

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 3 OF 2007**

EXCEL CONSTRUCTION LTD}PLAINTIFF

VERSUS

ATTORNEY GENERAL} DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff sued the Attorney General in its capacity as the Legal Representative and Chief Legal Adviser of the government for recovery of Uganda shillings 1,604,009,782/= being outstanding certified payments and accumulated interest arising out of Construction Contract No. MoH/KK/02 lot 3. The plaintiff claims general damages for breach of contract, and costs of the suit. Initially the Attorney General denied the claim. However during the pre-trial conference, the representative of the Ministry of Health accepted the claim.

On 31 March 2011 the plaintiff was represented by Paul Rutisya while Susan Adongo State Attorney appeared for the Attorney General when it was reported that the Ministry of Health had paid Uganda shillings 1,200,000,000/= to the plaintiff and according to the claim in the plaint the outstanding amount which remained was Uganda Shillings 452,452,349.70/=.

On 21 April 2011 Paul Rutisya appeared for the plaintiff while Ampaire Sheila Lwamafa State Attorney holding brief for Susan Adong appeared for the Attorney General. The plaintiff's counsel applied for judgement on admission on the strength of a letter from the Permanent Secretary Ministry of Health Dr. Lukwago Asuman, addressed to the Solicitor General Minister of Justice and Constitutional Affairs and copied to the plaintiff company. It is written in that letter in the mediation hearings on 20 March 2008 it was agreed that government owed the plaintiff **1,821,399,303.67/= Uganda shillings**. Subsequently **Uganda shillings**

1,200,000,000/= was paid leaving an outstanding balance of **Uganda shillings 621,399,303.68/=**. Thereafter the ministry made adjustments to the claim by subtracting **Uganda shillings 168,926,953.98/=** as 15% penal interest bank charges erroneously added by the plaintiff in the earlier computation contrary to the terms of the contract. The Permanent Secretary advised the Solicitor General that the amount owed to the plaintiff was **Uganda shillings 452,452,349.70/=**. The letter was copied to Excel Construction Ltd, the plaintiff and judgment on admission for **Uganda shillings 452,452,349.70/=** was entered by the court under order 13 rules 6 of the Civil Procedure Rules as settlement of the principal claim in the suit. Subsequently the suit was fixed for determination of the remainder of the issues namely general damages, interest and costs.

In the subsequent hearings the Attorney General was represented by Gerard Batanda while Paul Rutisya still represented the plaintiff. The plaintiff called PW1 Eng Raj Diwani a director of the plaintiff and Anil Patel PW2 certified Accountant. The defence called one witness Eng Francis Wakabi, Civil Engineer with the Ministry of Health.

Upon conclusion of the witness testimonies, Counsels addressed court in written submissions on the following agreed issues:

1. Whether the plaintiff is entitled to interest on account of late payments.
2. Whether the plaintiff is entitled to an award of general damages for breach of contract.
3. Where the plaintiff is entitled to an award of costs.

Written Submissions

Issue 1: Whether the plaintiff is entitled to interest on account of late payments

The Plaintiffs Counsel submitted that it is not in contention that the principal sum in the suit was fully paid. On the first issue learned counsel for the plaintiff relied on clause 43.1 of the contract. Clause 43.1 of the contract reads as follows:

“... If the Employer makes a late payment, the contractor shall be paid interest on delayed payment in the next payment. Interests shall be calculated from the date by which the payment should have been made up to

the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.”

PW 1 drew a graph exhibit PE 2 illustrating the amount of interest that accrued as a result of late payments. On 24th of April, 2009 the payment of **Uganda shillings 1,200,000,000/=** was made leaving a balance of **818,198,905/= Uganda shillings** that continued to accumulate interest. At the same time interest had accrued at **Uganda shillings 821,418,836/=**. **Uganda shillings 452,452,349.70/=** was paid on 24 to June 2011 by which time accumulated interest stood at **920,566,173/= Uganda shillings**. No further payment was made and by March 31, 2012 accumulated interest was **Uganda shillings 1,101,047,657/=**. Learned counsel referred to several authorities on the purpose of interest and that interest was discretionary. These are: **Stanbic Bank (U) Ltd vs. Atyaba Agencies Ltd HCMA 235/2006** that interest is the return or compensation for the use of retention by one person of a sum of money belonging to another; **Harbutt’s Plasticide Ltd vs. Wayne Tank & Pump Co. Ltd 1 All ER 849**; that an award of interest is discretionary and its basis is that the defendant has kept the plaintiff out of his money or that the defendant had the use of the money himself and ought to compensate the plaintiff accordingly; **Kazinga Channel Office World Ltd vs. A.G. HCCS 276/2005** where it was held that interest may be prescribed by statute or be agreed by the parties and the court would only interfere with an agreed interest rate under section 26 (1) of the Civil Procedure Act if it is harsh and unconscionable; and **Kituni Construction Ltd vs. Julius Okeny HCCS 250/2004** where it was held that the plaintiff should be compensated for the loss occasioned to its business and mere recovery of the principal debt was not sufficient. Furthermore counsel relied on section 26 (2) of the Civil Procedure Act, which gives the court power to award interest at such rate as it deems reasonable or where interest is not awarded, it is deemed to have been awarded at 6% per annum.

Counsel contended that the contract exhibit PE 1 awards interest under the terms of the contract from the date of default until payment in full at commercial rate. He prayed that the court awards interest at the contractual rate.

In reply counsel for the defendant submitted that the testimony of PW1 and PW2 was that the interest they relied on was compound interest. Counsel contended that

according to the testimony of DW1, the principal amount which had been paid included interest. He relied on the letter of the Permanent Secretary dated 14 March 2007 and contended that the judgement on admission for **Uganda shillings 452,452,349.70/=**, included interest. Relying on clause 43.1 counsel submitted that the provision does not provide for compound interest. The clause focuses on when interest for delayed payment is to be made, how it is to be calculated and the rate of interest to be applied. Counsel strongly submitted that clause 43.1 did not provide for compound interest. He stopped short of submitting that it provided for simple interest.

In rejoinder the plaintiff's counsel submitted that if the state were to rely on the letter of 14th of March 2007 from the Permanent Secretary Ministry of Health which gives the outstanding amount at **Uganda shillings 452,452,349.70/=**, the sums were not paid fully until over four years later in June 2011. Consequently there was delay in payment. He submitted that clause 43.1 explicitly provides that interest shall be calculated from the date by which the payment shall be made up to the date when delayed payment is made. He submitted that the wording of the clause provided for compound interest. He contended that interest is compounded from one month to the next until it is fully paid. Counsel relied on the textbook on **Building and Engineering Contracts by PC Markanda, Y2K Edition at page 707** where the author states that the provision for charging compound interest at the same rate of simple interest on failure to pay the principal or interest on the due date is perfectly legal and cannot be relieved against on the mere ground of hardship. He reiterated submissions based on the authorities that failure to pay in time entitled the plaintiff to compensation.

2. Whether the plaintiff is entitled to award of general damages for breach of contract.

The plaintiff's counsel submitted that the fact that the contract between the plaintiff and the defendant was breached cannot be disputed and general damages ought to be awarded to the plaintiff. He relied on the testimony of PW1 at page 15 of the record of proceedings that the plaintiff had been put to great inconvenience as a result of being denied use of monies expected from performance of the contract. The testimony is that delays in payment have adverse effects on the contractor or any business in Uganda. The contractor has to source for money from somewhere

to continue obligations under the contract and so he has to go to the banks to borrow at commercial lending rates. When payment is not made back to the bank, the bank can sue.

Failure to make a payment in time also adversely affects the plaintiff in that upon invoicing the defendants, Uganda Revenue Authority would demand for VAT. In 2009 Uganda Revenue Authority carried out an audit of the plaintiff and penalised it for non-payment and late payment of VAT. The working capital of the plaintiff was adversely affected. Exhibit PE 3 illustrates that the financial growth from 1993 to 2010 was affected and particularly for the period 2003 – 2004 there was a significant drop in the plaintiff's profits. The change in the financial fortunes of the plaintiff can be directly linked to the breach by the defendant to pay the plaintiff. Had the plaintiff been paid, the plaintiff's revenue in the year 2004 should have been around **9,973,415,000/=**. The witness PW1 illustrated that the anticipated revenues constituted a variance of about **Uganda shillings 240,000,000/=**. PW1 further illustrated his testimony with a report from Bank of Uganda showing the exchange rate between the United States dollars to the Uganda shilling from July 1990 to July 2011. There were changes in the exchange rate to the effect that from 2004 exchange rates were 1829 and to today exchange rates are 2500. The amount in default was **630,000,000/=** whose equivalent in US dollars in 2004 was **US\$345,000** which today is equivalent to **US\$252,000** making a difference of **US\$93,000**. That means that in today's rate it equates to **Uganda shillings 232,500,000/=**. Referring to the case of **Hajj Asuman Mutekanga versus Equator Growers SCCA 7 of 1995** it was held that general damages consists of items of normal loss which the plaintiff is not required to specify in his pleading to permit proof in respect of them at the trial. Counsel also relied on the case of **Monarch SS Company versus Karlshanus Oliefabriker (1949) AC 196 at 221** where general damages were distinguished from special damages as damages arising naturally. As far as proof is concerned counsel contended that the court may award what a jury may award when the court cannot point out any measure for assessment except the opinion and judgement of a reasonable man according the case of **Prehn versus Royal Bank of Liverpool (1870) LR 5 EX 92** at page 99 – 100. He submitted that the opinion of PW1 should be relied upon to arrive at the quantum of general damages and therefore prayed for a sum of **Uganda shillings 240,000,000/=**.

In reply the defendants counsel submitted the formula used in the computation of general damages was flawed. He contended that the proposed figure of **Uganda shillings 240,000,000/=** is premised on factors that were not even a subject of the suit and therefore inevitably led to a disproportionate amount. He contended that the correct method ought to have been to consider revenues minus costs of the particular contract and if need be divide the profits by total revenues to find the profit margin but this was not done.

As far as the sum of **Uganda shillings 240,000,000/=** is concerned counsel contended that it was the difference between extrapolated profit vis-a-vis the actual profit. He contended that the difference between **Uganda shillings 9.9 billion** which was expected revenue and **6.9 billion** which was the amount realised is **Uganda shillings 3 billion**. The suit amount was **Uganda shillings 1,821,399,303.67/=**. Even with the expected revenue for the year 2004 with the defendant owing some amounts to the plaintiff, the expected revenue for the year 2004 would fall short by approximately **1.2 billion**. If the difference between expected revenue and realised revenue and amounted to the suit sum there could have been an arguable claim for the proposed figure. However this was not the case. Counsel further submitted that PW1 admitted in cross examination that according to exhibit P2 it was not correct to say that the company had never made any losses. It therefore couldn't be argued that the shortfall was only attributable to the defendants breach as evidently there were other factors involved.

Counsel submitted that the second formula proposed by the plaintiff was the basis of the exchange rate in US dollars in the year 2004 and the rate at the time of the trial. Upon computation, the loss came up to **Uganda shillings 240,000,000/=**. Counsel contended that PW1 and DW 1 admitted that the contract was in Uganda shillings. Consequently he contended that it was untenable to compute general damages using the dollar rate. He submitted that to do so would lead to an exaggerated figure. Consequently he contended that the plaintiff computed general damages on wrong premises and invited the court not to award any general damages. On the testimony that the alleged breach affected the plaintiff's relationship with suppliers, bankers and the tax authority, PW2 did not know what the bank overdrafts in exhibit P5 were used for. The plaintiffs witnesses also conveniently fell short of mentioning who the suppliers and bankers of the plaintiff were and therefore he contended that this testimony was far-fetched.

Additionally PW1 had testified that they were reasons for delays on the construction of Bulyambuzi site because Ministry of health defaulted on payments and secondly there was a court injunction which not only affected progress on the construction but caused the plaintiff to incur unnecessary additional costs. However DW 1 in examination in chief according to exhibit D2 demonstrated that the plaintiff was paid all costs attendant to demobilisation caused by the injunction.

As far as the claim for interests on general damages from the date of filing the suit till payment in full is concerned, the plaintiff's counsel submitted that the position of the law is that interest is payable after assessment by the court and runs from the date of judgement according to the case of the case of **Mukisa Biscuit Manufacturing Company Ltd versus West End Distributors Ltd [1970] EA 469 at 475.**

In rejoinder on the question of general damages the plaintiff's counsel submitted that failure to pay the plaintiff definitely created a shortfall and boundless opportunities were lost for not having the money in the company's coffers.

Judgment

I have carefully considered the arguments of Counsels, the pleadings and evidence on record.

The first issue is **whether the plaintiff is entitled to interest on account of late payments.**

I must say that the issue was framed in such a general way that its answer is obvious. The obvious answer does not answer the question as to whether in the circumstances of the case interest was due on account of late payment. The first obvious answer depends on interpretation of the relevant clause in the contract. The contract was admitted as exhibit P1 and both parties submitted on the interpretation of clause 43.1 of the contract. Clause 43 generally deals with payments under the contract. Clause 43 reads as follows:

"43.1 Payments shall be adjusted for deductions for advance payments and retention. The Employer shall pay the Contractor the amount certified by the Consultant within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late

payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.

43.2 If an amount certified is increased in a later certificate or as a result of an award by the Adjudicator or an Arbitrator, the Contractor shall be paid interest upon the delayed payment as set out in this clause. Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of dispute.

43.3 Unless otherwise stated, all payments and deductions will be paid or charged in the proportions of currencies comprising the Contract Price.

43.4 Items of the Works for which no rate or price has been entered in will not be paid for by the Employer and shall be deemed covered by other rates and prices in the Contract."

Clause 43.1 expressly provides that interest is payable on delayed payments. The employer is supposed to pay the contractor within 28 days of the date of each certificate. In case the employer makes a late payment (that is later than 28 days of the certificate), the contractor is supposed to be paid interest on the late payment in the next payment. This expressly provides that interest is calculated up to the next payment and included in the next payment. The problem comes about if the next certificate is also not paid. Is interest calculated on the aggregate sum i.e. on the two certificates plus interest on delayed payment? It must be noted that the next certificate if not paid for, will also start attracting interest on account of delay. In the context of the clause the answer is provided by the method prescribed for calculation of interest under clause 43.1 itself. It is provided that "*interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.*" It is apparent from the contractual provision that interest is calculated from the date when payment is considered delayed which is 28 days after each certificate up to the time when delayed payment is made. This gives a separate formula/timeline for calculation of interest on each certificate where there are several certificates. It is

however question of mathematics as to whether the addition of amounts owing from additional certificates to previous certificates which have not been paid would not lead to the same result i.e. the same amount upon calculation of interest on the total outstanding principal amount.

I do not agree with the plaintiff's submission that interest is compounded. Interest is calculated for each certificate separately from the date when payment is due and from 28 days thereafter up to the date of payment. The contract only specifies interest payable on each certificate due to late payment. It is obvious that late payment is relative to each certificate as their due dates for payment differ. As stated earlier, it is a question of mathematics as to whether aggregation of all amounts arising due to delayed payments would lead to a different result in the calculation of interests as opposed to calculating interest separately for each certificate. The court does not have to indulge in making that calculation. That being the case, the proper interpretation of clause 43.1 as far as interest is concerned, is that interest accrues at commercial borrowing rates from 28 days after the due date of payment until when payment is actually made for each certificate. I further agree with the defendants counsel that interest is payable on the sum in the certificate issued for each period. Interest is not payable on interest. Interest is payable on the principal amount stipulated in the certificates upon there being a delay in payment for the specified amount. All that needs to be done is to count 28 days from the due date and start calculating interest on the amount on the certificates. I.e. if the interest rate is 24% per annum, then the interest rate would be applied on the amount stipulated in the certificates up to the time when it is paid. If the amount is 100,000/=, the principal amount on which the interest is applied would not change. In other words there is no compounded interest under clause 43.1.

The second aspect of the issue is whether interest is actually due. The defendant's submission is that interest was paid when the principal amount was calculated and paid. I have great sympathy for counsels as none of them agreed to the best course of action which was to refer the matter to an agreed independent auditor to establish the actual amount due on the basis of clause 43.1 of the contract, the certificates and what has been paid so far. In order to establish the actual amount due, the court will have to establish the amounts on each certificate, the due date of payment and where payment has been made, the interest at commercial borrowing

rates accumulated at the time of payment. And where payment has not been made, what is the rate of interest (which may vary over time) and what interest is payable for each certificate? This is also affected by the payments so far made. This is not a commendable course of action as I shall demonstrate.

I have carefully considered the pleadings. The plaint was filed on 4 January 2008. Paragraph 3 of the plaint pleads that the suit was for recovery of **Uganda shillings 1,604,009,782/=** and the facts in support of the claim generally is that it is the outstanding certified payments and accumulated interest thereon. Additionally the plaintiff claimed general damages for breach of contract and costs of the suit. The averments in paragraph 3 of the plaint further confirmed and are repeated in paragraphs 6 and 7 which I reproduce here under:

"6.The Plaintiff further avers that the outstanding certified payments and interest to it from the defendant for provision of the contractual services is the sum of **Uganda shillings 1,604,009,782/=** (... amount in words)

7.The Plaintiff further states that on 14th of March 2007, the Permanent Secretary Ministry of Health wrote to the plaintiff acknowledging the ministries indebtedness and stated that the amount owed by the defendant was **Uganda shillings 1,427,368,717.81/=** (amount is also stated in words). A copy of the said letter is attached and marked "A"."

In paragraph 8 of the plaint the plaintiff avers that the amount of approximately **1.4 billion Uganda shillings** was exclusive of interest and a copy of the letter was attached and marked to the plaint as annexure "B". Paragraph 3 of annexure "B" and the last two sentences thereof reads as follows: "*Interest payments on delay beyond 28th of February 2007 would be added on the same basis on last day of every subsequent month until the full payment is realised. It should be noted, however, that this amount is excluding VAT component as per item number 2 above.*"

There is no controversy about the fact that the Ministry of health paid the plaintiff **Uganda shillings 1,200,000,000/=**. This was admitted by the Permanent Secretary in a letter to the Solicitor General dated 8th of April 2011 and copied to the plaintiff. Subsequently an admission was made of an outstanding amount of **Uganda shillings 452,452,349.70/=** owed to the plaintiff and judgement was

entered under order 13 rule 6 of the Civil Procedure Rules for that amount. Judgement on admission was entered on 21 April 2011. According to PW1 the sum of **1,200,000,000/=** was paid on 24 April 2009. This evidence has not been contradicted and is proven. The time of payment is approximately one year and two months after the filing of the plaint. Secondly subject to proof, from the pleading it can be deduced by a simple subtraction of the amount claimed in the plaint in paragraph 7 from the amount in paragraph 6 that the interest which is included in paragraph 6 is **Uganda shillings 176,641,065/=** as at the time of filing the plaint. From the pleadings therefore and subject to proof the sum of **Uganda shillings 176,641,065/=** is the interest claimed on all the outstanding sums as at the time of filing the plaint by the plaintiff.

At the hearing of the suit, PW1 testified that he had calculated interest and the calculations which he made were exhibited as exhibit P3. He calculated interest on the admitted amounts and testified that it should have been paid on 21st of June 2008. However because it was not paid in time, **Uganda shillings 1,200,000,000** was paid in April 2009. He testified that interest accumulated on the admitted amount. Thereafter the balance decreed by the court on admission was paid on 24 June 2011. Judgement on admission was **Uganda shillings 452,452,349.70/=**. He testified that the interest was calculated latest up to 31 March 2012. According to PW1 the total interest payable on the admitted sums would be **Uganda shillings 1,101,047,657/=**. Exhibit P3 is the tabular form of the calculation of interest by PW1. PW1 further testified that he applied an interest rate of 24% which is the rate at which interest on delayed payments had been calculated and paid in the past. This information was not discredited during cross-examination and is proven. The witness testified that the interest was compounded. The handwritten calculations of PW1 were admitted during cross-examination as exhibit D1.

The next testimony on the matter is that of Mr Anil Patel who testified as PW2. He however did not testify about the rates of interest. DW1 Francis Wakabi a Civil Engineer with the Ministry of Health gave their understanding of clause 43 of the contract to be that so long as a certificate is not paid, interest should keep on accruing. He testified that the correct amount by 21st of June 2008 was confirmed by the Ministry of health in writing to the plaintiff. The position of the Ministry is that the principal amount and interest was paid. His interpretation of clause 43.1 was that the interest on any certificate which has been delayed had to be claimed in

the next payment or else forfeited. DW1 did not dispute the fact that they were delayed payments as far as certificates number 12 and 13 are concerned. On cross examination he testified that payment was done on the certificates and the Ministry put in writing what the position was. Interest and principal were included in the figure of **1.652 billion Uganda shillings**. There was no segregation between the principal and interest in the figure.

I have carefully examined the evidence on record and tried my best to analyse the facts. From the evidence on record, the due date of payments was the 31st of June 2008. The actual amount due is pleaded in the plaint as the principal amount in paragraph 8 exclusive of interest and is contained in annexure "B" to paragraph 8 of the plaint. The sum according to the pleading of the plaintiff and the letter of PW1 dated 19th of March 2007 is **Uganda shillings 1,427,371,466.81/=**. It accepts the figures pleaded in paragraph 7 of the plaint by letter of the Permanent Secretary dated 14th of March 2007 to the Director Operations of the plaintiff. It is exactly the same figure as quoted by the plaintiff and pleaded in paragraphs 7 and 8. The plaintiff cannot depart from pleadings without amendment in terms of order 6 rule 7 of the Civil Procedure Rules which provides that "No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleading of the party pleading that pleading." The rationale behind the rule is that the plaintiff is obliged to prove what is pleaded. This is because it operates as notice to the defendant as well as to the court. It constitutes the cause of action in that they are the relevant facts which the plaintiff must prove for judgement to be passed in its favour. Exhibit P3 which is the tabular form on calculations of interest by the plaintiffs PW1 does not give the position of the plaintiff as at the time of filing the plaint and it also compounds interests. Furthermore no evidence of certificates was adduced to assist the court in arriving at the interest payable on each certificate.

The conclusions that can be reached from the evidence is that by 4 January 2008 when the plaint was filed, the outstanding amount due to the plaintiff inclusive of interest was **Uganda shillings 1,604,009,782/=**. This amount is pleaded in paragraph 3 of the plaint. It is also pleaded in paragraph 6 of the plaint as reflecting the outstanding certified payments and interest on it. Additionally the amount was claimed in the prayers as the outstanding certified payments and interest were made in accordance with the contract. The letter relied on by the plaintiff dated 8th

of April 2011 and addressed to the Solicitor General by the Permanent Secretary Ministry of Health states in part that it was agreed by the parties during mediation hearings on 20 March 2008 that the government owed the plaintiff **Uganda shillings 1,821,399,303.67/=**. Subsequently the government paid **Uganda shillings 1,200,000,000/=** leaving an outstanding balance of **Uganda shillings 621,399,303.68/=**. The Ministry of Health decided to make further adjustments by deducting **Uganda shillings 168,946,953.98/=** as 15% penal interest bank charges erroneously added by the plaintiff in their computation. Consequently the Ministry admitted **Uganda shillings 452,452,349.70/=** and basing on the submission of the plaintiff on the basis of the letter dated 8th of April 2011, judgement on admission was entered for the admitted amount in April 2011 (21st of April 2011). In addition to the amount of **1.2 billion** paid on 24th of April 2009, the balance paid on 24th of June 2011 based on the judgement on admission when added amount to **Uganda shillings 1,652,452,349.7/=** which is the total amount paid so far. If the principal amount together with interest pleaded in paragraph 3, 6 and the prayers of the plaintiff are subtracted from the total amount so far paid, one gets an additional amount to the pleading in the plaint of **Uganda shillings 48,442,567.7/=**. In other words this seems to be the additional amount paid in interest since the suit was filed in January 2008 which is additional to what was pleaded as the principal amount together with interest.

Clause 43.1 provides that interest on late payments shall be calculated and paid simultaneously with the claim of the next certificate when it is paid. However the circumstances are that no monies were paid be it principal sums or interest on delayed payments. The defendant admittedly through the testimony of DW1 bundled up the principal sum together with interest and without a table form indicating the principal as against interest and it is difficult to calculate interest payable without the danger of charging interest on interest. Consequently, the principal sum due and interest should be calculated according to the wording of clause 43.1 of the contract as payments are progressively made on the delayed amounts. This would be an audit problem that cannot be solved by the court. The court can only hold that on the basis of clause 43.1 when any payment is made, it should at that point include all the accumulated interest. The accumulated interest shall be added to the sum of the next certificate which has a fresh principal sum. As to whether the entire accumulated interest would be cleared in the next payment

would depend on the amount paid. I.e. all interest previous to payment of 1,200,000,000 should be included in this amount. The balance thereof becomes the outstanding principal and starts accumulating interest on the ground that it is a delayed payment. If the accumulated interest at the point of payment of the admitted 1.2 billion payments made in April 2009 was less than that amount paid, it would mean that the accumulated interest is wiped out and some of the principal amounts are paid up and thereafter interest on the principal balance would start accumulating afresh. It is up to an auditor to work out what the outstanding interest was when 1.2 billion was paid. Thereafter interest is calculated afresh from the principal outstanding only. If accumulated interest remained outstanding, it does not attract interest. For emphasis interest is only payable on the principal amount whose payment has been delayed by more than 28 days from the date of the certificate.

Originally I had advised the parties that the question of how much interest was due should be referred to auditors. My conclusion is based on the premises that the averments in the plaint were the common position admitted by the defendant. The question to be resolved in terms of mathematics is simply a matter of accounts. My calculations may be wrong because I might miss an essential step. In keeping with the practice of the court and the provisions of section 27 (c) of the Judicature Act cap 13 laws of Uganda, the question of how much interest is due shall be referred for trial by an independent auditor appointed by the court. The referee who will try the question shall be appointed by the registrar under section 27 (c) of the Judicature Act. The official referee so appointed shall apply the rate of 24% per annum on the principal amount based on the certificates as at the date of filing the suit. It is therefore the conclusion of this matter that interest is calculated on each certificate after its issuance and the date of calculation commences 28 days after issuance of each certificate. The interest shall be added onto the principal amount as at the date of filing the suit and any amounts so far paid shall be deducted to establish the amount due. First under clause 43.1 accumulated interest is first deducted before the principal is deducted if any money is left over. Interest is calculated only on any outstanding principal amount. The auditor shall first establish the following:

1. The outstanding amount at the time of filing the plaint on 4 January 2008 as reflected in this judgment above.

2. The interest due at the time of filing the plaint on 4 January 2008 as reflected in this judgment above.
3. Calculate any additional interest on the principal admitted amount pleaded from the date of filing the plaint till payment of Uganda shillings 1,200,000,000/= in April 2009. The date of calculation should be by 30th April 2009.
4. Subtract all accumulated interest from the amount of Uganda shillings 1.2 billion paid in April 2009 to the plaintiff by the defendant as established in this judgment.
5. Subtract any amount from the principal amount if there is any balance left over from offsetting all accumulated interest from the amount of Uganda shillings 1.2 billion paid in April 2009.
6. Calculate interest on any outstanding principal amounts after applying the above procedures up to the date of the second payment of **Uganda shillings 452,452,349.70/=** which was paid on 24 June 2011 to the plaintiff.
7. Any accumulated interest is calculated from 1st May 2009 up to 24 June 2011 and shall be deducted from the next payment reflected in number 6 above.
8. If there is any principal amount left over after offsetting the accumulated interest and any outstanding principal amounts, interest shall be calculated thereon at the rate of 24% per annum from 24th of June 2011 up to the date of judgement which is 15th of February 2013.

The official referee appointed under section 27 (c) of the Judicature Act shall be an officer of the court and will determine the amount due to the plaintiff if any according to the above formula.

The second issue is:

Whether the plaintiff is entitled to an award of general damages for breach of contract?

The plaintiff claims the sum of Uganda shillings 240,000,000/= as general damages for breach of contract. The amount of Uganda shillings 240,000,000/= is arrived at using two alternative routes. The first premises are based on the financial statements of the plaintiff for the years of income 2003, 2004 and 2005. The

plaintiff's contention is that the statements clearly show that due to the default of the defendant to pay the plaintiff in time, the income of the company significantly dropped. Alternatively that when one compares the exchange rates for the years of income 2004 to date, the shilling has lost out to the dollar in that the exchange-rate shows that the value of the dollar has appreciated as against the Ugandan shillings over a period of time. The exchange rates are reflected in tabular form in exhibit P3 for the period 1990 – 2011. In July 2004 \$1 was equivalent to 1068.02 shillings. In July 1998 US\$1 was equivalent to 1235.02 Uganda shillings. In July 1999 US\$1 was equivalent to Uganda shillings 1454.51. In July 2001 US\$1 was equivalent to Uganda shillings 1596.41. In July 2001 US\$1 was equivalent to Uganda shillings 1726.07. In July 2002 US\$1 was equivalent to 1803.36 Uganda shillings. In July 2003 US\$1 was equivalent to 1995.02 Uganda shillings. In July 2004 it was Uganda shillings 1747.66. In July 2005 it was Uganda shillings 1754.39. In July 2006 it was 1857.72 Uganda shillings. In July 2007 the dollar was 1652.87 Uganda shillings. In July 2008 the dollar was 1633.94 Uganda shillings. In July 2009 a dollar was 2110.77 Uganda shillings. In July 2010 the United States dollar was equivalent to Uganda shillings 2257.29. Finally in July 2011 the United States dollar was equivalent to Uganda shillings 2587.23. Basing on those calculations, the plaintiff claims to have lost as against the dollar consequently the value of the anticipated payments.

It is not in issue that there has been a breach of payment terms by delays in payment. What Counsels have not addressed the court on is the fact that delays in payment by 28 days from the date of each certificate of completion attracts contractual interest. In other words the contract itself has provided avenues for compensation of the plaintiff if there is any delay in payment. Allegations of breach of contract do not indicate the provisions of the written contract that have not been complied with by the defendant. The relationship between the parties is governed by a written contract. There are several clauses that envisage that something may go wrong and the provisions of the contract do cater for the consequences thereof. For instance clause 44 provides for compensation events. I would just highlight a few of the compensation events. Under clause 44.1 (a) a compensation events includes an event where the Employer does not give access to a part of the site by the site possession date stated in the Contract Data; Under clause 44.1 (h) where other contractors, public authorities, utilities, or the

Employer does not work within the dates and other constraints stated in the contract, and they cause delay or extra costs to the Contractor; under clause 44.1 (i) "The advance payment is delayed."; (j) "the effects on the Contractor of any of the Employers risks."; "(k) The Consultant unreasonably delays issuing a Certificate of Completion." The list of events is defined as compensation events. Under clause 44.2 if a compensation event causes additional costs or would prevent the work being completed before the intended completion date, the contract price shall be increased or intended completion date extended. The consultant shall decide whether and by how much the contract price shall be increased and whether and by how much the intended completion date shall be extended.

In this case, the defendant has not denied that payment to the plaintiff had been delayed. Under paragraph 9 of the plaint, the plaintiff avers that despite repeated reminders to pay, the government of Uganda has failed/neglected/refused to pay the outstanding sums to the plaintiff and by reason whereof the plaintiff has suffered loss and damage. Consequently, the claim for loss and damage arises from failure or neglect to pay or refusal to pay. The prayer in the plaint is for general damages for breach of contract. The plaintiff's case is that it is entitled to prompt payment upon submitting its monthly statements indicating the amount of work done and upon a certificate of completion being issued by the consultant. Under clause 43.1 of the contract payment is supposed to be effected within 28 days from the issuance of a certificate of completion. The plaintiff duly completed the work and outstanding certified payments and interest were computed. Penalty for late payment is interest at commercial borrowing rates 28 days after the issuance of a certificate of completion until payment. The interest sums claimed under this contract and in the plaint are contractual interests for delayed payments. The plaintiff pleads in paragraph 4 (c) of the plaint that it is entitled to interest on any delayed/late payments calculated in accordance with the terms of the contract. The plaintiff's director PW1 has gone ahead to tabulate interest on the basis of the delay in payments.

The general damages claimed by the plaintiff are therefore over and above contractual interest that is provided for under clause 43.1 of the contract. Several authorities advance the position that a plaintiff cannot recover more damages for delayed payments than what is stipulated in the contract. The authorities are as follows:

In **Halsbury's laws of England fourth edition reissue volume 12** (1) and paragraph 1063 thereof page 484, upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow. This is consistent with the enforcement of contractual interest under the Civil Procedure Act, section 26 (1) thereof. Contractual interest is enforceable unless shown to the satisfaction of Court under section 26 (1) of the Civil Procedure Act that the agreed rate of interest is “*harsh and unconscionable and ought not to be enforced by legal process*”. According to Halsbury's laws of England (supra), the rate of interest agreed to will be the measure of damages no matter what inconvenience the plaintiff has suffered from the failure to pay on the day payment was due. The following authorities support this proposition of law. In the case of **Trans Trust S P R L v Danubian Trading Co Ltd [1952] 1 All ER 970** Denning LJ said at Page 977 where special loss is foreseeable as a consequence of non-payment, that loss is recoverable. He held as follows:

“It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the introduction of the Law Reform (Miscellaneous Provisions) Act, 1934, s 3(1): see *London, Chatham & Dover Ry Co v South Eastern Ry Co*; but the ground was that interest was “generally presumed not to be within the contemplation of the parties”: see *Bullen & Leake*, 3rd ed, p 51, note (a). That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. *But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be recoverable.*” (Emphasis added)

In the plaintiff's case, what is recoverable for delays in payment are interest at commercial lending rates under clause 43.1 of the contract. The evidence on record is that there were delays in payment. However during the mediation the Ministry was willing to pay. Secondly the Permanent Secretary Ministry of Health admitted that it owed the plaintiff according to the contract. Where parties agree as to the consequences for non – payment of money, such non-payment is enforceable under the strict provisions of the contract unless it is shown that the terms of the contract

are harsh or unconscionable or amount to a penalty as provided for under section 26 of the Civil Procedure Act. According to Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065 at page 486:

"The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered."

Consequently the plaintiff is entitled to claim liquidated damages at the rate of interest agreed to for delayed payments. This is normally claimed as special damages. The authorities also agree that the plaintiff can only claim the agreed amount and nothing less or more and there is no need to prove the actual loss suffered. In the case of **Suisse Atlantique Société D'armement Maritime S A v N V Rotterdamsche Kolen Centrale [1966] 2 All ER 61** a judgment of the House of Lords , Viscount Dilhorne said on the same principle of law at page 69 as follows:

"Here the parties agreed that demurrage at a daily rate should be paid in respect of the detention of the vessel and, on proof of breach of the charter party by detention, the appellants are entitled to the demurrage payments without having to prove the loss which they suffered in consequence. In my view, the appellants cannot avoid the operation of these provisions and cannot recover more than the agreed damages for the detention of their vessel..." (Emphasis added)

Such a contractual clause is enforceable irrespective of the adequacy of the amounts stipulated in the contract and the plaintiff cannot claim for more than is provided for. This was held by Lord Reid at page 77 of the said judgement of the House of Lords:

"The appellants chose to agree to what they now say was an inadequate sum for demurrage, but that does not appear to me to affect the construction of this clause. Even if one assumes that the \$1,000 per day was inadequate and was known to both parties to be inadequate when the contract was made, I

do not think that it can be said that giving to the clause its natural meaning could lead to an absurdity or could defeat the main object of the contract or could for any other reason justify cutting down its scope. If there was a fundamental breach, the appellants elected that the contract should continue, and they did so in the knowledge that this clause would continue.”

In the premises, the main claim of the plaintiff as pleaded in the plaint arises from delay or neglect to pay within time. No other provisions of contract have been pleaded or proved to have been breached by the defendant. In the circumstances and from the evidence on record, the injuries suffered by the plaintiff if any are based on delays in payment. The allegation that there was neglect in payment is the same as saying there was delay in payment. The contract was admitted by the defendant and in fact the plaintiff attached an admission and acknowledgement of the Permanent Secretary Ministry of Health in the letter annexure "A" to the plaint. The fact that the defendant owed the plaintiff was never in dispute by the time the plaint was filed. Secondly, the pleadings show that the defendant was willing to pay and negotiations were going on at the time the plaint was filed. It is further an admitted fact that payment was made in April 2009 of **Uganda shillings 1,200,000,000/=** in partial settlement of the plaintiffs claims. The plaint had been filed in January 2008. Subsequently there was judgement on admission of the remainder of the amount owing. It is my conclusions that the cause of action of the plaintiff was based on clause 43.1 which provided that any delay of more than 28 days would attract interest at commercial borrowing rates until full payment. That is the only damages recoverable by the plaintiff for the delay in payment. The plaintiff cannot claim additional amounts. Consequently the claim for Uganda shillings 240,000,000/= as general damages for breach of contract is disallowed.

Costs

As far as costs are concerned, the plaintiff's counsel submitted that under section 27 (1) of the Civil Procedure Act costs are at the discretion of the judge. He relied on the case of **Francis Butagira vs. Deborah Namukasa** (1992 – 1993) HCB 98 for the principle that costs should follow the event and a successful party should not be deprived of costs except for good cause.

In reply the defendants counsel submitted that costs are at the discretion of the court. He invited the court to consider the fact that the suit amount with the interest inclusive was paid by 21 April 2011 and the conduct of the defendant in no way frustrated the trial of the matter. The defendant has done its best to settle its indebtedness to the plaintiff.

In view of the findings of the court that the plaintiff is entitled to interest on the delayed amounts, costs shall follow the event. The plaintiff is awarded costs of the suit. In summary the following orders issues:

1. The plaintiff is awarded any outstanding sums calculated by the official referee to be appointed by the registrar following the guidelines in this judgment written above. Where an outstanding principal amount is established up to the date of judgment (15th February 2013) interest shall continue on the outstanding principal amount from the date of judgment at commercial borrowing rates till payment in full as stipulated in clause 43.1 of the contract between the parties.
2. The plaintiff is not entitled to general damages on the basis of delay in payment as delays are compensated by an award of interest at commercial borrowing rates per annum with effect from the 28 days after due date of payment until the next payment.
3. The plaintiff is awarded costs of the suit

Judgment delivered in open court this 15th day of February 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Paul Rutisya counsel for the plaintiff

Gerard Batanda State Attorney

Raj Diwani Operations director of Plaintiff in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

15th day of February 2013