THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

{ CORAM: ODOKI, C.J., TSEKOOKO, TUMWESIGYE, KISAAKYE, JJ.SC. AND MPAGI – BAHIGEINE, AG. JSC.}

CIVIL APPEAL NO. 13 OF 2006

BETWEEN

1. MULJIBHAI MADHVANI AND CO. LTD
2. STEEL CORPARATION OF E.A LTD **:::::: AND ::::::: APPELLANTS**

1. FRANCIS MUGARURA
2. LEBAN BUKULE
3. SILVER KIWANUKA
4. AND 33 OTHERS **:::::::::::: RESPONDENTS**

{An appeal from the judgment of the Court of Appeal at Kampala (Okello, Twinomujuni and Kitumba, JJA.) dated 3rd November 2006, in Civil Appeal No. 51 of 2004}

Land – Expropriated Properties Act – whether S.2 (2) of the Expropriated Properties Act only nullified dealings in the property and not employees' contract – Expropriated Properties Act – whether the employment contract of the 12 employees entered into after 1972 amounted to dealings in the property or business of the 2nd appellant and were therefore nullified under section 2 (2) (a) of the Act.

The two appellant companies were founded, managed and funded by the Madhvani family. The second appellant was expropriated in 1972. Upon the said expropriation, a number of employees were retained and more workers employed. In 1991 the terms and conditions of service of the 2nd appellant's employees were improved by the Board of Directors. In1994 the 2nd appellant was reposed by the 1st appellant its majority shareholder and former owner. After repossession, the appellants opted to dismiss/ retrench the employees of the reposed property and pay the affected employees their terminal benefits. The benefits were however, not paid in accordance with the 1991 agreement. The respondents therefore, sued for their partial benefits. The High Court allowed their claim and the same was accordingly upheld by the Court of appeal hence this appeal. The appeal was dismissed with costs to the respondents

JUDGMENT OF JOHN W.N. TSEKOOKO, JSC

This second appeal arises from the decision of the Court of Appeal upholding a judgment of the High Court {Opio Aweri, J.,} by which the respondents were awarded Shs.482,463,910/= as the balance of terminal benefits due to the respondents from the appellants.

The facts of appeal as found by the two courts below are clear and the parties hereto accept same. Both Muljibhai Madhvani and Co. Ltd. (the 1st appellant) and the Steel Corporation of East Africa Ltd. (the 2nd appellant) are companies founded, managed and funded by the Madhvani family who were Asians.

During the military regime of Idi Amin, the second appellant was expropriated in 1972 like many other companies and businesses owned by Asians. Upon expropriation a number of employees were retained and more workers were employed. In April, 1979, Idi Amin was over thrown by liberation forces consisting of Ugandans assisted by the Tanzania Army. In 1982, the Parliament of Uganda enacted the **Expropriated Properties Act, 1982** (the Act) which provided for, inter alia, repossession by the former Asian owners of their expropriated properties. The Act revested those properties in the Uganda Government and the properties were to be managed by the Ministry of Finance which was empowered by the Act to handle applications for the repossession by former owners. There is evidence {Exh. P5} showing that in 1991 the terms and conditions of employees of the 2nd appellant were changed and improved by its Board of Directors. According to the contents of Exh. P5, signed by the Chairman of the Board, a new Salary Structure came into effect on 1st August, 1991.

In 1994, the 2nd appellant was repossessed by the 1st appellant, its majority shareholder and the former owners. The Ministry of Finance, Planning & Economic Development (MFPED) handed it over to the two appellants. After the repossession exercise, the appellants opted to dismiss or retrench the employees of the repossessed property and pay the affected employees their terminal benefits. The respondents who were members of the senior staff originally employed by the second appellant were affected by the retrenchment exercise in that benefits were not paid in accordance with the 1991 new terms. The respondents therefore, instituted a suit in the High Court and claimed that the appellants had made partial payments of their entitlements leaving out a balance of Shs.482,463,910/=. The 1st appellant denied any liability. The second appellant contended that it had fully paid the terminal benefits but that the Government was responsible for what the respondents claimed in the suit.

During the trial a number of documents some of which related to the new terms of employment and the terminal benefits for employees were produced and admitted in evidence without objection by appellants or their counsel. It is important to mention exhibits P1, P7, P8, P9, and P10, found in the record of appeal at pages 313-328. Exhibit P7 is a letter to the Chairman of the Board of Directors of EASCO, explaining that the workers had not been paid in full and a settlement should be worked out in order to avoid litigation. The documents listed under Exhibit P9 are the letters that were sent from EASCO to the employees whose services were terminated explaining that the final sum due to them would be paid immediately thereafter. Exhibit P8 is a letter from the 2nd Appellant to the terminated employees explaining that the Board was working on a terminal benefit package. Exhibit P10 is the handover document of EASCO to 1st Appellant, which includes the terminal benefits liabilities listed at over Ug. Shs.1,000,000,000/=. Exhibit P1 is a memo from W.T. Muhairwe, General Manager of the 2nd Appellant, written to the 2nd Appellant, explaining that the total sum of Ug. Shs.1,138,746,125/= was owed to EASCO workers in employment benefits. In the High Court, Rubby Opio Aweri, J., upheld the respondents'

claim. The Court of Appeal affirmed his decision. The appellants have now appealed against the decision of the Court of Appeal and they based the appeal on three grounds.

The parties opted to argue the appeal by filing written submissions. The statement of arguments by the appellants in support of the appeal was lodged by Messrs **Kampala Associated Advocates** as far back as 30/5/2007. That of the respondents was lodged by Messrs **Kwesigabo, Bamwine and Walubiri, Advocates, jointly** with Mssrs. **Sebalu & Lule , Advocates** on 7th June, 2007.

It is regrettable that for three years we could not write judgments because of the problems of lack of appropriate Coram caused by the retirement of some Justices of this Court whose replacement took too long to be made. This is a terrible indictment on the administration of justice in this country.

1st Ground.

In the First ground, the appellants complained that the Learned Justices of the Court of Appeal erred in law when they held that S.2(2)(a) of the Expropriated Properties Act nullified only dealings in property and not employees' employment contracts.

The purpose of the EPA, as evidenced by its long title, is to return the properties and businesses to their former owners. In the case **of the Registered Trustees of Kampala Institute v. Departed Asians Property Custodian Board,** Civil Appeal No. 21 of 1993, {Supreme Court}, this Court held, *"Having regard to the evil intended to be cured by the Legislature which is deprivation of former owners of their properties appropriated or taken over or of which they were dispossessed by the Military Regime, any other interpretation would defeat the purpose of the legislation."* The Appellants urged this court to interpret S. 2(2) to the effect that an employment contract is a liability which Parliament intended to nullify. The section states:

> ***(2)*** *For the avoidance of doubt, and notwithstanding the provisions of any written law governing the conferring of title to land, property or business and the passing or transfer of that title, it is declared that—*
>
> (a) *any purchases, transfers and grants of, or any dealings of whatever kind in, such property or business are nullified* ……

Counsel for the appellants contend that the employment contracts of the twelve employees entered into after 1972 amounted to dealings in the "property or business" of the 2nd Appellant, and were therefore nullified under S. 2(2)(a). On the other hand counsel for the Respondents contends, and the High Court and Court of Appeal agreed, that S. 2(2) (a) nullified dealings in property and not employment contracts. This issue is therefore one of statutory interpretation.

It is helpful to refer to S.I of the Act which provides interpretation. According to **Section 1:** *In this act, unless the context otherwise requires:*

> (g) *Property or business means movable and immovable property and includes stock, shares and liabilities of whatever description.*

Learned counsel for the appellants argue that the words *"liabilities of whatever description"* prove that the intention of Parliament was to nullify liabilities such as employment contracts. Counsel for respondents counter this by relying on the principle of *ejusdem generis*. In particular learned counsel relies on the statement in the book by Sir Rupert Cross, ***Statutory Interpretation***, Buttersworths, London, 1976 to the effect that

"where general rules are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or general scope and purview of the Act that Parliament intended that they should be given a broader significance."

On the basis of *ejusdem generis rule,* counsel for the respondents submitted that the word "liabilities" refers to liabilities related to the nature of the property or business such as mortgages, liens, and debentures which, like other ordinary property, can be assigned, similar to a title, stocks and shares. Learned counsel further contends that the words "purchases," "transfers," "grants," and "title" in S. 1(g) read together with S. 2.2(a) all relate to the title of the property or business, that is capable of being conferred or registered under the ***Registration of Titles Act* or *the Companies Act.*** In my opinion this argument has merit. I think that the words, when read together, all relate to the transfer of title to property, which can all be transferred.

The dispute in this case is really a matter of statutory interpretation. The appellants' arguments seem to hinge very much on the phrase ***"any dealings of whatever kind* in, *such property or business are nullified"*** contained in S.2(2) (a). Obviously Parliament specifically enacted S.1 for interpretation of expressions in the Act. In S.1 (g) property or business means *"movable and immovable property and_includes stock, shares assets and liabilities of whatever description"*. This should be interpreted differently only if the context of the language of the Act implies otherwise.

I am persuaded by respondent's argument. The appellants' interpretation would produce absurd results which cannot reasonably be supposed to have been the intention of the legislature. To allow all employment contracts, supply contracts, and other contracts to be nullified simply because, they are in some way related to or incidental to the property or business in question, would certainly lead to injustice.

The result would mean that parties, who had not yet received the benefits of their contracts, would now have no legal remedy to enforce these contracts. Therefore, someone must be responsible for the employment contracts of these employees. There can be no doubt that the Appellants are responsible for the terminal benefits of all those employees who were employed before the 1972 expulsion. In addition, exhibits P1, P7, P8, P9, and P10 prove that the Appellants intended to maintain responsibility for the disputed employment contracts. There is no evidence showing that the Uganda Government was the responsible party. Indeed, the Appellants must also compensate those workers employed after the 1972 expulsion to avoid an unfair result. Learned counsel for the appellants attack the holding of Kitumba, JA., [as she then was], who wrote the lead judgment in the Court of Appeal with which the other Members agreed. I shall reproduce a portion of that judgment presently.

Counsel for the appellants in their written submissions contended that S.2(2)(a) nullified all employment contracts that were entered into by the 2nd appellant and some of the respondents before the repossession took place and that all employees recruited after 1972 never had valid

contracts of employment with the 2nd appellant. Learned Counsel further submitted that the resolutions appearing in Exhs. P5 and P6 passed by the 2nd appellant's Board of Directors also amounted to "dealing in property or business" which was nullified by the Act. In reply counsel for the respondents argued that that is not a correct interpretation of the section asserting that employment contracts entered into by the respondents and the appellants do not fall under the category of "liabilities" in S1.{c} of the Act. Learned Counsel relied on the ***Ejusdem generis*** rule of statutory interpretation, and submitted that the words *"liabilities of whatever description"* appearing in 2(I)(c) should be interpreted narrowly as a general word following the particular words "movable" and "immovable property", "stock" and "shares." Counsel submitted that the interpretation should be restricted to liabilities in the nature of property such as mortgages, liens, debentures which, like other ordinary property, can be assigned.

I think that the Title of the Act clearly sets out the intention of Parliament. The title is worded thus: —

An Act to provide for the transfer of the properties and businesses acquired or otherwise expropriated during the military regime to the Ministry of Finance, to provide for return to former owners or disposal of the property by the Government and to provide for other matters connected therewith or incidental thereto.

Clearly this wording read together with Subs. (1) of Section 2 provide for transfer of properties and businesses acquired or otherwise expropriated during the military regime to the Ministry of Finance for management. The subsection reads thus:

S.2. (1) Any property or business which was—

a) *Vested in the Government and transferred to the Departed Asians' Property Custodian Board under the Assets of the Departed Asians Decree, 1973*
b) *acquired by the Government under the Properties and Businesses (Acquisition) Decree, 1973;*
c) *in any other way appropriated or taken over by the Military Regime except property which had been affected by the provisions of the repealed National Trust Decree, 1971, shall, from the commencement of this Act, remain vested in the Government and be managed by the Ministry responsible for Finance.*

Businesses continued lawfully under the management or ownership of the Government. In the process it was inevitable for various lawful undertakings to be effected for effective operation of business. Among the businesses which had to be carried out were employment of workers including entering into contracts of employment with some of the respondents. The contracts of employment with respondents can not in any way be interpreted as part of "any dealings" that were prohibited by the Act as they were part of management of the 2nd appellant under the supervision of the Ministry of Finance. I think that since those employment contracts and the other dealings complained of took place before the 1st appellant had repossessed its shares, while the business was under lawful management of the Ministry, the Act cannot be invoked to nullify such dealings. By any stretch of imagination effecting contracts of employment cannot under the Act be described as transfer of any kind.

I agree with the submission of counsel for the respondents on the interpretation of S. **1(g)** regarding the application of the word "liabilities." Counsel for the appellant when arguing this ground sought to rely on S. 2 (2) (a) of the Act for the contention that employment contracts are

dealings which were nullified by that section. This argument is fallacious. It is useful to quote the whole of subsection (2) which reads as follows:

> **(2)** *For the avoidance of doubt, and notwithstanding the provisions of any law governing the conferring of title to land, property or business and the passing written or transfer of title, it is declared that: —*
>
> (a) *Any purchases, transfers and grants of, or any dealings of whatever kind in, such property or business are nullified; and*
> (b) *Where any property affected by this section was at the time of its expropriation held under a lease or an agreement for a lease, or any other specified tenancy of whatever description and where the lease, agreement for a lease or tenancy had expired or was terminated, the same shall be deemed to have continued, and to continue in force until the property has been dealt with in accordance with this Act, and for such further period as the Minister may by regulations made under this Act prescribe.*

In view of these clear provisions, I cannot appreciate the criticism {by Counsel for appellants} of the holding by the Court of Appeal that the Act only nullified dealings in property and not employees' contract. In the Court of Appeal, Lady Justice Kitumba, JA.., [as she then was], wrote the lead judgment with which the other Members of the Court concurred. The learned Justice of Appeal discussed the matter in the following words {at page 6 of her judgment}.

It is appreciated that Dr. Muhairwe, the General Manager of the second appellant wrote exhibit P1. This was a letter addressed to the Deputy Secretary to Treasury, Ministry of Finance and Economic Planning. He gave the total sum of the staff terminal benefits as being shillings 1,138,746,125/=. This exhibit was admitted in evidence unchallenged. Exhibit P10 was a letter dated 24/2/1994 again written by Dr. Muhairwe as a handing over report. This handing over included liabilities and one of such liabilities was the former employees' terminal benefits. The two exhibits were received in evidence unchallenged and I, therefore, believe them as being correct. Counsel's argument with regard to section 2 (2) (a) of the Expropriated Properties Act is not tenable in the instant case. What the section nullified is the dealing in property itself but not the employees' employment contracts. In any case the first appellant re-possessed the 2nd appellant as its shareholder. The fact that the first appellant paid some retirement benefits to the respondent shows that it admitted liability. As rightly pointed out by the respondent's Counsel, the first appellant is estopped from disclaiming the liability.

I find no fault with this reasoning of the learned Justice of Appeal. The first ground has no merit and ought to fail. This really should dispose of this appeal. But let me consider the other grounds briefly.

2nd Ground.

In this ground of appeal, the complaint is that the Learned Justices of the Court of Appeal erred in law in holding that the first appellant having repossessed the second appellant as its shareholder and by paying some terminal benefits to the respondents admitted liability to pay the respondents' terminal benefits in terms of the 12th September 1991 terms and conditions of service, and thus estopped from disclaiming liability.

There is documentary evidence to which I have already alluded relevant to the issue of estoppel. If I may repeat for the sake of emphasis. That evidence is in exhibits P1, P7, P8, P9, and P10, which exhibits were tendered in evidence without any objection. Exhibit P7 is a letter dated September, 1994 written by Permanent Secretary, Ministry of Trade and Industry to the Chairman of the Board of Directors [of EASCO], explaining that the workers complained to the Ministry that their benefits had not been paid in full and the Permanent Secretary advised that settlement should be worked out in order to avoid litigation. The documents marked as Exhibit P9 are the various letters dated 28th July, 1994, addressed to the various employees including the respondents informing them that their services would be terminated on 31st July, 1994. They were written by the General Manager. The letters advised employees that terminal benefits had been "worked out on the basis of the terms of service as applicable". The letters were sent from EASCO to the many employees whose contracts were terminated explaining that the final sum due to them would be paid immediately thereafter. Exhibit P8 is a letter from the 2nd Appellant to the employees whose contracts had been terminated in which the Board explained it was working on a terminal benefit package. Exhibit P10 is the handover document of EASCO to 1st Appellant, which includes the terminal benefits liabilities listed at over Ug.Shs. 1,000,000,000/=. Exhibit P1 is a memo from Dr.W.T. Muhairwe, General Manager of the 2nd Appellant, written to the 2nd Appellant, explaining that the total sum of Ug.Shs.1,138,746,125/= was owed to EASCO workers in employee benefits.

As stated earlier, these documents form evidence and they were admitted without any objection. The Respondents relied on relevant ones. The Appellants should be estopped because exhibit P10 and exhibit P1 show that the two intended to pay for and transfer of liabilities including those of employee contracts.

Section **114 of the Evidence Act:** is about stopped. It states—

> *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.*

I have already quoted Kitumba JA's portion of her judgment (page 6) relevant to estoppel. I need not reproduce it here.

*The a*ppellants contend that there must be a representation, "which representation is relied upon by the Respondents to their detriment or was intended to influence them and cited **Greasly and others v. Cooke, [1980] 3 All ER 710, 713**. The appellant's counsel relied on exhibit P9, the letter of EASCO's General Manager to terminated employees services, which states inter alia, that, "Please sign a copy of this letter to acknowledge receipt of the sum of money and acceptance of the same as full and final settlement of your dues. Counsel appears to argue that there were no more benefits. The argument is flawed for two reasons: first, no amount of compensation was mentioned in the letter itself and second, the Court of Appeal also relied on exhibits P1, P7, P8, and P10, to come to the conclusion that estoppel applies.

Further Exh.P9 {in its 5th para} states that "in case your contract of employment with Steel Corporation of East Africa was frustrated in/ around 1972, we are paying you your terminal benefits for the said pre-1972 period on behalf of Steel Corporation of East Africa Ltd.

Exhibit P9 does not mention the amount of money that was allegedly paid, for the post – 1972, the date of payment, and the calculation used to arrive at that amount, or the details behind their personal terminal benefits. It merely asks the recipient to sign the letter and agree that the full amount was settled.

In my opinion, Exhibits P1, P7, P8, P9, and P10 are evidence that the Appellants did make representations that they would pay the terminal benefits; those representations were made in order to avoid litigation, and the Respondents did in fact believe those representations to be true. In addition, the change in the terms and conditions of service in 1991 are also representations about the terminal benefits of those employees. When a company has a document for its terms and conditions of service, which specifies payment plans and benefit options, an employee should be allowed to rely upon those terms and conditions. If that was not the case, then an employer could write enticing retirement packages into their bylaws in order to attract better employees, but then dishonour the terms when the individual seeks to retire. I agree with the Court of Appeal. Ground 2 should fail.

3rd Ground.

In this ground the complaint is that the learned Justices of Appeal erred in law when they held that the formula for calculation of terminal benefits in the terms and conditions of service adopted on the 12th September 1991 are applicable in ascertaining the respondents' terminal benefits for the period prior and after the same came into effect.

The gist of the Appellants' argument is that the trial judge improperly evaluated evidence which led to an incorrect, exorbitant, and unconscionable calculation of terminal benefits. The two courts below relied on the terms and conditions of service adopted on the 12th day of September 1991 (Exh.5 and Exh. P6).

Contents of the two documents clearly show that a resolution was passed which brought into force the contested 1991 terms and conditions of service. Exh. P5 is very short and reads as follows:-

"EAST AFRICAN STEEL COPORATION LIMITED.
Extracts from the Minutes of a meeting of the Board of Directors of Messrs East African Steel Corporation Ltd properly convened and at which a Quorum was present held on 5th and 6th day of July, 1991.

RESOLVED that Terms and Conditions of Service as presented by EASCO Management to be passed with amendments and the commencement of the new Salary Structure be 1st August, 1991.

Certified True Copy. **Chairman**
Director **12/9/1991"**

The Director and Chairman signed this document on 12/9/1991. The two officials represented the 2nd appellant before the 2nd respondent was repossessed by the 1st appellant.

It is not shown anywhere that the said resolution was contested. It is therefore binding. Since it was passed while the 2nd appellant was under the lawful management of the Ministry of Finance whose management and dealings were never nullified by the Act, counsel's contention that they are null and void is without foundation.

The appellants based their case upon allegations that the terms and conditions of service were doctored. At the trial the 1st issue was whether the appellants had paid all the respondents the benefits. The question of doctored documents was raised and the learned trial judge found at page 6 of his typed judgment that on the basis of the evidence available, there was no doctoring. The appellants appealed to the Court of Appeal and included grounds 2 and 5 which reflect this question. The two grounds complained that the trial judge relied on wrong formula, (ie. doctored documents) to award the damages to the respondents. The Court of Appeal took pains to re-evaluate the evidence of both sides before it concluded that there was no doctoring and that Exhs. P5 and P6; P1 and P2 show the correct figures and, therefore, there was no doctoring. It upheld the decision of the trial judge. Appellants had not presented their case properly, Oder, JSC, {RIP} in **Interfreit Forwarders (U) Ltd v. EADB, Civil Appeal No. 33 of 1992** held that a party should present their causes of action and defences at trial or risk losing them. Counsel for the Appellants is responsible for raising clear issues and must adduce evidence on relevant issues on behalf of his client. Counsel should draw the attention of the court to the correct source of law. It was not the role of the learned Justices of the Court of Appeal to raise issues and carry out research on behalf of the appellants.

The Appellants' counsel argues that appellants did not participate in the negotiations and or formulation of the 1991 terms and conditions of service, and therefore should not be bound by them. This argument is not reflected in the findings of the High Court and Court of Appeals: S*ee* also exhibits P1, P2, P5, P6, and P10. A bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience: **Multiservice Bookbinding Lts. and others v. Marden, [1978] 2 All ER 489, 502.** Unconscionability means that the terms of agreement are so one-sided as to shock the conscience. Procedural unconscionability typically requires a showing of an unfair bargaining process that is manifested by: (1) oppression, which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party; or (2) surprise, which occurs when the supposedly agreed-upon terms are hidden in a document.

In this case, the High Court held that the Appellants failed to produce sufficient evidence to disprove or contradict the amount which was calculated by the management and communicated to the Deputy Secretary to the Treasury. The document was prepared and signed by Dr. William Muhairwe, who was the General Manager of the 2nd Appellant. The Appellants challenged the document by calling Mutazindwa Katorogo [DW2] as a witness. Katorogo claimed the terms of service had been doctored to benefit the Respondents, but admitted that he could not challenge the calculation or produce evidence of the correct terms and conditions of service.

The trial judge, opined: —

> *"The quanta of the claims are tabulated in exhibits P1 and P2. The total claim is Shs.482,463,910/=. The entitlement of each plaintiff (Respondent) is also quantified in those two exhibits. I accordingly declare that each plaintiff be paid his entitlement as*

quantified in the exhibits P1 and P2. The plaintiffs claimed interest on the above at 25% pa from 1994. Considering the period the court took to dispose of this matter, awarding that percentage would be very oppressive to the Defendants who never solely contributed to the delays. I would therefore award interest at 10% (ten) from the date of their entitlements. The plaintiffs are also awarded costs of the suit."

Based upon exhibits P1, P2, P5, P6, and P10, and the findings of the High Court; there is no reason to overturn the decision of the Court of Appeal. Therefore, the unconscionability argument must fails.

The Appellants also argue that the terms relating to the terminal benefits were implied warranties. That is incorrect. The terms were expressed and written inside the document described as the 1991 terms and conditions of service. There is nothing implied about terms which are clear and written into a contract.

Further, counsel for the appellants argued that the appellants were not a party to the negotiations and or the formulation of the 1991 terms and conditions of service which are unfair and unconscionable in the circumstances. Learned counsel contended that once it is proved that a particular term in a contract is unfair and unconscionable, a party complaining is excused from its performance. On the other hand, counsel for the respondents contends, correctly in my opinion, that this matter was never raised at the trial nor in the Court of Appeal contending, again correctly, that the appellants are bound by their pleadings.

I have not found on the Record of Appeal any indication suggesting that during the trial or in the Court of Appeal, there were any suggestions or arguments about whether or not the terms and conditions of service adopted on 12/9/1991 were unconscionable or unfair. Only paragraph 5 of the written statement of Defence (as an alternative averment) refers to a clause appearing in terms and conditions as not being "equitable". That is all. Indeed none of the four issues framed for determination by the trial judge included the question of whether the terms were unconscionable or unfair. Such questions should have been properly raised first in the pleadings, then at the trial so that, if need be evidence could be adduced to show the nature of these terms and conditions. It is again contended that the appellants were not party to the negotiations and/or formulation of the said terms and conditions of service. With due respect, I am not persuaded by this argument in the circumstances of this case. When the Decree was passed in 1972, the shares of the 1st appellants in the 2nd appellant vested in the Government. Company meetings, as a matter of law, are only a matter for members, who are the shareholders of that particular company. The evidence on record shows that the 1st appellant repossessed its shares in 1994, about three years after the adoption of the said terms and conditions. At that time, it could not in any way, have been legally able to participate in the formulation of the contested terms and conditions as it was not a member of the 2nd appellant. For terms in a contract to be declared unfair and unconscionable, various circumstances have to be considered. Counsel for the appellants cited the case of ***Bookbinding Ltd and Another Vs Marden [1978] 2ALL ER 489***. The Case sets out circumstances under which unfair and unconscionable terms may be challenged in court. At page 502 of the judgment the Court held: —

"***There is unfair bargain where a party to it imposed objectionable terms in a normally reprehensive manner …….. which affects its conscience, for example where an advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible, well advised person would accept."***

The 2nd appellant, on the contrary, passed the resolutions openly with the benefit of its legal secretary. When the 2nd appellant repossessed its shares, it also inherited workers and their benefits as evidenced by its General Manger's letter exhibit P10. The Appellants cannot allege unfairness as they accepted all the liabilities of the 2nd appellant as set out in exhibit P10.

It was contended further that the said terms were applicable to periods prior to and not after the 1991 resolution. Unfortunately there is nothing in Exh. P.5 showing that it was the parties' intention that the terms and conditions of services adopted were to apply only retrospectively. The case of ***Trollope and Colls Ltd Vs Atomic Power Construction Ltd [1962] 3 ALLER1035*** relied upon by counsel for the appellants properly explains the circumstances under which terms may be implied in a contract in absence of express provisions. It was there held, inter alia; that —

> ***Terms can only be implied in a contract if they are necessary in order to give "business efficacy" to the contract."***

I do not see how retrospective application of the adopted terms and conditions of service, show how it will bring about business efficacy. In my opinion the terms and conditions of service meant to apply from 1991 onwards. However since the 1st appellant is estopped from disclaiming liability in respect of the unpaid terminal benefits, which were calculated from the date the respondents signed their contracts of employment to the date services were terminated, holding that the said formula was meant to operate retrospectively would be untenable. Ground three has no merit and should fail.

I find no merit in this appeal. I would dismiss it with costs to the respondents here and in the two Courts below.

Delivered **at Kampala** this **20th day** of **October 2010.**

J.W.N. Tsekooko.
Justice of the Supreme Court.

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(CORAM: ODOKI, CJ, TSEKOOKO, TUMWESIGYE, KISAAKYE, AND JJ.SC. AND MPAGI – BAHIGEINE, AG. JSC.)

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JUDGMENT OF ODOKI, CJ

I have had the advantage of reading the judgment of my learned brother, Tsekooko JSC and I agree with it and the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with costs here and in the Courts below.

Dated at Kampala this **20th** day of **October** 2010.

B J Odoki
CHIEF JUSTICE

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FRANCIS MUGARURA & OTHERS :::::::::::: RESPONDENT

(Appeal from the judgment of the Court of Appeal at Kampala (Okello, Twinomujuni and Kitumba, JJA) dated 3rd November 2006, in Civil Appeal No. 51 of 2004)

JUDGMENT OF TUMWESIGYE, JSC

I have had the benefit of reading in draft the judgment of my learned brother Tsekooko JSC.

I agree with the judgment and the orders he has proposed and I have nothing more useful to add.

Dated at Kampala this **20th** day of **October**, 2010

JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 13 OF 2006

1. MULJIBHAI MADHVANI AND CO. LTD
2. STEEL CORPARATION OF E.A LTD :::::::::::: APPELLANTS

VERSUS

1. FRANCIS MUGARURA
2. LEBAN BUKULE ::::::::::::::::::::::::: RESPONDENTS
3. SILVER KIWANUKA & 33 OTHERS

CORAM: HON. CHIEF JUSTICE
HON. JUSTICE JWN **TSEKOOKO**
HON. JUSTICE J. **TUMWESIGYE, JSC**
HON. JUSTICE E.M. **KISAAKYE, JSC**
HON. JUSTICE A.E.N. **MPAGI – BAHIGEINE, Ag. JSC**

JUDGMENT OF A.E.N MPAGI-BAHIGEINE, Ag. JSC

I have read in draft the judgment of my brother JWN Tsekooko, JSC.

I agree and cannot usefully add anything.

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A.E.N MPAGI-BAHIGEINE
Ag. JUSTICE OF THE SUPREME COURT