

THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEALS TRIBUNAL AT KAMPALA

MISCELLANEOUS APPLICATION NO. 1 OF 2022

ARISING OUT OF REGISTRY APPLICATION NO 20 OF 2021

BETWEEN

OBON & INFRASTRUCTURE DEVELOPMENT
JV:.....:APPLICANT

AND

- 1. MBARARA CITY:.....: 1ST**
RESPONDENT
- 2. MBJ TECHNOLOGIES LIMITED :.....:2ND**
RESPONDENT

APPLICATION IN RESPECT OF THE ALLEGED CONTEMPT OF THE TRIBUNAL'S DECISION IN APPLICATION NO. 20 OF 2021 IN RESPECT OF THE PROCUREMENT FOR PROVISION OF CONSULTANCY SERVICES FOR SUPERVISION OF ROADWORKS BY MBARARA CITY REF: MCC 852/USMID/SRVCS/20-21/00001/Cluster 6

BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA, THOMAS BROOKES ISANGA, GEOFFREY NUWAGIRA KAKIRA; PAUL KALUMBA; AND CHARITY KYARISIIMA, MEMBERS

RULING OF THE TRIBUNAL

A. Background

1. The procurement of consultancy services by Mbarara City for supervision of roadworks under Cluster 6 is coming before the Tribunal for the third time.
2. This matter first came before the Tribunal vide Application No. No. 5 of 2021 filed by the Applicant. In a decision dated 17th May 2021 the Tribunal cancelled the procurement.
3. *MBJ Technologies Ltd* who had been recommended as the best evaluated bidder filed Miscellaneous Cause No. 171 of 2021 in the Civil Division of the High Court seeking judicial review of the decision of the Tribunal. The application was premised on alleged violation of the right to be heard when the Tribunal made its decision. In a decision dated 29th July 2021 the High Court (Philip Odoki, J) allowed the application. He declared the Tribunal's decision void, quashed it and issued an injunction restraining the Entity from implementing the decision.
4. On 30th July 2021, the Contracts Committee of the 1st Respondent awarded the tender to *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd*. The agreement between *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* and Mbarara City was signed on 25th August 2021.
5. The Applicant lodged the second application before the Tribunal vide Application No. 20 of 2021.

6. In a decision dated 18th October 2021, the Tribunal found that the tender had been illegally awarded to *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* in respect of an expired bid. The Tribunal accordingly cancelled and set aside the contract dated 25th August 2021 between Mbarara City Council and *MBJ Technologies Ltd in association with Hersun Consults Ltd*.

B. The instant application

1. The Applicant now brings this application by notice of motion under section 98 of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act and Order 52, rules 1 & 3 of the Civil Procedure Rules S.I 71-1, rules 34 & 36 of the *Public Procurement and Disposal of Public Assets* (Tribunal)(Procedure) Regulations, 2016.
2. The Applicant seeks orders that:
 - a) The Respondents be cited for contempt for flouting the Tribunal's orders.
 - b) The Respondents be ordered to pay general damages to the Applicant amounting to Ug. Shs. 500,000,000 (Five Hundred Million).
 - c) Costs.
3. The application filed on 27th January 2022 was supported by the attached affidavit of MENYA RONALD. The grounds of the application are:
 - a) That since after the date of issuance of orders by this Honourable Tribunal, the Respondents have continued to brazenly implement the contract arising out of Procurement Reference No. MCC825/USMID/SRVCS/2021/00001 that this Tribunal cancelled and set aside on the 18th October 2021.
 - b) That by reason of the Respondents' continued disobedience of the court orders, the Applicant is being prejudiced.

- c) That it is in the interest of justice that the Respondents be cited for contempt of court and be ordered to pay general damages and a fine.
4. The application is also supported by another affidavit filed on Ntalo Steven Mwase filed on 1st February 2022.
5. The 1st Respondent filed an affidavit in reply deponed by Mugisha Richard, the Deputy City Town Clerk.
6. The 2nd Respondent filed an affidavit in reply deponed by Phillip Kakuru, Executive Director. A supplementary affidavit was deponed by Eng. Jjemba Edgar Tefiro, a resident engineer of the 2nd Respondent.

C. The oral hearing

1. The Tribunal conducted an oral hearing of this application on 24th February 2022.
2. Appearances were as follows:
 - (1) Mr. Solomon Baleese of Ajju, Baleese & Co. Advocates-counsel for the Applicant.
 - (2) Mr. Kisira Julius of Paul Byaruhanga Advocates on brief for Mr. Arinaitwe Timothy-counsel for the 1st Respondent.
 - (3) Mr. Samuel Kakande of Silicon Advocates- counsel for the 2nd Respondents.
3. We have considered the pleadings of the Applicant and the as well as the submissions of respective counsel. We have also read the authorities cited by counsel.

D. The Issues

This application raises 2 substantive issues:

- 1) Whether the Respondents are in contempt of the decision of the Tribunal in Application No. 20 of 2021.
- 2) What remedies are available to the parties.

E. Resolution of the issues

Issue no. 1- Whether the Respondents are in contempt of the decision of the Tribunal in Application No. 20 of 2021.

1. *Black's Law Dictionary* 11th Edition, at page 397 defines Contempt of Court as a disregard of or disobedience to the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its precincts or so near thereto as to disturb the proceedings or to impair the respect due to such a body.
2. In **SUPREME COURT CIVIL APPLICATION NO. 05 OF 2019 - PROF. FREDERICK E. SSEMPBWA & OTHERS VERSUS ATTORNEY GENERAL**, the Supreme Court cited with approval a number of authorities and the following definitions and principles in paragraphs 3 to 10 below, can be discerned from the court ruling:
3. Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

4. Under the common law, there are different classifications of contempt: civil and criminal, *in facie curiae* (before a court) or *ex facie curiae* (outside of a court). The forms of contempt that concern us here, namely those occurring outside of the court, could be brought before court in proceedings initiated by parties, public prosecutors or the court acting of its own accord (*mero motu*).
5. The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.
6. Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with the coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.
7. It is of great importance that when Courts give orders in exercise of their judicial power, the orders are respected, implemented and take effect. Nobody should interfere with Court orders and state agencies are obliged to assist the courts to ensure that they are effective.

8. The public expects Court orders to be obeyed. Court orders should never be given in vain. Civil contempt of Court serves the purpose of empowering Courts to enforce Court orders and punish those that wilfully and unlawfully disobey Court orders. The procedure for civil contempt of Court serves the objective of ensuring compliance with Court orders.
9. The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements. (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings. (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. A declaratory and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.
10. Applying the principles discussed above the following have to be proved. (1) That an order was issued by Court. (2) That the order was served or brought to the notice of the alleged contemnor (the respondent). (3) That there was non-compliance with the order by the respondent. (4) That the non-compliance was wilful or mala fide.
11. In ***Housing Finance Bank Ltd & another vs Edward Musisi Misc. App. No. 158 of 2010*** it was held by the Court of Appeal that;
“the principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders issued by Court through the

set judicial process, in the normal functioning of the Courts are not complied with in full by those targeted and/or called upon to give due compliance. A party who knows of an order, regardless of whether, in the view of that party, the order is null or valid, regular or irregular, cannot be permitted to disobey it, by reason of what that party regards the order to be. It is not for that party to choose whether or not to comply with such an order. The order must be complied with in totality, in all circumstance by the party concerned, it is the responsibility and duty of the party concerned, in case that party for some genuine reason, finds compliance with the Court Order not possible, to appropriately move the court issuing the order and bring to the attention of that Court the reasons for non-compliance. This is to ensure that the Court issuing the order not only must not be held in contempt, but must not, whatever the circumstances, appear to be held in contempt by any litigant.”

12. In the instant case, the burden is on the Applicant to prove that (i) this Tribunal issued a lawful order; (ii) that the Respondents had knowledge of the order; (iii) that the Respondents had ability to comply; and (iv) that the Respondents wilfully failed to comply with/disobeyed the Tribunal order.

Issuance of a lawful order

13. It is not in dispute that in a decision dated 18th October 2021, this Tribunal found that the tender had been illegally awarded to *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* in respect of an expired bid. The Tribunal accordingly cancelled and set aside the contract dated 25th August 2021 between Mbarara City Council and *MBJ Technologies Ltd in association with Hersun Consults Ltd*. The jurisdiction of the Tribunal over the impugned procurement is not in dispute. The Tribunal made its decision in exercise of its jurisdiction under Part VIIA of the *Public Procurement and Disposal of Public Assets Act* and the *Public Procurement and Disposal of Public Assets (Tribunal)(Procedure) Regulations, 2016*.

14. There is therefore a lawful order of this Tribunal dated 18th October 2021.

Respondents' knowledge of the order

15. According to paragraph 4 of the affidavit of Ntalo Steven Mwase, the Respondents, being dissatisfied with the said decision, filed Civil Appeal No. 45 of 2021 in the High Court. Copies of the memoranda of appeal are annexed to the affidavit as “**MR2** & “**MR3**” respectively. The appeal is said to be pending before the High Court.
16. Paragraph 4 of the affidavit of Mugisha Richard, the Deputy City Town Clerk of the 1st Respondent, states that *the 1st Respondent has never been served with an order or decree of the tribunal in regards to the decision of the tribunal on this matter and I am informed by my advocates and which information I believe to be true that the 1st respondent's aforementioned advocates have never been served with any order or decree as well.*
17. Paragraph 5 of the affidavit in reply by of Phillip Kakuru, Executive Director 2nd Respondent, states that 2nd Respondent is not aware of any orders or directives of the Tribunal in respect to Procurement reference MCC 852/USMID/SRVCS/20-21/00001.
18. Contrary to the assertions of the Respondents, according to the record, the decision of the Tribunal in Application No. 20 of 2021 was delivered to the parties by email on 18th October 2021.
19. The Respondents have also not controverted the Applicant's evidence that the Respondents have appealed against the decision of the Tribunal. Obviously, the Respondents could not have appealed against a decision they are not aware of.

20. We are satisfied that the Respondents have at all material times had knowledge of the decision and orders of this Tribunal in Application No. 20 of 2021.

Respondents' ability to comply

21. The impugned contract was executed between *Mbarara City Council* and *MBJ Technologies Ltd in association with Hersun Consults Ltd*. *Mbarara City Council* is the 1st Respondent in both Application No. 20 of 2021 and in this application. *MBJ Technologies Ltd* is the 2nd Respondent in both Application No. 20 of 2021 and in this application. Both Respondents were not third parties or strangers to the impugned cancelled contract. Both Respondents therefore had the ability to respect and comply with the order cancelling the impugned contract.

Wilful failure to comply with/disobedience of the Tribunal order

22. The affidavit of Ntalo Steven Mwase, the Managing Director of the Applicant, states that the Respondents have, notwithstanding the Tribunal's orders, gone ahead to implement the impugned contract that the Tribunal cancelled.
23. The deponent states in paragraph 6 that on the 18th January 2022, he travelled to Mbarara and established that the 2nd Respondent was indeed offering consultancy services to the road works that were being done by the contractor, Multiplex Ltd-Ditaco International Trade and contacting JV. That he also established that one Eng. Jjemba Edgar Tefiro, the resident engineer for the 2nd Respondent was on site. That he took pictures of the site works and presence of the 2nd respondent's workers on the 18th January 2022, 20th January 2022 and 22nd January 2022. The pictures are annexed to the affidavit as "**MR6**", "**MR7**", "**MR8**", "**MR9**" and "**MR10**".

24. Annexure “**MR6**” is a photograph of a sign post for the *Uganda Support for Municipal Infrastructure Development Project (USMID-AF)* in respect of the rehabilitation of roads in Mbarara City.
25. The consultant is indicated as *Multiplex Ltd and Ditaco International Trade and Contracting Joint Venture*. The consultant is indicated as *MBJ Technologies Ltd in association with Hersun Consults Ltd*.
26. **Annexures “MR7”, “MR8”, “MR9” & “MR10”** are photographs of people on site and wearing reflective jackets labelled *MBJ Technologies Ltd in association with Hersun Consults Ltd*.
27. The averments in the affidavit of Ntalo Steven Mwase are corroborated by the affidavit of Menya Ronald. This affidavit was not originally filed with the notice of motion but was filed on 1st February 2022 and served together with the notice of motion. The Respondents asked that this particular affidavit be struck off but we do not agree. An application may be supported or opposed by any number of affidavits so long as they contain relevant evidence. The Respondents themselves were granted leave to file supplementary affidavits and no injustice is caused if the Applicant’s second affidavit is also admitted as a supplementary affidavit.
28. Paragraph 6 of the affidavit of Mugisha Richard, the Deputy City Town Clerk of the 1st Respondent, states in response to paragraph 6 of the affidavit in support of Menya Ronald and Ntalo Steven Mwase that the contents together with the annexures attached are denied as to authenticity and that the 1st Respondent intends to have the same verified by an expert.
29. The 2nd Respondent’s affidavit in reply deponed by Phillip Kakuru, Executive Director and the supplementary affidavit deponed by Eng. Jjemba Edgar Tefiro, resident engineer, of the 2nd Respondent, deny that Jjemba Edgar Tefiro or any workers of the 2nd Respondent have ever been at the said site. Jjemba Edgar Tefiro did not however deny

being in the photographs. He also did not deny that the other persons in the photographs are workers of the 2nd Respondent.

30. When this application first came up for hearing on 17th February 2022, the 1st Respondent applied for an adjournment and leave to file a supplementary affidavit of the said an expert. The application was granted but no expert affidavit was filed to discredit the authenticity of the photographs.
31. The photographs of the project sign post and personnel at the site remain unchallenged.
32. At the hearing of this application, the 2nd Respondent's counsel raised technical objections about the admissibility of the photographs. With due respect to counsel, regulation 27 of *The Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations, 2016* provides that the Tribunal may not strictly observe the rules of evidence in the hearing of an application. In view of the seriousness of the matters raised in the affidavit, we find that the photographs are very relevant and see no reason to disallow them.
33. The 1st Respondent did not also present any specific evidence about the status of the impugned contract.
34. The affidavits of the Respondents are bare denials. The specific allegations and documentary evidence of the Applicant, which prove works at the site, were not controverted by contrary evidence.
35. It was held in the case of ***Samwiri Massa Vs. Rose Achen [1978] HCB 297*** that where certain facts are sworn in an affidavit, the burden to deny them is on the other party and if he or she does not, they are presumed to have been accepted.
36. We are therefore satisfied that the impugned cancelled contract between *Mbarara City Council* and *MBJ Technologies Ltd* in

association with Hersun Consults Ltd. Mbarara City Council is being implemented, contrary to the decision of this Tribunal in application No. 20 of 2021. The conduct of the Respondents is a defiant disobedience and disregard of the decision and orders of the Tribunal.

37. In the premises, we find that the Respondents are in contempt of the decision and orders of the Tribunal dated 18th October 2021 in Application No. 20 of 2021.
38. Issue no. 1 is answered in the affirmative.

Issue no. 2-What remedies are available to the parties

39. In view of our findings on issue no. 1 the Respondents are hereby declared to be in contempt of the decision and orders of the Tribunal dated 18th October 2021.
40. Regarding damages, the Applicant prayed for an award of general damages in the sum of Ug. Shs. 500,000,000 (Five Hundred Million). There is no prayer for aggravated or exemplary damages.
41. The general rule is that damages are compensatory in nature. General damages are such as the law presume to be the direct, natural or probable consequence of the act complained of.
42. Paragraphs 8 and 9 of the affidavit of Menya Ronald, Applicant's Managing director, state that the Applicant is being prejudiced by the Respondents' actions of contempt in a sense that if the 2nd Respondent continues to perform this contract under circumstances in which the said contract has been cancelled, the Applicant will lose the opportunity to do the same work and this will lead to loss of income. That the Respondents' conduct is an abuse/contempt of Tribunal process and it is in the interest of justice that the Respondents be cited for contempt, be ordered to pay general damages to the Applicant.

43. We are not persuaded that loss of opportunity to do the same work is a relevant factor in assessing damages in this application. The Applicant was not awarded the tender in this procurement and this is not a suit for breach of contract.
44. The Applicant's affidavits do not provide any evidence to show the direct, natural or probable consequence of the contemptuous acts complained of.
45. In **GERALDINE BUSUULWA SSALI VERSUS NATIONAL SOCIAL SECURITY FUND & OTHERS, (MA0116 of 2016 Arising from Misc. Applications No. 96 and 97 of 2016 and Miscellaneous Cause No. 32 of 2016)** the High Court Civil Division awarded the Applicant general damages of shs. 200,000,000 for contempt of court. The Applicant proved inter alia that the Respondents had, in violation of a court order, continued to deny access to her office; issued press statements saying they have blocked her official e-mail and fuel card. The Applicant demonstrated the direct consequences of the contempt on her.
46. In **COMMERCIAL DIVISION MISCELLANEOUS CAUSE NO.21 OF 2014; MEGHA INDUSTRIES (U) LTD VERSUS COMFORM UGANDA LIMITED**, the Applicant proved that the Respondent was manufacturing and selling mattresses which infringed the Applicant's trademark, and which was a violation of a consent judgment. Court awarded exemplary damages of shs. 300,000,000/- with interest at court rate from date of this ruling plus shs. 100,000,000/- as a penalty.
47. In **HIGH COURT CIVIL DIVISION MISCELLANEOUS APPLICATION NO.593 OF 2019 ARISING OUT OF MISCELLANEOUS CAUSE NO.117 OF 2016; BIN-IT SERVICES LIMITED VERSUS KAMPALA CAPITAL CITY AUTHORITY & ANOTHER**, the impugned conduct of the Respondents caused loss and inconvenience to the Applicant in the business of garbage collection. Court awarded exemplary damages of shs. 150,000,000 with interest at court rate from the date of ruling till payment in full; shs. 20,000,000 as a penalty for

contempt of court orders; and the 1st Respondent's officials directly responsible were ordered to pay to the Applicant a further sum of 25,000,000 per month for any further contempt of the court order after the ruling.

48. In **HIGH COURT OF UGANDA AT KAMPALA CIVIL DIVISION MISCELLANEOUS APPLICATION No. 120 OF 2017 (Arising from Miscellaneous cause No. 148 of 2016)- DR. CHARLES TWESIGYE Versus KYAMBOGO UNIVERSITY**; the Applicant was denied a record of proceedings of the Staff Appeals Tribunal, contrary to the orders of court. The court awarded exemplary damages of shs. 20,000,000. The Respondent was also fined shs. 2,000,000.
49. What can be discerned from the above authorities is that damages in contempt proceedings are at large, and the quantum to a large extent depends on evidence of the nature and effect of the contempt on the Applicant.
50. Court orders are not issued in vain. There is a legitimate expectation that the decisions of this Tribunal will be respected and complied with. Disregard for or disobedience of the decisions and order of this Tribunal undermines the structure and processes of the public procurement and disposal system in Uganda. Such conduct also undermines public confidence in the Tribunal as a specialized forum for the effective, efficient and speedy adjudication of public procurement and disposal disputes. In the premises, this Tribunal shall not countenance any disobedience of its decisions.
51. A warning also goes out that under section 91T (2) (d) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021, regulations made under the Act shall create the offence of contempt of the Tribunal.
52. A judgment or other decision of a court or Tribunal in favour of a party, is property. Therefore, any interference therewith must attract

sanctions against the offending party. To the extent that the Tribunal gave the Applicant a remedy which has been ignored with impunity, the Applicant is entitled to general damages. Doing the best we can, we award the Applicant general damages of shs. 30,000,000 to be paid by the Respondents jointly and severally.

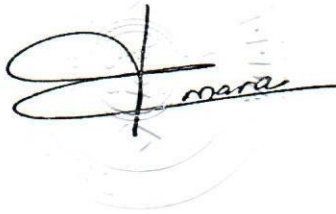
53. The Respondents shall also jointly and severally pay a fine of shs. 10,000,000.
54. Costs follow the event. The Respondents shall pay the Applicant's taxed costs of this application.

F. Disposition

55. In the final result this application is allowed with the following orders:
 - (1) The Respondents are declared to be in contempt of the decision and orders of the Tribunal dated 18th October 2021.
 - (2) The Respondents shall jointly and severally pay the Applicant general damages of shs. 30,000,000 (thirty million shillings).
 - (3) The Respondents shall jointly and severally pay a fine of shs. 10,000,000 (ten million shillings).
 - (4) The general damages and fine shall carry interest at the rate of 8% per annum from the date of this ruling until payment in full.
 - (5) The Respondents shall jointly and severally pay the Applicant's taxed costs of this application.
 - (6) The 1st Respondent is prohibited from paying any consideration to the 2nd Respondent under the impugned contract for supervision of road works in Mbarara City under Cluster 6.

- (7) The 2nd Respondent shall immediately refund all payments received (if any) under the impugned contract for supervision of road works in Mbarara City under Cluster 6.
- (8) The Registrar of this Tribunal is directed to serve a copy of this ruling on the following:
- (a) The Permanent Secretary/Secretary to the Treasury, Ministry of Finance, Planning and Economic Development.
 - (b) The Auditor General.
 - (c) The Permanent Secretary, Ministry of Lands, Housing and Urban Development.
 - (d) The Permanent Secretary, Ministry of Local Government.
 - (e) The Executive Director, Public Procurement and Disposal of Public Assets Authority.

Dated at Kampala this 7th of March 2022.



FRANCIS GIMARA S.C
CHAIRPERSON



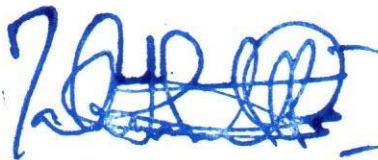
NELSON NERIMA
MEMBER



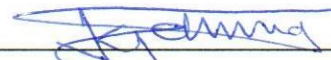
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GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER