THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC – CS - 248 - 2008

FACE TECHNOLOGIES (PTY) LTD ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. ATTORNEY GENERAL
2. UGANDA BUREAU OF STANDARDS :::::::::::::::::: DEFENDANTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Face Technologies (PTY) hereinafter called the Plaintiff sued the Attorney General in his representative capacity and Uganda Bureau of Standards who will both be referred to in these proceedings as the first and second Defendant respectively. The Plaintiff claims special and general damages, lost profit and costs as a consequence of breach of contract entered into by the parties for the National Population Data Bank & Identification System a project that is hereinafter referred to as 'NPDB & IS'.

Desirous of a National Population Data Bank & Identification System, the Defendant advertised in the press seeking expression of interest by way of competitive bidding by companies that would come up with a population data bank and a system of identification. The bidding

documents specified that the contract would be a Build, Operate & Transfer hereinafter referred to as 'BOT'. In the contract, the bidder would be the financer, in this case the Plaintiff.

The Plaintiff emerged the best evaluated bidder and was accordingly notified on 5th January 2006. The letter to the Managing Director of the Plaintiff in part read;

> *"This is to inform you that your technical proposal was evaluated and ranked highest among all the bid submissions. However, given the nature of this Build, Operate & Transfer procurement it has been decided that detailed negotiations be held between you and the Government of Uganda to be able to maximize on the benefit that may accrue from your offered solution."*

The Plaintiff was invited for negotiations with the Government of Uganda on 5th January 2006 as Exhibit P.8 showed. The negotiations took place on the 9th January 2006 and at the end of it all, the Plaintiff was approved and notified as Exhibit P.3 indicated. The notification dated 23rd January 2006 signed by the Chairman Contracts Committee showed that the National Population Data Bank & Identification System which was the subject of procurement conducted under Open International Bidding had been awarded to M/S Face Technologies (PTY) Ltd, the Plaintiff.

On the 2nd February 2006 however, the same Chairman Contracts Committee wrote to the Managing Director of the Plaintiff stopping it from proceeding with the execution of the contract Exhibit P.4.
He wrote:

> *"This is to inform you that the IGG has stopped all activities relating to the award of tender with effect from 27th January 2006. This is to enable the IGG to investigate allegations raised by aggrieved bidders in the tender process ... You should therefore wait for communication on the decision of the investigating authority before taking further steps in this area."*

Having got no further communication, the Plaintiff's advocate on the 1st February 2008 Exhibit P.9 raised the matter with the 2nd Defendant in a letter. Receiving no proper response, the Attorney General was served with a statutory notice followed by this suit.

The Defendants denied liability and contended that a contract had never been finalized because not all the salient features had been discussed. They specifically denied that a contract ever existed and that if any contract had ever existed, it was frustrated by the IGG when she directed the suspension of the project.

The issues that emerged for resolution were agreed on by the parties as follows:-

1. Whether there was a contract formed between the Plaintiff and the Defendants?
2. If so, whether the contract was breached?
3. Whether there was frustration of the contract?
4. What remedies are available to the parties?

Issue 1: <u>Whether there was a contract between the parties</u>?

Both parties are agreed that the Defendants did advertise inviting bids for the establishment of National Population Data Bank & Identification System. Eight companies applied and 3 were prequalified. That subsequently the Plaintiff was evaluated as the best bidder and was invited for contract negotiations, where in he presented his procedure of work, work content, programme out laying the time spans of each phase to the satisfaction of the government negotiating committee; which awarded the Plaintiff the contract and on 23rd January 2006 notified them of the contract award. This award was signed by the Chairman of the Contract Committee.

This award was however suspended on 2nd February 2006 when the Chairman of the Contract Committee wrote to the Plaintiffs informing them that the IGG had directed the suspension.

It is the Plaintiff's contention that by the time this suspension took place, the contract was in place and they had begun working. PW1 told Court that they started work after they agreed on the implementation schedule. That they had agreed to run Phase 1 and Phase 2 parallel if they were to beat time and that that is why immediately after the negotiation meeting, they started to develop the solution and indeed developed the solution. Asked what work they were supposed to do under Phase 1 and Phase 2, he told Court that Phase 1 if completed would get the system more or less ready. That apart from developing the solution, it included user administration to register people on the system, to go out and do the actual registration, to mobilize mobile equipment to get data from all the people by setting up finger print solution and verifying them in the Database before issuing the cards.

As for Phase 2, it was handling all the other documents like death certificate, marriage certificate, personal changes, passports, VISAs and working permits. He concluded that by the time they were stopped, Phase 1 was complete since the software solution had been obtained and putting it together with Phase 2, about 80% of the work had been concluded. He testified that formal registration had not started and on cross-examination he admitted that Phase 1 had not been completed.

The Defendant does not dispute the fact that the Plaintiff was found to be the most desirable bidder and that a notification of award was made to him. What the Defendant disputes is that there was a valid contract entered into by the parties.

The defence of the Defendants is based on points of law whose effect is that there was no signed contract and therefore the procedures laid out in the Public Procurement & Disposal of Public Assets Act (PPDA) 2003 and Regulations made thereunder were not complied with and consequently there was no enforceable contract between them.

Counsel for the Defendant also faulted the contract because it had not been approved by the Attorney General. In this she relied on Article 119(5) of the Constitution of the Republic of Uganda 1995 which provides:

> *"Subject to the provisions of this constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General,*

except in such cases and subject to such conditions as Parliament may by law prescribe."

She also relied on the case of **Nsimbe Holdings Ltd V The Attorney General & Another Constitutional Petition 2/2006** in which National Social Security Fund had entered into a contract with Mugoya Estates without involving the Attorney General. The Court held that such a contract was unlawful and could not be allowed to stand.

The instant case however was a case where in the contracting parties knew that some of the final necessities of contract would be entered into during the implementation as illustrated by Exhibit D3. The issue of approval by the Attorney General is a Constitutional requirement and it is mandatory. This function of the Attorney General can and in most cases is handled by the Solicitor General.

The Solicitor General derives this authority from Section 29 of the Interpretation Act which states;

"Any power conferred or duty imposed on the Attorney General by or under any Act may be exercised or performed by the Solicitor General:

a) In any case where the Attorney General is unable to act owing to illness or absence.
b) In any case or class of cases where the Attorney General has authorized the Solicitor General to do so."

The foregoing means that agreements that require approval of the Attorney General could receive it from the Solicitor General.

It is these provisions that the Constitutional Court took into account in **Nsimbe Holdings Ltd V The Attorney General & Another** (supra) where in the Court held:

> *"Any contract, agreement, treaty, convention or document by whatever name called to which Government is a party shall not be concluded without the legal advice from the Attorney General and its therefore unconstitutional to proceed without the legal advice of the Attorney General."*

The contract in the instant case would indeed have been illegal if the Solicitor General had not been involved in it.
Exhibit P.2 does not only show that the Solicitor General was involved, but also that he gave the assurances that negotiations were within the Procurement law.

Where the Solicitor General's representative was present, he encouraged and advised that all the regulations pertaining to the contract had been followed and that the Plaintiffs were protected under Constitutional provisions Article 16 and Section 28 of the Uganda Citizenship and Immigration Control Act, the Defendant could now not turn round and say that the Attorney General who was represented by the Solicitor General did not approve the contract.
The instant case is thus distinguishable from **Nsimbe Holdings Ltd V The Attorney General & Another** (supra) in that while in the latter there as no involvement of the Attorney General, in the instant case, the Attorney General was visibly represented.

Counsel for the Defendant submitted that all public procurement was subjected to the Public Procurement & Disposal of Public Assets Act. She cited Section 55 which provides that all public procurement & disposal shall be carried out in accordance with the rules set out in this part of the Act, any regulations and guidelines made under this Act.

She also relied on Section 76 of the Act which provides:

> 76 (1) For the purposes of this Act, an award decision is not a contract.
>
> (2) An award shall not be confirmed by a procuring and disposing entity until –
>
> a) the period specified by regulations made under this Act has lapsed; and
>
> b) funding has been committed in the full amount over the required period.
>
> (3) An award shall be confirmed by a written contract signed by both the provider and the procuring and disposing entity only after the conditions set out in subsection (2) have been fully satisfied.
>
> (4) The award decision shall be posted in a manner prescribed by regulations during the period specified in paragraph (a) of subsection (2).

Basing their argument on Section 76(3) which requires contracts to be signed, the Defendant contended that the absence of a signed document completely removed the Plaintiff from the bracket of a contractual relationship with the Defendant. By this one would conclude that if there had been a written document, seen and considered by both parties, signed by both declaring their assent, and

if then both had acted upon the terms so written a contract would have been constituted and the argument whether there was a contract or not would not have arisen. However, these were not the circumstances in the instant case. What pertained here is that no written agreement was drawn and signed. For the Plaintiffs to sue and maintain the suit, the burden lay upon them to prove that a contract existed between them and the Defendants. This they tried to justify through several pieces of evidence which included communications between the parties, minutes of meetings, conduct of the parties and the law.

The Plaintiff contended that the dealings between them were not governed by the Public Procurement & Disposal of Public Assets Act because the relationship was that of a Build, Operate & Transfer (BOT). That this Build Operate & Transfer relationship was stated by PW1 when he told Court that they were involved in Build, Operate & Transfer in several contracts and that this was the method that they discussed in the meeting with the contract negotiating committee in Entebbe. He gave an example of one of those being the Uganda Drivers Licence on which they had been working for the last 9 years.

PW2 stated that at the commencement of the contract negotiations, the Plaintiff had asked for assurances that it would not be disadvantaged bearing in mind that this was a Build, Operate & Transfer project and therefore unique, which assurances were given.

Counsel for the Plaintiff submitted that this contract was a Build, Operate & Transfer concept. That it was a Build, Operate & Transfer understanding was also supported by DW2. In her testimony she stated:

> *"This was a National Professional Data Bank & Identification Solution the government was trying to put in place to have a national identity card. This contract was a Build, Operate & Transfer where the investor would invest his resources and government was a beneficiary and it was supposed to be agreed on how the investor would recoup his investment."*

In a memorandum – Exhibit D3 page 112, DW2 writing to the Hon. Minister of Finance made it clear that this was a Build, Operate & Transfer contract. She wrote:

> *"The purpose of this communication therefore is to bring it to your attention that;*
>
> 1. *The bid validity has to be extended before expiry date of 28 January 2006.*
> 2. *The current Public Procurement & Disposal of Public Assets Regulations do not have provisions for Build, Operate & Transfer contracts. In order to handle the Build, Operate & Transfer investment projects fairly, international regulations need to be applied.*
> 3. *All this process has been done in consultation with Public Procurement & Disposal of Public Assets Authority."*

These statements from DW2 left no doubt that contracts of Build, Operate & Transfer did not fall within the provisions of the Public Procurement & Disposal of Public Assets Act. This meant that the contract in question fell out of the ambit of Section 76 that made the requirement of a signed contract mandatory.

It further meant that the interpretation of whether a Build, Operate & Transfer contract had been entered into could be done by applying

other laws, domestic or international. DW2 emphasized that international regulations would be applied.

From DW2's statements it is also made clear that Reg. 243(2) of the Public Procurement & Disposal of Public Assets Regulations 2003 had been complied with. The Regulation provides:-

> *" (2) Where a project is to be financed or partially financed under a Build Own Operate (BOO), Build Own Transfer (BOT), Build Own Operate Transfer (BOOT), Public Private Partnership (PPP) or similar type of private sector arrangement, a procuring and disposing entity shall seek guidance from the Authority on the applicable procurement procedures and documents."*

That the foregoing Regulation was complied with received illustration from Exhibit D2 page 22 in a letter from the Executive Director of the Public Procurement & Disposal of Public Assets Authority to the Permanent Secretary Minister of Internal Affairs dated 12th April 2005. I find it necessary to reproduce it here;

> *"The Authority has been participating in an advisory role in the above committee that you chair. Our role was to advise on the preliminary steps and procurement procedures to kick start this process.*
>
> *Now that the procurement process is under way with Expression of Interest issued to all potential bidders, the authority is of the opinion that due to our mandate as a regulatory authority for procurement, we cannot continue to*

participate in the development of the bidding documents and to follow on bidding process. The Authority may in future monitor compliance, audit the procurement process and also hear complaints from bidders.

This is to therefore inform you that the Authority will not be attending any future meetings of the above steering committee dealing with the bidding process."

From the foregoing, it is clear that the Public Procurement & Disposal of Public Assets Authority got involved only to fulfill the requirements of Reg. 243(2). Build, Operate & Transfer being a type of contract that did not fall within the provisions of the Public Procurement & Disposal of Public Assets Act, the Authority's role was simply advisory and as DW2 stated, its interpretation could best be handled under International provisions.

If then it did not fall within the Public Procurement & Disposal of Public Assets Act and there was no signed contract, where did the relationship between the parties fall? The answer to this question lies in the communication and conduct of the parties.

Both parties had met on several occasions. The work content, procedures and time spans were agreed. The need for the work to commence expeditiously is found in several pieces of communication and the evidence of all witnesses.

PW1 told Court that even before the notification of the award, there was pressure from the beginning that time was of the essence. He said the Minister said the matter was urgent and that the solution was

required urgently. He added that during the negotiations at Entebbe, while everyone in the government negotiating team repeated themselves that the Plaintiffs were the successful bidder, at the same time emphasized that time was of the essence. That the pressure exerted on them made them drop other commitments because they had to meet the time span set in the negotiating meeting. He added that if they failed to meet the time scales, the solution would not be operationalised in time which would put their money, company and banks at risk.

In a meeting known as the Pre-Bid Conference – Exhibit D3 page 65, the Minister in Charge of Planning; Ministry of Finance, Planning and Economic Development cautioned the aspiring bidders on time essence of the project and while considering the importance of the time factor, he advised that the technology to be provided should be one to be lived with.

DW2, in a letter to the IGG dated 18th August 2006 – Exhibit D3 page 127 stated that the procurement committee had emphasized the need to maintain the time standards that had been set and that because of the need for speed, outstanding issues which could not be resolved at the time of the award would be dealt with during implementation.

In Paragraph 11 of the letter, she wrote:

> *"It is therefore not easy to have all issues finalized at the onset until the business is in place and its level of success is measured appropriately. It is then that the two parties can decide on the way forward."*

It would seem by this statement that it was only during the execution of the project that the contents of the contract to be signed would be clear. It follows that whatever contract was envisaged would act retrospectively. See **Trollope & Colls Ltd V Atomic Power Construction Ltd [1963] 1 WLR 333** in which it was held:

> *"The parties may begin to act on the terms of an agreement before a contract between them is actually concluded. That contract may then, if it expressly or by implication provides, have retrospective effect so as to apply to work done or goods supplied before it was actually made."*

The foregoing would lead one to conclude that there was clearly a consensus between the Plaintiff and the Defendant arrived at and expressed by several communications, documentary and oral in which the Plaintiff was approved and awarded the contract based on the clear understanding that speed was of the essence, the course of dealing having been accepted. It is this consensus which must have caused the Plaintiff to mobilize resources, human and otherwise and commence the project. The need for consensus on contracts is well illustrated in the case of **Rose & Frank Co. V J.R. Crompton & Bros Ltd [1924] All ER 248** where it was stated:

> *"It is essential to the creation of a contract, using the word in its legal sense that the parties to an agreement shall not only be ad idem as to the terms of their agreement but that they shall have legal consequences and be legally enforceable."*

The conduct of the parties in itself indicated their intention to form a contract. The Plaintiff had been assured that all the necessary

consultations with the relevant Authority had been done and that they would not be disadvantaged.

They were assured that other aspects would be handled as and when they arose in the course of implementation. It had been made clear that the project was to proceed with all speed. The notification of the award stating the contract price and terms of payment specified coupled with the pressure to work quickly within the time spans; in my view justified the commencement of the project by the Plaintiff.
The question that arises here is whether commencement of execution of a non signed contract was a valid contract enforceable under the law.

In my view, the conduct of parties who have exhibited the meeting of minds in the execution of an understanding could lead to an enforceable contract even in the absence of signatures. This position is as old as the 19th Century in a decision of the **House of Lords** in **Alexander Brogden & Others V The Directors of the Metropolitan Railway Company** (1876 – 77) LR 2 AC. as 666 in which their Lordships dealing with a dispute where the Plaintiffs had supplied coal to the Defendants but no formal contract had been signed held:

> *"The facts and the actual conduct of the parties established the existence of such a contract and there having been a breach of it, they must be held liable upon it."*

It is also accepted in the world of business that even in the absence of a signed contract, the agreements between parties can be enforced where it is shown that the parties intended to enter into the contract in

question. This receives illustration in the case of **Finishing Touches Ltd V Attorney General HCCS 144/2010** in which a contractor had executed works that had been agreed between the Plaintiff and the Defendant but without a formally signed agreement. The learned Judge held that this agreement that had not been signed should have been regularized by the Permanent Secretary so as to enable payment and that even if the Plaintiff had provided his services without a signed agreement to deny it payment for work done would be an injustice.

In the case of **Development Finance Company of Kenya Ltd V Wino Industries Ltd [1995 – 98]2 EA 65** their Lordships relied on **Cairncross V Lorimer]1860]3 LT 130** under similar circumstances as those in the instant case, where the Lord Chancellor stated;

> *"It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be had to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal.*

Their Lordships further cited the case of **Day V Lala [1982] LR 19 IA 203** – writing;

> *"The Principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error."*

From the foregoing, even if the Defendants in pressurising the Plaintiff were acting in error, the Plaintiff who relied on them cannot be faulted.

In the case of **Pan African Insurance Co. (U) Ltd V International Air Transport Association HCCS 667/03** Learned **Justice Lameck Mukasa** relying on the same principles enunciated above, found the doctrine of estoppels applicable where the Plaintiff had made the Defendant believe that a contract was being executed within agreed terms.

In the instant case, the Defendant had made the Plaintiff believe that everything was okay and the contract was lawful, that time was so important and commencement should be immediate; and the signing of the contract would be after all the other outstanding issues had been dealt with during implementation.

The dealing was such that if you asked me when in my judgment the contract was complete, I would answer with certainty that the contract was complete when the Plaintiff, basing on the conduct of the Defendant during negotiations, took the first step in mobilization of resources required for the execution of the contract.

The doctrine of estoppel is laid out in Section 114 of the Evidence Act Cap 6. It provides thus:

> *"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing."*

Lastly, it is a well established principle that where a person who has no control enters into dealings with those whose duty it is to promote the intentions of the legislature, and they do not, any dispute under resolution would be resolved more strictly against those whose duty it was to ensure the following of procedure. This was well enunciated by **Sir Arthur Channel in Montreal Street Ry Co. V Normandin [1917] AC at Page 381** in these words;

> *"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who*
>
> *have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only."*

All the foregoing put together, it is my finding in the instant case that the contract was complete and enforceable notwithstanding the absence of a signed document.

Issue 2: If so, whether the contract was breached?

Having found that there was a valid enforceable contract between the parties, the question then is, whether there was a breach of this contract.

A breach of contract is defined as a violation of contractual obligations by failing to perform one's own promise, by repudiating it or by interfering with another party's performance. **Black's Law Dictionary 8th Edition Page 200**. In the instant case, after the Plaintiff had been given the notification of award on 23rd January 2006 by the Chairman Contracts Committee, the same Chairman wrote back to the Plaintiff on 2nd February 2006 interfering with it's performance of the contract.

He wrote:

> *"This is to inform you that the Inspectorate of Government has stopped all activities relating to the award of the above tender with effect from 27th January 2006. This is to enable the Inspectorate of Government to investigate allegations raised by aggrieved bidders in the tender process. "*

This alone would not have amounted to a breach as the Plaintiff was told to wait which they did. However, the Inspectorate of Government completed her investigations and submitted her report on 30th august 2008 – Exhibit D4 to the President. The Plaintiff was never served a copy of this report.

By 2008, the activities related to the implementation of the contract were still under suspension. Having read the report, Counsel for the Plaintiff wrote to the 2nd Defendant on 1st February 2008 Exhibit P.9 – stating that since the IGGs investigations had ended and no impropriety had been attributed to his client, the Plaintiff expected resumption and completion of the project and awaited confirmation of this. There has been no response from the Defendants to date. Taking into account that about two years had passed since the Plaintiff had

been suspended and no communication had come from the Chairman of the Contracts Committee asking the Plaintiff to resume work, the only conclusion is that the Defendant had abandoned the contract which can only be construed as a breach.

Issue 3: Whether there was frustration of the contract?

In the alternative, counsel for the Defendant submitted that if ever there was a contract, this contract was frustrated. Frustration occurs when the further fulfillment of the contract is brought to an abrupt stop by some irresistible and extraneous cause for which neither party is responsible, the contract shall terminate forthwith and the parties discharged. **Taylor V Caldwell [1863] 3 B and S 826**. It follows that there must be radical changes to the parties principle purpose for entering into the contract or the subject matter must have been removed or destroyed not in default of the parties. This is illustrated in **Krell V Henry [1903] 2 KB 740** where the Plaintiff agreed to let a room to the Defendant for the day upon which Edward VII was to be crowned. Both parties understood that the purpose of letting the room was to view the coronation procession but this did not appear in the agreement itself. The procession was postponed owing to the illness of the king. The Court of Appeal took the view that the procession was the foundation of the contract and that the effect of its cancellation was to discharge the parties from the further performance of their obligations. It was no longer possible to achieve the substantial purpose of the contract.

Frustration can successfully be set up if after the formation of the contract, certain sets of circumstances arise, which owing to the fault

of neither party render the contract impossible. **Potgieter V Stumberg & Another (no. 2) [1972] EA 370**.

Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract?
Secondly, was the performance of the contract prevented?
Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all the questions are answered in the affirmative, then both parties are discharged from further performance of the contract. **Krell V Henry (supra)**.

In relation to the first question, in the instant case the foundation of the contract was the development of a National Population Data Bank & Identification System as set out in the Notification of Contract award – Exhibit P.3. Its performance by the Plaintiff was anticipated by all the parties; the Plaintiff being notified by the 2nd Defendant that they had emerged as the highest bidder and invited for further negotiation Exhibit P.8. This question is therefore answered in the affirmative.

On the second question as to whether the performance of the contract was prevented, it was prevented by the Defendant.
That the parties did not contemplate the frustration of the contract is seen in the conduct of DW1 who first resisted its cancellation. As for the Plaintiff, it had received assurances in no uncertain terms that procedure had been followed and its interests protected. The subject matter was not destroyed, on the contrary it remained in place and was awarded to another contractor – Muhlbauer High Tech

International. This was a contract between the Plaintiff and Government of Uganda. The Inspectorate of Government, Ministry of Finance, Uganda Bureau of Statistics who played part in the suspension and eventually stopping the execution of the contract were and are still Government bodies. This was a contract therefore stopped by Government which was a party to the contract. This contract having been suspended by the Government, the Defendant cannot now turn round and plead frustration.

In the circumstances, the plea of frustration as a defence by the Defendant must fail.

Issue 4: <u>What remedies are available to the parties</u>.

The Plaintiff made several prayers which included; US$ 18,653,781- as costs for the customized solution. US$ 4,296,639- as special damages for related expenses and financial exposure.

It also claimed general damages and punitive damages. It claimed interest and costs of the suit.

On the customized solution, the Plaintiff claimed that on the understanding that it had been awarded the contract, it developed an ICT knowledge based solution and went through the rigors of customizing the software design, development methodology architecture to suit Uganda's specific and unique requirements. It was the Plaintiff's contention that since it had developed this solution for Uganda's specific and unique requirements, it could only be used for Uganda and nowhere else.

That it could only be used in Uganda received support from Laro Systems which produced a report Exhibit P.19(i) in support of the fact that the customized software could only be used for the purpose that it was developed. The Report was written by an independent Biometric Standards Software Integration specialist in the names of Llewellyn Louw. The evidence was not disputed by the Defendant and the court takes it as the truth.

According to the Plaintiff, this solution was worth US$ 18,653,781-. To justify this claim PW1 stated that the money was the cost of their intellectual property which had been built over time and perfected over many years. That they had added functionalities and other smart modules.

Furthermore, that they had customized the solution to handle what they referred to as full “Cradle to Grave” concept specially for Uganda. By this concept it was meant that the software was meant to keep record of a person from birth until his demise. He added that the Plaintiff was a company certified by the International Organisation for Standardization (ISO).

Furthermore, that the many years of research in improving its software covering biometrics like finger prints, facial and iris had resulted into a sophisticated solution.

The Plaintiff supported its status with Exhibit P.5, P.5(i), P.5(ii) and P.5(iii) being registration certificates showing its high capacity in quality management systems.

PW1 also gave a detailed description of what the Plaintiff did to come up with the customized knowledge based solution. It gave details of the research and rigors the Plaintiff went through to customize the solution to Uganda. He said to do so the Plaintiff covered the following;

- Business requirements i.e. System initiation/planning
- Application components
- Documentation and requirement analysis
- Business processes covering functional specifications
- Architectural design and configuration aided by Team knowledge and local knowledge
- Detailed component design and specification
- Component implementation and specification debugging
- Software coding and testing solution overview
- Management control processes
- Planning and deployment and installation
- Research and development to suit country legal and regulatory requirement.
- Human Resource.

On how he reached the sum of US$ 18,653,781-, he stated that an industry standard mobilization fee for a project of this nature and size was normally 30% of the contract price and that the Plaintiff was only claiming 24.93% of the total contract price. He explained that the Plaintiff straight away went into this expense because in a mobilization of a Build, Operate & Transfer Contract, the Defendant was not required to make any upfront payment since that duty fell upon the Plaintiff.

On the issue of keeping human resource in place even after receiving communication to suspend works on the project, Exhibit P.4, PW2 told

Court that since they had not been told that the contract was cancelled, they did not demobilize but remained in a state of "readiness" until August 2006. When he was directed by the management of the Plaintiff to scale down, that that is when he discharged several of the technical personnel but told them to "remain on call should the suspension of the project be lifted."
That it is in this status that the Plaintiff remained until 2008 when it went to Court.

Under cross-examination, PW1 told Court that the special damages claimed as in (a) US$ 18,653,781- and in (b) as US$ 4,296,639 totaling to US$ 22,950,420 was the cost of the solution and costs of related expenses and financial exposure respectively incurred.
None of the two witnesses for the Defendant said anything to dislodge the Plaintiff's claim on the customized solution.

Counsel for the Defendant submitted that the claims that were being forwarded by the Plaintiff were on the premise that there had been part performance yet there was none. She submitted that the Plaintiff failed to show Court what they had actually claimed to have done and that since they had not displayed it to court it could not be held that they had incurred any costs.

The Plaintiff said they developed a solution. There is no doubt that the solution was developed because it was demonstrated to the satisfaction of the Defendant before the award was made.

Exhibit P.2 minute 3.2 clearly stated that Face Technologies gave a presentation of the solution which was found to be good and accepted by the Chairperson and the members who attended.

This also received further support from Exhibit P.19(ii) which was the supporting document to the Intellectual Property included in the Uganda National Population Data Bank Project.

This solution must have been better than those of the other bidders for the Defendant to choose it and exclude those of the other bidders. PW1 testified that the normal percentage of mobilization is 30%. This has not been disputed by the Defendant either through its witnesses or documents.

That notwithstanding, much of the work in the two phases was not done. The two phases set out in Exhibit P.2(ii) included the following;

Phase 1 Schedule:

1. User Registration Specification (URS)
2. Build and Procure
3. Train and Roll Out
4. Kampala Mass Registration
5. Mass Registration Rest of Uganda
6. Finalise Data bank
7. AFIS
8. Card Productivity Facility
9. Produce 10 Million cards

Phase 2 Schedule:

1. URS (Passports, Visas, Smart ID, Cards, Work Permits, Births & Deaths)
2. Build and Procure

3. Train and Roll Out
4. Start Automation

Of all these, the Plaintiff completed one of the important requirements which was the drawing of a User Requirement Specification under Phase 1 and 2. They built software and procured equipment and human resource. This, in my view left out a lot still to be done under the management of the project. They were still faced with mass registration in Kampala and throughout the rest of Uganda, to train and roll out the project implementers, finalise the databank, produce cards and start automation of the project. It is therefore clear that they still had a lot to do and what they did compared to what was yet to be done could not have amounted to 30% of the project.

In my view, considering the amount of work that was yet to be done, I find 10% as the appropriate percentage of work done in the circumstances. The contract price having been US$ 92,049,422-, 10% of this results in US$ 9,204,947.2- which is accordingly awarded for the customized solution.

Turning to the special damages of US$ 4,296,639- as the cost of related expenses and financial exposure, the Plaintiff claimed;

a) Travel and subsistence expenses - US$ 314,865-

b) Hiring floor space for project assembling & preparation - US$ 89,272-

c) Requisition & Preparation of Geographical Information System - US$ 469,467-

d) Senior Project Team costs - US$ 513,182-

e) Operational Team costs - US$ 1,320,115-

f) Consultants on specialized items costs - US$ 174,091-

g) Project equipment and software - US$ 391,937-

h) Project Financing team costs - US$ 114,335-

i) Negotiation documents and preparation - US$ 94,192-

j) Consultants & professional team in Uganda - US$ 447,193-

k) Registration Team Consulting - US$ 361,240-

l) Bid guarantee procurement - US$ 6,750-

PW2 relied on exhibit P.10 which was a record of the Plaintiff's travels in and out of Uganda from South Africa to prove its claim of travel and subsistence expenses.
He relied on Exhibit P.11 which was a record of the Plaintiff's monthly rental for hiring floor space for project assembling and preparation.

With regard to the claim of requisition and preparation of Geographical Information Systems, PW2 relied on Exhibit P.12.
He further relied on a list of personnel who were paid at an hourly rate, Exhibit P.13 to prove the claim of Senior Project Team costs.

On the claim of Operational Team costs, PW2 relied on a list of employees who were referred to as Headquarter Operational Team – Exhibit P.14.

On the claim of Consultants on specialized items, PW2 relied on Exhibit P.15 which was a list of 4 consultants.

On the claim of Project Equipment & Software, PW2 relied on Exhibit P.15 which was an itemized list of equipment and supporting invoices.

With regard to the claim of Project Financing Team, PW2 relied on Exhibit P.16 which was a record of the Plaintiff's employees.

PW2 relied on Exhibit P.17 which was a list of persons on the negotiating team to support the claim of negotiation documents and preparation; some of the names here appear in Exhibit P.2 which form the minutes of the negotiation meeting between the Plaintiff and the Defendant.

With regard to the claim for Consultants and Professional Team in Uganda, PW2 relied on Exhibit P.20 which was a record of the Plaintiff employing Dema Trade Ltd to act as their local consultant. It was to be paid US$ 1,850,000- excluding all taxes and bank charges. That the employees of Dema Trade Ltd were in place is shown by their acceptance of the engagement.

Also for the Human Resource, the Plaintiff retained Unisis Ltd which was to act as the exclusive Human Resource Consultant at a cost of US$ 3,612,414-. This assertion received support from Exhibit P.18.

The Plaintiff also paid for a bid guarantee of US$ 6,714.93- which is supported by Exhibit P.19.

In relation to these claims, Counsel for the Defendant submitted that no air tickets had been attached to show that the Plaintiff incurred travel expenses during specific periods, that there was nothing to show

that some of these travel expenses had not been incurred while the Plaintiff was attending to its other projects in Uganda.

She further submitted that the claims for negotiation documents and preparation ($ 94,192-) and bid guarantee procurement ($6,750) were incurred prior to the contract in discharge of the bidding process and cannot be included in the Plaintiff's claims. That the Defendant was not liable for those costs regardless of the conduct or outcome of the bidding process and that if it were the case, then whoever bided and lost would come and claim costs.

PW2 testified that in earlier discussions, documentation showing these expenses was provided to the Defendant which evidence was not discredited by either DW1 or DW2 nor by cross-examination.

DW2 should have said something about this in her statement but she chose not to; which silence only leads to the inference that the claim was genuine.

I would also agree with the evidence of PW2 that indeed these were documents already given to the Defendant and verified.
I arrive at this conclusion because of the manner in which the record of expenses was handled during cross-examination. If that record was in question, the Defence would not only have cross-examined PW2 on them with a view to discredit them but would even have insisted on the production of the authors of those records. The fact that this was not done is indicative that these were documents that had been agreed upon before the hearing of the case.

Furthermore on the issues of special damages for travel expenses, there is evidence that senior officials of the Plaintiff travelled to Uganda to attend meetings, negotiations and presentation of their work plan and operations. This receives support from Exhibit P.2 which shows the attendance of the Plaintiff's senior staff.

It is for those reasons that the Court takes PW2's evidence undisturbed as it were as the correct position of expenses incurred.

In relation to the negotiation preparations and bid guarantee, it was PW2's evidence that the Plaintiff did more than just show its credibility, experience and knowledge which is what would be entailed in a basic bid document. He stated that the Plaintiff had to put the sizes of architecture among others which required skilled personnel to implement. They designed a solution framework which they were able to present to the negotiating committee, going beyond the ordinary scope of a basic bid document as seen from the negotiation meeting and its outcome; Exhibit P.2. The Plaintiff had to prepare in the instant case because they were customizing the solution for the uniqueness of Uganda. It is my opinion that the Plaintiff has successfully proved this claim.

With regard to the bid guarantee, the amount for the purchase of the prequalification bidding documents set out in the "call for Expression of Interest" advert Exhibit D.2 Page 19 was a non refundable fee of US$150 or its equivalent in Uganda Shillings. It is this fee that the Counsel for the Defendant submitted that the Plaintiff cannot claim. The Plaintiff is not claiming this. He is claiming the amount expended on the bank guarantee. One of the terms on securities was that the Plaintiff would provide securities in favour of the Defendant in the

terms agreed; Clause 13.1 of the Request for Proposal. The Plaintiff opted to provide a bank guarantee worth US$6,750- which was expected to run until the Plaintiff had discharged its obligations. Clause 13.2.3 provided thereof;

> *"The security shall automatically become null & void once all the obligations of the vendor under the contract have been fulfilled, including, but not limited to, any obligations during the Warrant Period and any extensions to the period. The security shall be returned to the vendor not later than thirty (30) days after its expiration."*

The foregoing was in complete agreement with Regulation 232 of the Public Procurement & Disposal of Public Assets Regulation No. 70 of 2013 which provides in 232(8) that a proposed release of a performance security shall be communicated to the provider and returned in accordance with the provider's instructions.

In the sum total, the bank guarantee was entered into under the full understanding that after the Plaintiff had discharged their obligations, they would be released. The Plaintiff begun their obligations, but for reasons yet to be communicated to them, the Defendant prevented the continuance of the project. This being a breach by the Defendants, they cannot deny the Plaintiff's the refund of the security. In the circumstances, I find for the Plaintiff in recovery of US$ 6,750- as bid guarantee.

The Plaintiff has also made a claim for human resource expenses which they categorized as;

a) Senior Project Team Costs - US$ 513,182-
b) Operational Team Costs - US$ 1,320,115-

c) Consultants on specialize item costs - US$ 174,091-
d) Project Financing Team costs - US$ 114,335-
e) Consultants & Professional Team in Uganda - US$ 447,193-
f) Registration Team Consulting - US$ 361,240-

It has already been seen earlier in this judgment that speed was of the essence and that the Plaintiff had been given tight timelines. It is also agreed by all parties that the contract they entered into was complex and called for specialized and skilled human resources personnel. Because of the urgency, these were to be obtained and put in place as quickly as possible. This being a Build, Operate & Transfer contract, the Plaintiff expected to provide all the human resource ranging from skilled information technology experts to highly qualified personnel in financial matters.
The highly specialized personnel was made even more necessary because the Plaintiff's were the ones financing the project which money they could only recover if the project succeeded. It is not in doubt that high skilled workmanship comes with a cost.

Counsel for the Defendant submitted that this recruitment was done too early before the signing of the contract and in any case, when the Chairman of the Contracts Committee wrote to the Plaintiff to suspend work, it should have discharged its skilled man labour immediately. With the greatest respect, I do not think that should have been the case. Since the matter was urgent, with tight timelines, the human resource had to be in place as soon as possible. The letter merely suspended work, not specifying how long. Possibly if the Defendant had written to the Plaintiff cancelling the contract it would have discharged the labour.

As of today even that notification has never arrived. The contract in its context was such that the Plaintiff being in a state of “readiness” was the applicable status.

It is my finding therefore that the human resource was rightly in place and the cost for keeping them should be compensated to the Plaintiff by the Defendants. There is no evidence to show that the cost of this human resource personnel was over priced. Exhibits P. 13 – 17 provide evidence of what some of the skilled personnel was going to earn.

Turning to the claim for the cost of equipment and software amounting to US$ 391,937-, PW2 relying on Exhibit P.15 showed the Plaintiff purchase equipment whose details are set out therein. I have no doubt this equipment was purchased because none of the Defendant’s witnesses countered the evidence in this purchase. The Plaintiff however has not told Court that this equipment was handed over to the Defendants. This equipment in my opinion is still with the Plaintiff, there is nothing in their evidence to show that this hardware was customized to the uniqueness of Uganda.

In my view, this is equipment that the Plaintiffs can use anywhere in their line of trade. I therefore find their claim in respect of the equipment, unjustified and is hereby denied.

As for the other claims, there was no evidence from any of the Defence witnesses to counter the Plaintiff’s claim I find these claims proved and accordingly award them.

The claim under this head totaled to US$ 4,296,639-. But subtracting project equipment and software worth US$ 391,937- leaves a total of

US$ 3,904,702- which is accordingly awarded to the Plaintiff as special damages.

The plaintiff claimed for general damages. The ordinary remedy for breach of contract is damages and in the instant case the Plaintiff, if there was breach, was entitled to have such a sum as would put him in the same financial position as he would have been had the Defendant carried out his side of the bargain. **JK Patel V Spear Motors Ltd SCCA 4/1991**.

PW1 and PW2 testified that the cancelation of the contract was an inconvenience to it in as much as the suspended contract had kept them from other work.
Counsel for the Defendant in submission stated that those general damages had not been proved because no evidence was led to show that the Plaintiff was inconvenienced.

It was PW2's undisputed evidence that because of the importance and magnitude of the project, the Plaintiff had to forego participation in tenders in the DRC, Ghana, Central African Republic and Rwanda because it ring fenced its top Technical human financial resources for the Uganda National Population Data Bank & Identification System.

Further, that the Plaintiff had fair chances of winning tenders in other countries which it was unable to participate in including;

a) Sri Lanka Driver's Licence – 2008
b) Sierra Leone voters registration for national elections – 2011
c) India Bihar State – Registration of people for Government grants – 2007

d) Nigeria – Registration of tax payers – 2010
e) Ethiopia - Registration of tax payers – 2008
f) Swaziland – Voter registration for national elections – 2013
g) Namibia – Voter registration for national elections – 2012
h) Mozambique – Driver's License – 2007.

To illustrate this, he relied on Exhibit P.21(i) which was a case study on a national electronic ID Card solution for Rwanda and a national biometric identification initiative for Gabon.

PW2 stated that the Plaintiff had suffered tremendous and injurious bad press over the years because of the abandoned contract which was not its fault and relied on newspaper article extracts set out in Exhibit P.21(ii).

In a letter to the IGG dated 31st March 2006 – Exhibit 22, the Plaintiff wrote;

> "We would like to point out that following the successful negotiations that took place during 9th – 11th January 2006, the notification of the award and thus formation of a contract, Face Technologies has already mobilized resources with their associated costs and demobilized the required key professionals from other projects to allow for the project implementation as required in the RFP. It would otherwise not be possible under Build, Operate & Transfer to mobilize funds and human resource to establish a data bank in 11 months, issue ID cards in 12 months etc. We continue of course to incur costs of keeping such personnel and holding financial resources in place."

The foregoing in my view was evidence of the inconvenience that the Plaintiff went through with the cancellation of the contract. That notwithstanding, it is important to consider whether the act of the Defendant was proximate in this case, because his liability for breach of contract was limited only to losses that were proximate. In other words could the loss suffered be viewed as the likely consequence of the breach or one that could have been contemplated by the parties at the time they entered into the contract **Hadley V Baxendale [1843 – 60] All ER 46**.

The speed at which the Defendant wanted the project to be done, the complexity of the project thus requiring personnel of high expertise, the time span within which the project was to be executed all demanded for undivided attention of the Plaintiff towards the completion of the task.

As I have said above, and it is agreed by all parties that the Plaintiff is a reknown company which was bound to have other projects across the globe – illustrated in the many offers from many countries as shown in Exhibit P. 21(i).

It is therefore, a company that would incur losses if its resources were pulled and concentrated in Uganda as it were in this case.
In view of the foregoing, it was foreseeable by the Defendant that if the Plaintiff pulled away its resources from other projects and directed them towards a project that would later collapse, loss would be incurred.
For the Defendant to have assured the Plaintiff that all was well causing it to abandon its other projects in a bid to concentrate on the National Population Data Bank & Identification System and then

dismissing them in breach of the agreement they had entered, can only be resolved by holding the Defendant liable in general damages.

The Plaintiff in a list of lost opportunities – Exhibit 21 listed the many projects in which it would have participated with estimated losses. Those estimated losses however cannot influence the amount to be awarded here because they are just estimates and because of the vicissitudes in the business world, they could have failed to get the contracts, they could have succeeded or could even have lost them. They could also have worked at a loss. This therefore leaves us with no concrete evidence as to how much was lost.

Considering all the factors surrounding this case and the uncertainty as to how much it would have earned from the lost opportunities, I find an award of UShs. 50,000,000/= (Uganda Shillings fifty million only) appropriate of the circumstances.

The Plaintiff prayed for punitive damages. These focus on the Defendant's misconduct and not the injury or loss suffered by the Plaintiff. They are awarded to punish, deter, express outrage of Court at the Defendant's high handed, malicious and vindictive conduct. **URA V Wanume David Kitamirike CACA 43/2010**.

The Plaintiff therefore was expected to adduce evidence of the Defendant's high handedness or vindictiveness. In the instant case, a complaint was raised by a competitor of the bid and the IGG directed the suspension of all activities relating to the contract. There followed a slow investigation into the matter and eventually a report to the President of Uganda without directly notifying the Plaintiff of the outcome. This type of conduct can at worst be referred to as slow-

paced in handling investigations. It would be wrong to refer to it as high handedness or vindictive. This claim therefore has not been proved by the Plaintiff and it is therefore denied.

The Plaintiff prayed for interest on special, general and punitive damages at 12% per annum from 1st February 2006 till payment in full. They prayed for further interest on this interest above at 20% per annum from the date of judgment till payment in full.

Counsel for the Defendant submitted that there was no evidence to show that this is the interest the Plaintiff is entitled to. She prayed that Court exercise its discretion judiciously by not awarding the interest being claimed.

An award of interest is discretionary and the basis of this award is that the Defendant has kept the Plaintiff out of his money and the Defendant has had use of it himself. **Harbutt's Plasticine Ltd V Wayne Tank & Pump Co. Ltd [1970] AQB 447** in which Lord Denning said;

> *"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the Plaintiff out of his money, and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly."*

Interest is awarded so as to bring a person to the position he would have been if the wrong complained of had not taken place. When awarding such interest, consideration must be given to the type of

business the Plaintiff does, to the length of period he has been deprived of the use of his money.

In the instant case, the span of time since the breach of the contract has been 8 years. It is just fair to conclude that being a business body, the Plaintiff would have multiplied these resources. Keeping this money for this duration of time deprived the Plaintiff of his money.

The Plaintiff prayed for 12% per annum. Taking into account the factors surrounding this case, especially the fact that the Plaintiff was a business body, I find his prayer of 12% justified and award it in respect of special damages from date of breach, that is, 1st February 2006 till payment in full appropriate in the circumstances.

As for general damages, the Plaintiff is awarded interest at 6% per annum from date of judgment till payment in full.
The Plaintiff also prayed for interest upon interest of 20% per annum. Since it has been awarded interest on special damages from date of breach till payment in full, I find that awarding such interest would be unjustified and it is denied. The Plaintiff is also awarded costs of the suit.

In conclusion, judgment is entered in favour of the Plaintiff in the following terms:-

a) US$ 9,204,947.2- for the customized solution
b) US$ 3,904,702- special damages
c) UShs. 50,000,000/= general damages
d) Interest on (a) and (b) at 12% per annum from the date of breach, that is, 1st February 2006 till payment in full.

e) Interest on (c) at 6% per annum from the date of judgment till payment in full.

f) Costs.

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David K. Wangutusi

JUDGE

Date: 4/12/14