff.

Judgment delivered in open court the 25<sup>th</sup> of October 2013

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

George Kalemera Senior State Attorney for the Plaintiff

Moses Adriko for the Defendant

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**25<sup>th</sup> October 2013**