IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION AT ARUSHA

CORAM: (Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; Edward Rutakangwa; Aaron Ringera and Geoffrey Kiryabwire JJ.A)

APPEAL No. 3 OF 2015

BETWEEN

GODFREY MAGEZI .....APPELLANT

AND

THE ATTORNEY GENERAL OF THE REPUBLIC

OF UGANDA .....RESPONDENT

(Appeal from the Judgment of the first instance Division at Arusha- Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; and Faustin Ntezilyayo,J dated the 14th day of May, 2015 in Reference No. 5 of 2013).

INTRODUCTION

1. This is an Appeal by Godfrey Magezi (hereinafter referred to as "the Appellant") against the Judgment of the First Instance Division of this Court (hereinafter referred to as "the Trial Court") dated 14th May, 2015 in Reference No. 4 of 2013 (hereinafter referred to as "the Reference") in which the Trial Court dismissed the Appellant's reference with costs to the Respondent.

2. The Appellant, who is a resident of Uganda, was the Applicant in the Trial Court. He described himself as a whistleblower. He sued the Attorney General of the Republic of Uganda for violation and/or infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

3. The Respondent is the Attorney General of Uganda and was sued in the Reference as a representative for and on behalf of the Republic of Uganda.

4. The Appellant was, both in the Trial Court and in this Court represented by Mr. Mohammed Mbabazi, instructed by the firm of Nyanzi, Kiboneka and Mbabazi Advocates of Kampala Uganda and the Respondent was represented in this Court by Mr. George Karemera Principal State Attorney, Ms Goretti Arinaitwe, Senior State Attorney and Mr. Bichachi Ojambo, State Attorney.

BACKGROUND.

5. The factual background to this Appeal as agreed to by the parties at the Scheduling Conference held on the 3rd June 2014 is as outlined below.

6. At a time in Uganda, when access to the treatment for HIV/ AIDS was almost impossible for the poor and malaria was at its peak, the Government of Uganda (hereinafter referred to as the "GOU") conceived the idea of establishing a pharmaceutical factory to manufacture drugs to treat the aforesaid illnesses within Uganda. Pursuant to the foregoing, the GOU and Quality Chemical Industries Ltd (hereinafter referred to as "QCIL"), a private Limited Company incorporated in accordance with Ugandan Laws and Regulations, signed a Memorandum of Understanding (The "MOU") on 14th December, 2005, under which the off-take purchase of anti-retro viral ("ARVs") and anti- malaria drugs by the GOU from QCIL was guaranteed until 2019. A formal guarantee to QCIL by GOU was issued on the same date. Both the MOU and Guarantee provided that QCIL would construct a pharmaceutical drugs and products factory in Uganda which would manufacture the said ARVs and Anti malaria drugs.
7. The MOU further provided, that GOU would purchase the drugs from QCIL plant in Uganda before the construction of the factory was completed and drugs manufactured. It was further agreed that the prices of those drugs would be equal to or less than the prices provided in a joint UNICEF –UNAID-WHO-MSF project.
8. Prior to the completion of the construction of the aforesaid factory in 2007, the Appellant alleged that he discovered that the GOU through the National Medical Stores had procured drugs from QCIL which had been imported from India and which were sold at an unjustified 15% mark-up above that of the

E4

international prices agreed upon in the MOU and that this act had caused financial loss of USD17,826,038.94 to the public in Uganda. The Appellant now acting as a whistleblower, brought the above malpractice to the attention of the Inspector General of Government of Uganda (hereinafter referred to as "the IGG") who started investigations and produced a Report dated 20th December, 2011 that confirmed the said loss.

9. In her Report, the IGG recommended to the Government that it consider recovery of the payments made above the 15% mark-up for drugs purchased illegally from QCIL, which amounted to USD17,826,038.94.

10. As a whistleblower, the Applicant expected a reward of 5% of the recovered money, in accordance with Section 19 of Whistle blowers Protection Act, 2010. The IGG, however in a subsequent letter dated 8th July 2013, in an apparent turnabout, reviewed her conclusions related to the recovery of the alleged loss highlighted in the aforesaid Report and stated that she was satisfied by the Report of The Attorney General of Uganda that the USD 17,826,038.94 could not be recovered. The effect of this letter was that the Appellant would not be entitled to any reward hence the filing of the Reference in the Trial Court.

The Reference.

11. Aggrieved by the IGG's alleged turnabout, the Appellant on the 25th July, 2013 filed the Reference in the Trial Court under Articles 6(d), 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the

Establishment of the East African community (hereinafter referred to as "The Treaty") and Rule 24 of the East African Court of Justice Rules of Procedure, 2013 (hereafter referred to as the "Rules of the Court"). The Appellant's case was contained in his Amended Reference, his reply to the Respondent's Response filed on 20th May, 2014, his Affidavit sworn on 17th June, 2014, his written submissions filed on 17th November, 2014 and his rejoinder to the Respondent's submissions filed on the 12th January, 2015.

12. The Appellant in the Amended Reference pleaded that, the turnabout (detailed above) by the IGG is inconsistent with Articles 6(d), 7(2) and 8(1) (c) of the Treaty. He prayed for the following reliefs:-

"4.1 A declaration that the inaction, refusal or failure of and/or by the Government of Uganda to recover USD17,826,038.94 from Quality Chemicals Industries Limited as per the Inspectorate's recommendations and report of December 2011 is an aberration and fundamental departure from the principles of good governance, accountability and a subversion of the principles of the rule of law and is contrary to Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty.

4.2 A declaration that the act of the inspectorate in deeming "the review and amendment of the original MOU and the execution of the amended MOU and Guarantee on the 16th April 2012" to be adequate implementation of all recommendations contained in the report and thereafter

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closed the matter, is breach and infringement of Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty.

4.3 An order enforcing compliance with and adherence to the Treaty and directing the Government of Uganda to immediately adhere and comply with the treaty by taking measures to recover the USD17,826,038.94 from M/S Quality Chemicals Industries Limited rather than deeming the same to have been recovered through the review and amendment of the original Memorandum of Understanding at the execution of the Amended Memorandum of Understanding and Guarantee.

4.4 Costs of the Reference be paid by the Respondent....”

The Response to the Reference.

13. The case for the Respondent was contained in the Response to the Amended Reference filed on 7th February, 2014 and supported by the Affidavit sworn by one, Richard Kiggundu, Finance Manager of the QCIL dated 11th July, 2014 and another Affidavit dated 29th July, 2014 sworn by one Ms. Jane Aceng, the Director General of Health Services in the Ministry of Health, in the Republic of Uganda. In brief the response stated as herein under.

14. The Respondent conceded that an MOU and a Guarantee Agreement between the GOU and QCIL Ltd was signed on 14th December, 2005 and that this was then amended on 16th April, 2012;

15. It was further conceded, that the Appellant made a disclosure of alleged malpractices that occurred between the National Medical Stores and QCIL Ltd. As a result of this disclosure the IGG carried out investigations and produced a Report on 20th December 2011.

16. As a follow-up to the recommendations made by the Inspectorate of Government Unit, the IGG sought an update on the implementation of the recommendations from the relevant Government departments. The Attorney General on 12th April, 2012 and 27th May, 2013 issued two legal opinions stating in particular, that there was no loss occasioned to the Government by the supply of ARVs, ACTs and other drugs by QCIL Ltd as had been alleged.

17. The Respondent, by issuing his legal opinion, acted within his constitutional powers and that could not be said to have contravened the principles of good governance, democracy and rule of law. It was the case for the Respondent that he independently and within his constitutional mandate analysed all relevant facts and recommendations in the Report and shared his conclusions with the IGG.

18. It was the further case of the Respondent that the IGG did not require any consent or approval of any authority to discontinue her investigations into the matter as provided under Section 14(8) of the Inspectorate of Government Act, 2002.

19. Furthermore, the Respondent in his response stated that he exercised his constitutional mandate in issuing the aforesaid legal opinion and in doing so, he neither altered the IGG's Report nor influenced the Inspectorate of Government.

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20. The Respondent therefore prayed that the amended reference be struck out with costs.

The Issues for Determination.

21. At the Scheduling Conference held by the Trial Court the parties agreed to the following 6 issues for determination:-

1) Whether this is a matter of interpretation before this Honourable Court pursuant to Articles 27(1), 30(1) and (3) of the Treaty;

2) Whether this Honourable Court can find against an entity that is not a Party to this Reference and specifically Quality Chemical Industries Ltd;

3) Whether the content and the implications of the Inspectorate of Government's letter dated 8th July, 2013 was in breach of Principles of good governance, rule of law, accountability and transparency contrary to the provisions of Articles 6(d), 7(2) and 8(1)(c) of the Treaty;

4) Whether there was any loss of USD17, 826,038.94 by the Government of Uganda and Quality Chemicals Limited;

5) Whether there was inaction, refusal/or failure by the Government of Uganda to recover USD17, 826,038.94 from Quality Chemical Industries Limited; and

6) What reliefs are available to the Parties?

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The Trial Court's Determination.

22. After considering the pleadings of the parties and the affidavits in support thereof, as well as the submissions of counsel, the Trial Court in a Judgment delivered on 14th May 2015 , found that the Respondent had not breached the Treaty and accordingly dismissed the Appellant's reference with costs to the Respondent.

The Appeal to the Appellate Division.

23. Dissatisfied with the entire Judgment of the Trial Court, the Appellant instituted this appeal by filing a Memorandum of Appeal filed on the 6th July 2015. The Appellant raised the following grounds of Appeal.

1. The Hon. Learned Justices of the First Instance erred in Law when they found and decided that the content and the implications of the Inspectorate of Government's letter dated 8th July, 2013 did not breach and were neither inconsistent nor an infringement of Articles 6(d), 7 (2) and 8(1)(c) of the Treaty.

2. The Hon. Learned Justices of the Court of First Instance erred in Law when they declined to make a finding on and decide the issue of whether the inaction , refusal and or failure by Government of Uganda to recover US$ 17,826,038.94 Dollars from Quality Chemicals Industries Limited was a breach and an infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

3. The Hon. Justices of the Court of First Instance Division erred in Law when they decided that the Appellant is not entitled to the reliefs and remedies sought in the Reference against the Respondent.
4. The Hon. Learned Justices of the Court of First Instance Division erred in Law when they failed to apply the principle of legitimate expectations in the context of the principles of good governance, rule of law, accountability and transparency in determining whether the contents and implication of the Inspector General of Government letter dated 8th July 2013 breached and infringed Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

24. The Appellant by this Appeal seeks an Order that the Judgment of the Learned Justices of the First Instance Division dated 14th May, 2015 in Reference No. 5 of 2013 be set aside and the Appeal be allowed with costs to the Appellant here and in the lower Court. The Appellant further prays that this Court enter Judgement for the Appellant as prayed for in Reference No 5 of 2013. The Respondent opposes this Appeal and agrees with the decision of the Trial Court.

The Scheduling Conference

25. At the Scheduling Conference of the Appeal pursuant to Rule 99 (of the Rules of this Court) the parties with the guidance of this Court agreed that the grounds of the appeal could be resolved by the determination of the following issues:-

1. Whether or not Hon. Learned Justices of the First Instance Division erred in Law when they found and decided that the content and the implications of the Inspectorate of Governments' letter dated 8th July, 2013 did not breach and were neither inconsistent nor an infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

2. Whether or not the Hon. Learned Justices of the First Instance Division erred in Law when they failed to apply the principles of legitimate expectations in the context of the principle of good governance, rule of law, accountability and transparency in determining whether the contents and implication of inspector General of Government's letter dated 8th July 2013 breached and infringed Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

3. Whether or not the Hon. Learned Justices of First Instance Division erred in Law when they declined to make a finding on and decide the issue of whether the inaction, refusal and or failure by the Government of Uganda to recover US $ 17,826,038.94 Dollars from Quality chemicals Limited was a breach and an infringement of Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

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4. Whether or not the Learned Justices of the Court of First Instance Division erred in Law when they decided that the Appellant is not entitled to the reliefs and remedies sought in the Reference against the Respondent.

26. The Parties to this Appeal filed written submissions addressing the above issues. When the Appeal came up for hearing, the learned Counsel for the parties wholly adopted those submissions and prayed that the Court makes its determination on the basis of the submissions filed.

The Role of The Appellate Division

27. The role of this Court in determining an Appeal is found in Article 35 A of the Treaty and Rule 77 of the Rules of this Court. Both provisions have the same wording and provide

"...An appeal from the Judgment or any order of the First Instance Division shall lie to the Appellate Division on:

(a) Points of law;

(b) Grounds of lack of jurisdiction; or

(c) Procedural irregularity..."

28. Save for what is provided for under the above provisions, there is no limitation placed on this Court as the nature of inquiry it may carry out in determining the appeal on those grounds. This Court therefore in determining the appeal has the power to inquire into whether the trial Court erred on a point of law, lack of jurisdiction and/or on a procedural

irregularity. Taking the above principles on appeals into consideration we shall proceed to determine the issues presented to us.

Issue No. 1: Whether or not Hon. Learned Justices of the First Instance Division erred in Law when they found and decided that the content and the implications of the Inspectorate of Governments' letter dated 8th July, 2013 did not breach and were neither inconsistent nor an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

The Appellant's submissions.

29. The Appellant's submissions on this issue were quite long and overlapped in a number of areas. We shall try to align them as follows. Counsel for the Appellant submitted that the Appellant (Mr. Godfrey Magezi) was a whistleblower as defined under the **Whistleblowers Act** of Uganda (Act 6 of 2010). That the Appellant discovered that the GOU through the National Medical Stores had procured drugs from QCIL which had been imported from India and which were sold at an unjustified 15% mark-up, above that of the international prices agreed upon under the MOU signed between the GOU and QCIL. Furthermore, this act had caused a financial loss of USD17,826,038.94 to the Republic in Uganda. Counsel for the Appellant in his submissions, repeatedly referred to this loss of money as *"theft of Government money".*

30. The Appellant as a whistleblower reported this alleged loss to the IGG who is an "authorised officer" under the Whistleblowers Act to receive

such information and to take action on it. Counsel for the Appellant further submitted, that the IGG investigated the information provided by the Appellant and found the said disclosure to be correct. The IGG then made a Report dated 20th December, 2011 with recommendations that the lost money be recovered by the GOU. The Report's recommendations are found at paragraph 17 which reads:-

"17.1 RECOMMENDATIONS

17.1 The Attorney General should as a matter of urgency cause the review of the prices of drugs purchased under the MoU (Sic) with a view to ensuring that drugs purchased from CIPLA Ltd are purchased at prices not higher than CIPLA Ltd International prices, and drugs purchased from QCIL are not more than 15% higher than CIPLA international prices.

17.2 The Government of Uganda and QCIL should review the need for further importation of drugs as the QCIL plant in Uganda has already been commissioned.

17.3 The Government of Uganda should consider recovery of the payments made above the 15% mark up for drugs purchased from QCIL and payments for drugs purchased from CIPLA at prices above CIPLA international prices which amount to US 17,826,038.94 for drugs procured between December 2009 and October 2010 plus the subsequent procurements..."

31. Counsel for the Appellant submitted that the Attorney General and National Medical Stores instead of complying with the said recommendations vigorously resisted the recovery of the money which was stolen. The Attorney General in his letter dated 27th May 2013, after carrying out his own investigations and finding that there was no loss of Government money advised as follows:-

> ***"...in light of the foregoing the office of the Attorney General is of the considered opinion that pursuit of recovery of US $ 17,826,036.94 recommended by the IGG is without basis and will be an exercise in futility which will expose Government to protracted unnecessary litigation likely to result in Government paying heavy sums and costs..."***

(a) Counsel for the Appellant argued, that the IGG caved in to the Attorney General of Uganda's opinion and agreed that no loss had occurred as alleged. The IGG then in a turnabout on her earlier recommendations of 20th December, 2011 wrote a letter to the Minister of Health Uganda dated 8th July 2013 (the impugned letter) and deemed that the recovery had been done through other acts; as it was expensive to recover the money through legal means. The IGG's impugned letter partly reads*;*

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"The Hon. Minister of Health
Ministry of Health
KAMPALA

IMPLEMENTATION OF THE RECOMMENDATION OF THE INSPECTORATE OF GOVERNMENT TO RECOVER MONEY ALLEGED TO HAVE BEEN LOST THROUGH INFLATION OF PRICES BY QUALITY CHEMICALS INDUSTRIES LTD

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The government has since carried out a review of the MoU, which review culminated in the execution of the Amended Memorandum of Understanding (A MoU) and Guarantee, between the Government of Uganda and QCIL, signed on 16th April 2012. This adequately addresses Recommendations 1 and 2 above.

The implementation of Recommendations 3 (recovery of funds) has been controversial, with NMS refusing to implement it as requested by the Permanent Secretary, Ministry of Health, while the Permanent secretary insists that NMS must recover the said funds. The Attorney General upon requests by the Minister of Health has advised that the recovery of the money from QCIL is untenable, because the pricing was done in accordance with the MoU, and recovery would be an exercise in futility in view of the Government contractual obligations under the MOU and Guarantee, such recovery

44

would render the Government liable for both breach of this contract, and also damages for failure to fulfil their obligations under the origin MoU, which QCIL had agreed to waive.

It is noted that the contracted relationship between the Government of Uganda and QCIL was reviewed to address the concerns raised by the Inspectorate of Government . Further that the Attorney General has advised that the recovery cannot be pursued as it would leave the Government vulnerable to liability for its own breaches of contract.

Therefore, the Inspectorate deems the review and amendment of the original MoU, and the execution of the Amended MoU and Guarantee on 16th April 2010 to be adequate for implementation of ALL recommendations contained in the report and deems the matter closed..."

32. Counsel for the Appellant submitted, that the result of the above turnabout was that the IGG in effect released "the thief" from liability to refund the stolen funds. This refusal and/ or inaction by the Respondent, to recover the stolen funds, argued Counsel for the Appellant, violated the Treaty to which Uganda is a Partner State and is bound by. The Respondent's actions were therefore inconsistent with the Treaty's principles of good governance, rule of law, transparency and accountability. He further argued that pertinent questions in the context of the Whistleblowers Protection Act arose as a result of this inaction, namely:

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i) How should the Government of Uganda treat a thief who is caught stealing public funds?

ii) How does the Government of Uganda treat Whistleblowers who come out to disclose acts of impropriety leading to the discovery of the thief of Government funds?

33. Counsel for the Appellant submitted that the IGG's impugned letter of the 8th July 2013 has two facets. The first facet, is the question what did the IGG do when she authored the impugned letter. The second facet, is what did the IGG decide in that letter? In answer to the first facet, Counsel for the Appellant, submitted that the impugned letter was written after the IGG's Report of December, 2011 which, was a direction or order to recover stolen money. However the IGG by the impugned letter, reviewed her own Report and recommendations. He argued that, the impugned letter in law could not amount to a review, appeal or revision of the 20th December 2011 Report because it was written by the same person. On the second facet Counsel for the Appellant submitted that the IGG in her Report of December 2011 recommended recovery by GOU of the USD 17,826,038.94 that had been discovered as stolen. Counsel for the Appellant argued that by writing the impugned letter, the IGG had discharged "the thief" from liability to repay the stolen money. He further argued that this amounted to a write off of a debt due to Government by a culpable party. Counsel for the Appellant also argued that the IGG had illegally varied her decision recommending the recovery of the money by deeming that the said money had been recovered.

34. Counsel for the Appellant, submitted that it was not in contention that the IGG, moved by the disclosure of the Appellant as a whistleblower investigated and found a loss of USD 17,826,038.94 to the GOU which finding has never been challenged nor quashed by any competent authority. This finding was therefore in his view still valid and binding until set aside by Court [he referred the Court to the authority of **Minister for Immigration & Multicultural Affairs V Bhardwa** (2002) CLR 597]. The IGG however deemed that the USD 17,826,038.94 had been recovered and this is what the Appellant was challenging.

35. Counsel questioned whether the IGG had the mandate and jurisdiction to deem that the money had been recovered and answered that question in the negative. He further questioned to whom the IGG was accountable under the Whistleblower's Protection Act and whether the IGG in so deeming the money as recovered had acted with integrity? Counsel further questioned whether there could be forgiveness of "thieves" under the Whistleblowers Protection Act when a loss had been discovered and confirmed through investigations?

Constitutional and statutory powers and mandate of the IGG to eliminate corruption

36. Counsel for the Appellant submitted that the office of the IGG had both Constitutional and Statutory powers to eliminate corruption. He referred to Articles 223 (1), (2), (3) and (5); 225, 226 and 227 of the **Constitution of Uganda 1995** which sets up the Office of the IGG. He further submitted that these same provisions are re-enacted in the **IGG Act** in Sections 3, 8, 10, 12,14, 29,21, 25, 30, 34, and 36. He submitted that Section 2 of the **IGG Act** defined corruption as

"...the abuse of public office for private gain and includes but is not limited to embezzlement, bribery, nepotism, influence peddling, theft of public funds or assets, fraud, causing financial or property loss and false accounting in public affairs..."

37. Counsel for the Appellant argued that in this case there was evidence of theft of public funds, fraud and loss which amounted to corruption which, the IGG is mandated to investigate and eliminate under Articles 225 of the Constitution of Uganda and Section 8 of the IGG Act. The evidence of corruption was that QCIL a purported "manufacturer" of drugs, was in fact not manufacturing drugs but "importing" them from M/s CIPLA India and labelling the imported products as if they were manufactured by the local factory. This led to the finding of a loss of USD 17,826,038.94 by the IGG which has never been reversed. He argued that to forgive QCIL was an antithesis of the IGG's key performance deliverable.

38. Counsel for the Appellant submitted that the IGG acted outside her constitutional and statutory mandate to eliminate corruption and instead did a diametrically different and opposite act of promoting corruption. These actions by the IGG therefore breached Articles 6, 7, and 8 of the Treaty. He further argued that this was contrary to previous practice of the IGG like in the case of **Attorney General & IGG V Afric Coop Society Ltd** SCCA No. 5 of 2012 and **American Procurement Co. Ltd V Attorney General & IGG** SCCA No. 35 of 2009 where the IGG despite pressure to do so, did not waver on or change her recommendations and saved the GOU a lot of money.

Ejusdem generis rule and the interpretation of Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act

39. Counsel for the Appellant submitted that the Trial Court erred when it held

"...it is our obligation to determine whether the letter of the IGG and legal opinion of the Attorney General infringed Treaty provisions. Sadly, the Applicant did not elaborate enough on that issue..."

40. Counsel for the Appellant pointed out that the Appellant as Applicant in the Trial Court had exhaustively elaborated the breaches of the MOU in his written submissions in paragraphs 3.11-3.29 of the Applicant's written submissions at page 625-721 of the Record of Appeal and paragraphs 7:10-7:21 of the Applicant's response to the Respondent's submissions. He argued that it is the Appellant's case, that the IGG was complicit to the theft of public funds when she

wrote the impugned letter. He further submitted that there was no evidence to justify the turnabout in the impugned letter, apart from Attorney General's advice (dated 29th May, 2013) which was attached. It is this letter from the Attorney General which the IGG quoted from, before she reached her decision to forgive, exonerate or write off the USD 17,826,038.94. He argued that there was no legal basis for the IGG to heed the Attorney General's advice.

41. He further submitted that the Trial Court had erred when it decided that the IGG had and applied special powers conferred on her by the Constitution and the IGG Act to act independently and write the impugned letter and deem that the stolen funds had been recovered. He submitted that the Trial Court wrongly interpreted and referred to Article 230 of the Constitution and Section 14 of the IGG Act in reaching their decision. Article 230 of the Constitution provides

"**Article 230: Special powers of Inspectorate**

(1) The inspectorate of government shall have the power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office.

(2) The Inspector General of Government may ,during the course of his or her duties as a consequence of his or her findings ,make such orders and give directions as are necessary and appropriate in the circumstances."

(b) Sections 14(5) and (6) of the IGG Act (Act 5 of 2002) provides;

"(5) The inspectorate shall have the powers to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office .

(6) The Inspector General of Government may, during the course of his or her duties as a consequence of his or her findings , make such orders and give directions as are necessary and appropriate in the circumstances..."

42. He argued that the orders and directions the IGG is empowered to make, ought only to be as a consequence of her own findings; which in this dispute were those of her Report of December, 2011. However in the case of the impugned letter no new investigations had been carried out before it was written and therefore the said letter could not, as the Trial Court had found, be a consequence of the IGG's findings. The IGG's role therefore ended when she issued her first Report.

43. Counsel for the Appellant referred the Court to the case of **Attorney General and IGG V Afric Coop** (supra) where the IGG also wrote two letters after the completion of the investigations but the second letter unlike the situation in this case restated and reiterated the initial Report Findings and Recommendations which the Court then upheld.

44. He argued that the impugned letter could not vary the Report of December, 2011 and it at best was a mere correspondence between the IGG and Ministry of Health. The finding therefore by the Trial Court that the

impugned letter was protected by Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act was fundamentally wrong and an error of law.

45. Counsel for the Appellant further submitted that the Trial Court misinterpreted Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act when it gave the impression, that the IGG had discretionary powers to do anything within and outside the law. He argued that the Trial Court interpreted the contents of the IGG's letter of 8th July, 2013 as ***"...any order and direction that is necessary and appropriate in the circumstances"***. This interpretation he submitted was a form of *carte blanche* (open cheque). Counsel disagreed that this could not have been the intention of the Parliament to grant the IGG such wide and unfettered discretionary powers to be exercised by a person or body, contrary to the intent and purpose of the law. He submitted that such an interpretation would mean that the IGG could do any of the following:-

"(a) ***Recover the USD 17,826,038.94 and use it for her own purposes e.g. her salary, buy an official car or go for treatment abroad;***

(b)***Recover the USD 17,826,038.94 and donate it to charity;***

(c)Recover a portion and leave the balance;

(d)Recall her report and declare that there was no loss;

(e)Quash her report;

(f)Revise the report and make fresh findings and recommendations implicating another person..."

46. Counsel for the Appellant submitted that the IGG being an administrative tribunal or body meant that its Report and recommendations

are an administrative decision and therefore all the investigations of the IGG had to comply with the rules of natural justice as well as fair and just treatment. He consequently asked the question whether the IGG could invoke Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act to deny a person who is adversely affected by his/her investigation a right to be heard by revising, reviewing, quashing or shelving a Report by the mere stroke of a pen? This Counsel for the Appellant answered in the negative.

47. Counsel for the Appellant further submitted that the IGG is accountable to the Parliament of Uganda under Article 231 of the Constitution and Sections 29 and 30 of the IGG Act whereby the IGG has to lay before Parliament once every six months a Report of what it had done. He argued that this meant that the IGG hands over whatever it had done in the last six months without change to Parliament for further action.

48. Counsel for the Appellant submitted that all of the above showed that the IGG's powers are circumscribed and that Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act do not give the IGG an open cheque of full discretionary powers to act outside the law especially so to write off the loss of money and deem it recovered. He argued that there was no criteria or basis shown for forgiving or otherwise deeming a recovery of the lost money. He pointed out that this arbitrariness results in abuse of power and authority as the enforcer of the law becomes the violator and abuser of the law. He argued that the office of the IGG is a symbol of good governance, the rule of law, transparency and accountability under the law and therefore could not at the same time be the violator and abuser of the same principles.

49. Finally on the issue of misinterpretation of Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act, Counsel for the Appellant submitted that the law is settled that no provision or word in a statute is to be read in isolation, but rather a statute has to be read as a whole and in its entirety. For this proposition he referred us to the case of **Reserve Case of India V Peerless General Finance & Investment Co. Ltd (1987), SCC 424** where the Court held

> *"33. Interpretation must depend on the text and context. They are the bases of interpretation. One may well say if the text is the texture, texture is what gives the color. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrases and word by word. If a statute is looked at in the context of its enactment, with the clauses of the statute marker, provided by such context, its scheme, the sections, clauses, phrases words may take color and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything in its place..."*

50. Counsel for the Appellant also submitted that the IGG having made her Report and recommendations as a result of which the Appellant was a whistleblower was entitled to 5% of the amounts recovered.

51. On estoppel, Counsel for the Appellant submitted that by reason of the express representations the IGG made as a result of the investigation, she was estopped from going against her word. He submitted that, the Appellant having relied on the express representations of the IGG that the USD 17,826,038.94 would be recovered and consequently he would get a 5% reward, then the doctrine of promissory estoppel applied, as explained in the case of **Collars v P & MY Wright (Holdings Ltd 2007) EWCA liv 1329** and **Central London Property Ltd V High Trees Ltd (1947) KB 130**. He pointed out that the Appellant had suffered a detriment by losing his reward, which he called a statutory entitlement. He emphasized that this entitlement was a right conferred by law and could not be taken away by any person without due process.

52. Counsel for the Appellant also raised the principle of *functus officio* and wondered how the IGG could re-open the investigations she had concluded and decide that the inspectorate deems the review and amendment of the original Memorandum of Understanding to be adequate implementation of all the recommendations in her original Report? He pointed out that the Ministry of Health as the line Ministry in charge of the National Medical Stores, had already tasked the said National Medical Stores to recover the lost funds in their letter dated 11th March, 2013 (at pages 406-432 of the Record of Appeal). It reads;

"The Minister of Health
Ministry Of Health Headquarters
Kampala

AUDITOR GENERAL'S REPORT REGARDING FINANCIAL STATEMENT OF NATIONAL MEDICAL STORES FOR THE YEAR ENDED 30TH JUNE 2011

The Inspectorate of Government received and reviewed the Auditor General reports on the financial statements of National Medical Stores (NMS). Among others, it was noted that NMS procured ARVS and ACTS drugs from Quality Chemicals Industries Ltd (QCIL).

You may recall that the same finding was contained in our report Ref.RT.128/2010 dated 20thDecember, 2011.The report was addressed to His Excellency the President and copied the Hon. Minister of Health. Among others, the report recommended recovery of 17,826,038.94 being overpayment to QCIL by NMS see copy of the report attached.

Therefore, this is to ask you to give us an update on the recovery that was recommended by this office. In addition, we urge you take appropriate action on the concerned NMS officials and inform us of action taken…"

53. Counsel for the Appellant referred us to the South African case of **Retail Motor Industry Organisation V Minister of Water & Environmental Affairs (143/13) [2013] ZASCA 70** where it was held that:-

> *" The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.*

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as general rule, exercise those powers only once in relation to the same matter... the result is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive.. Such a decision cannot be revoked or varied by the decision-maker..."

54. He referred us to the further authorities of **Ridge V Baldwin [1964] AC 40** and **Stephen J Moloney: Finality of Administrative Decisions & Decision of Statutory Tribunals in AIAL Forum No 61.**

55. Counsel for the Appellant therefore submitted that the IGG became *functus officio* after she submitted the Report to the President with a copy to the Appellant and could as a result not deal any further with the matter thereafter.

(a)56. It is also the Appellant's submission that the turnabout by the IGG is not an "appropriate action" envisaged under the Whistleblowers Protection Act and was therefore done outside the law. Counsel for the Appellant submitted that anything done outside the law is a breach of the principles of good governance and rule of law. It further depicts lack of accountability and transparency. He referred us to the salient provisions of the **Whistleblowers Protection Act 2010** which provides ***;***

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"Long Title

An Act to provide for the procedures by which individuals in both the private and public sector may in the public interest disclose information that relates to irregular, illegal or corrupt practices; to provide for the protection against victimization of persons who make disclosure.

Interpretation

In this Act, unless the context otherwise requires-

"authorized officer" means the Speaker of Parliament or Deputy Speaker of Parliament, the Executive Director of National Environment Management Authority in case of environmental issue, Resident District Commissioner , a Senior Ethics Officer with the Directorate of Ethics and Integrity, a Human Rights Commissioner with Uganda Human Rights Commission, the Director of Public Prosecutions, ***an Inspectorate Officer of the Inspectorate of Government*** *, a police officer not below the Rank of Assistant Inspector of Police.*

"disclosure " means any declaration of information made by a whistleblower with regard to the conduct of one or more persons where the whistleblower has reason to believe that the information given shows or tends to show one or more of the following-

(a) That a criminal offence or other unlawful act has been committed , is being committed or is likely to be committed;

(b) That a miscarriage of justice has occurred , is occurring or likely to occur ;

(c) That a person has failed , is failing or likely to fail to comply with any legal obligation to which that person is subject;

(d) That any matter referred to in paragraphs (a) to (c) has been, is being or likely to be deliberately concealed.

"impropriety" means conduct which falls within any of the categories of definition of disclosure referred to in paragraphs (a) to (d) irrespective of whether or not-

(a) The impropriety occurs or occurred in the Republic of Uganda or outside the Republic of Uganda; or

(b) The law applying to the impropriety is that of the Republic of Uganda or outside the Republic of Uganda.

"protected disclosure" means a disclosure made to-

(a) An authorized officer;

(b) An employer;

(c) A nominated disclosure officer."

***"whistleblower"** means a person who makes a disclosure of impropriety under this Act..." (Emphasis added).*

57. Counsel for the Appellant pointed out that the IGG is an authorised officer under the Whistleblowers Protection Act. He further pointed that the **Whistleblowers Protection Act** does not have wording similar to those found in Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. He contested the holding that the Trial Court found that the IGG as an authorised officer is subject to Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act whereas other authorised officers under the **Whistleblowers Protection Act** are not. This in effect gave the IGG a

special status under the **Whistleblowers Protection Act** to forgive wrong doers and write off lost funds. He argued that such an interpretation defeats the purpose and intention of the Whistleblowers Protection Act. He further argued that Section 8 of the **Whistleblowers Protection Act** provides that an authorised officer has to investigate a matter and then take "**appropriate action"**. In his view, appropriate action under the Whistleblowers Protection Act means a deliberate action which would motivate individuals to disclose and report illegal and corrupt practices and then get a reward of 5% of the amounts recovered under Section 19 of the same Act. Counsel for the Appellant submitted that deeming recovery of money that is stolen is an antithesis of the meaning of taking appropriate action required of an authorised officer under the **Whistleblowers Protection Act**. He pointed out that the Trial Court failed to interpret the meaning of appropriate action under the Whistleblowers Protection Act and instead considered the powers of the IGG under the Constitution and the IGG Act, which is an error in interpreting and applying the law. This by extension the foregoing amounted to a breach of the fundamental and operational principles of the Treaty.

58. Counsel for the Appellant further faults the IGG, for evaluating evidence from one side only, namely the opinion of the Attorney General yet there is no mandate under the **Whistleblowers Protection Act** for an authorised officer to consider the merits and demerits of recovery of money that had been discovered as stolen. He wondered whether the impugned letter under the **Whistleblowers Protection Act** would not be subject to judicial review by Court and if so whether this was not a breach of the rules of natural justice against the Appellant? Counsel for the Appellant submitted

that recovery is a process and can only be done through due process; the evaluation of the merits and demerits of the said recovery is for the Courts or a tribunal established for that purpose, not the IGG.

59. Counsel for the Appellant further wondered whether in light of the unfettered discretion to make such orders and give directions as the IGG pleases it would also be proper for the whistleblower to withdraw his or her disclosure. He argued that this interpretation would be absurd as it would mean that an authorised officer and whistleblower could agree to terminate investigations and share "the loot" thereby commencing another circle of corruption. Such an action would lead to the plunder and pilferage of public funds and resources which, depicts arbitrary or bad governance, lack of accountability and transparency. In effect this would defeat the purpose of the **Whistleblowers Protection Act** and infringe the rule of law and good governance in breach of Articles 6 (d), 7 (2) and 8 (1) of the Treaty.

60. The Appellant then prayed that we find that the Trial Court erred when it found and decided issue No. 3 (at the Trial Court) in the negative i.e. that the contents of the IGG letter of the 8th July, 2013 did not breach Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty.

The Respondent's submissions.

61. Counsel for the Respondent, submitted that the Appellant sought to convince this Court that the IGG's impugned letter (of the 8th July), was an unlawful review and amendment of the original MOU and hence a breach of Articles 6(d), 7 (2) and 8 (1) (c) of the Treaty. He in reply submitted that there was no breach of the Treaty provisions as alleged. He further

84

submitted that the Attorney General received the recommendations in the IGG's original Report of 20th December 2011 on behalf of the Government of Uganda. He pointed out that the Attorney General considered the IGG's Report and came to the conclusion that no loss of money had occurred as alleged, which was communicated in two letters dated 12th April, 2012 and 27th May, 2013. In the letter dated 12th April, 2012, the Attorney General's Chambers was in the process of clearing the amended MOU for signature to vary the original MOU but the IGG asked that the clearance be stayed because of her ongoing investigation. In response to the request by the IGG to stay the signing of the MOU the Attorney General wrote:-

> *"...the IGG informally requested the Solicitor General to stay the Clearance for it is stated there was an on-going inquiry.*
>
> *If the enquiry referred to be the one compromised in the report forwarded, there is no bar to this office clearing the draft Memorandum of Understanding.....*
>
> *As long as you have not formally brought to our notice any wrong doing on the part of M/s Quality Chemicals Industries Limited, the current Memorandum of Understanding is cleared with the comments.*
>
> *Your office can still go ahead with the investigation if you so wish".*

62. In the letter of the 27th May 2013 (supra) the Attorney General made it clear that recovery of the USD 17,826,036.94 by court action was without basis and would be an exercise in futility.

63. Counsel for the Respondent, submitted that the Attorney General found that a mistake had been made by the IGG in the interpretation of the pricing

of the drugs, which had led to the erroneous Findings that there was loss occasioned to the Government of Uganda whereas there was none. It was therefore not possible to recover funds that were in fact, not lost in the first place.

64. Counsel for the Respondent submitted that, both the IGG and the Attorney General acted within their legal mandates under the law and that it did not mean that the final outcome, not being what the Appellant wanted, was a breach of the Treaty. He strongly disagreed with submissions by Counsel for the Appellant, that the IGG "caved in" to the Attorney General's advice when there was in reality no battle between the two Government institutions.

65. Counsel for the Respondent submitted that the Appellant's understanding of the different roles of the IGG and the Attorney General, was fundamentally flawed. He pointed out that the Attorney General's office is a creature of Article 119 of the Constitution of Uganda clause 3 of which provides ;

"The Attorney General shall be the principal legal advisor of the Government"

66. He further referred us to Article 119 (4) which lays out the functions of the Attorney General and provides ;

"

a) *To give legal advice and legal services to the Government on any subject;*

b) *To draw and pursue agreements, contracts, treaties , conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest;*

c) *To represent the Government in court or many other legal proceedings to which the Government is a party ; and*

d) *To perform such other functions as may be assigned to him or her by the President or by law…"*

(c)67. Counsel for the Respondent also referred us to the case of **James Katabazi & 21 Others V Secretary General of the East African Community and Attorney General of Uganda** EACJ Reference No. 1 of 2007 where it was held that ***;***

"…perhaps the most important application of the rule of law is the principle that government authority is legitimately exercised only in accordance with written law, publically disclosed laws, adopted and enforced with established procedural steps that are referred to as due process…when a government official acts pursuant to an express provision of a written law, he acts within the rule of law…"

68. Counsel for the Respondent submitted that, in giving his advice, the Attorney General acted within the written laws of Uganda and so any allegations to the contrary are baseless.

69. He agreed with Counsel for the Appellant that the IGG under Article 230 of the Constitution has the power to investigate, cause investigation in respect of cases involving corruption and abuse of authority or public office. He further agreed that the IGG, may during the course of his or her duties,

or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances. He submitted that the IGG in carrying out her duties, does so independently and in support of this he cited the Ugandan High Court case of **Prime Contractors Limited V IGG & UNRA High Court Misc Cause No. 301 of 2013**. The IGG under the law does his or her work independently even though directed by the President. In such a situation the IGG may in the exercise of his or her discretion choose whether or not to investigate. This was the finding of the Constitutional Court of Uganda in the matter of **Jim Muhwezi & 3 Others V Attorney General and Another Constitutional Petition No 10 of 2008** where the Court held

> ***"...The President did all these things in the impugned letter to the IGG. He like anyone else has the right to make a complaint to the IGG. It is the absolute right of the IGG to investigate and determine how to do it. Whether the President "directs" or "instructs" the IGG is in my opinion of no consequence since the Office of the IGG is independent and the IGG must take the decision independently whether to investigate and how to investigate. Article 99 vests the Executive authority of Uganda in the President. It is unlike a Head of State to write to his junior "requesting or begging" for his junior to carry out his duty. He will most likely use the terms of command like "direct', "order" or "instruct', even where the officer ordered, directed or instructed has powers under the constitution to choose to act or not to act. If the President directs the IGG to investigate anyone and the IGG does it, the report made by the IGG does not***

become void merely because such words were used as long as the President does not interfere with the IGG's power to decide whether to investigate or not and how to do so..." (emphasis added).

70. He argued that in this case the IGG's Recommendations to the Attorney General in their ordinary meaning were not a directive because she wrote

> ***"The Government of Uganda SHOULD CONSIDER (emphasis added) recovery of the payments made above the 15% mark-up for drugs purchased from QCIL and payments for drugs from CIPLA at prices above CIPLA international prices which amount to US$ 17,826,038.94 for drugs procured between December 2009 and October 2010 and subsequent procurements which have not been calculated under this investigation"***

71. Counsel for the Respondent submitted that the said recommendation required the Government of Uganda to apply its mind to the option of recovery and then reach an appropriate conclusion. He further submitted that the Government was given the option to choose whether or not to recover the money. In this case the Government chose not to recover the money because it established that there had been no loss of money.

72. Counsel referred us to the Ugandan case of **Lawrence G. Nuwagira V Public Service Commission and Another High Court Miscellaneous Application No. 55 of 2009** where a District Service Commission was ***"Advised to consider"*** rescinding the appointment of an officer and re-advertised his post. The Court in that case interpreted the words ***"Advised***

to Consider" and held that they did not amount to a directive. He further argued that the Attorney General in his letter to the IGG dated 27th May 2013 stated that ***"...your office can still go ahead with the investigations if you so wish..."*** thus did not interfere with the work of the IGG.

73. Counsel for the Respondent submitted that the above notwithstanding, the legal opinion of the Attorney General must be accorded the highest respect by government, public institutions and their agents. For this proposition he referred us to the Ugandan Supreme Court decisions of **Hon. Theodore Ssekikubo and 4 Others V The Attorney General and 4 Others, Supreme Court Civil Appeal No.1 of 2015**; **Bank of Uganda V Banco Arabe Espanol, Civil Appeal No. 1 of 2001** and **Gordon Sentiba and Others V IGG Civil Appeal No 6 of 2008.** Counsel submitted that the IGG did not act unlawfully when she agreed with the position of the Attorney General and therefore it would be ***"preposterous for the Appellant to allege that the IGG was in breach of the principles of good governance, rule of law, accountability and transparency contrary to the provisions of Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty".***

(a)74. Counsel for the Respondent disagreed with the Appellant's submissions that in writing the impugned letter of the 8th July 2013, the IGG was functus officio. He referred us to the Decision of The Hon. Justice Bart Katureebe (Justice of the Supreme Court of Uganda as he then was) in the case of **A.K.P.M. Lutaaya V The Attorney General Civil** Reference No 1 of 2007 where he cited with

approval the definition of *functus officio* found in the **Black's Law Dictionary** 5th Edition (page 606) as ;

"i. A task performed;

ii. Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority..."

75. Counsel for the Respondent submitted that the Appellant premised his assertion that the IGG was *functus officio* when she made her Report of the 20th December 2011 that he was entitled to a 5% reward with finality under the Whistleblower's Act. Counsel disagreed with this position and submitted that at no point did the IGG's Report ***"...create an unchallengeable entitlement to a 5% reward as the Appellant would like this Court to believe..."***

76. He further argued that in this case there was no final Order made by Court for the receipt of the 5% reward and so there could be no recanting of such an Order. Counsel submitted that the Appellant was just disgruntled that he was not able to realize the 5% reward as he had hoped.

77. Counsel for the Respondent prayed that Court determines the first issue in the negative.

The Appellant's replying submissions.

78. Counsel for the Appellant submitted that while the Appellant directed its submissions to show that the Trial Court's Decision was made in error the Respondent on the other had sought to justify the Attorney General's opinion that informed the IGG turnabout.

79. He argued that the fact that the IGG relied on the Attorney General's opinion means that the Attorney General overruled the IGG and so the IGG cannot be said to have acted independently. He further argued that what happened in reality, was a conflict between the Findings and Recommendations of the IGG and that of the legal opinion of the Attorney General. He submitted that Court is being asked to determine the action of the IGG turning around on her earlier recommendations in the context of the Treaty provisions.

80. Counsel for the Appellant submitted that under Articles 225 and 230 of the Constitution and Section 14 of the IGG Act, the recommendations cannot be equated to mere advice and guidance as this would be contrary to the objective of fighting corruption. He argued that what the Attorney General and IGG did in their respective legal opinion and turnabout letters' was to foster and promote corruption which is contrary to the act of adherence and observance of the rule of law and good governance.

81. Counsel for the Respondent further submitted that the Respondent misapplied the principle of *functus officio*. He disagreed that the IGG's letter of 8th July, 2013 was the final decision of the IGG because the Whistleblowers Act was clear that the results of an investigation after a disclosure leads to a finding and recommendations of the IGG which has to be presented to Parliament within 6 months. This shows that it is the original recommendations of the IGG that were final.

82. Counsel for the Appellant reiterated that this issue be determined in affirmative and/ or in favour of the Appellant.

The Determination of the Court.

83. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue for which we are grateful.

84. The Appellant argued this issue very broadly, but at the core of it all is the argument that, the IGG did not legally have the legal right/authority to write the impugned letter of 8th July 2013.

85. The main argument of the Appellant under this ground, is that the IGG having investigated the alleged breach of the MOU by QCIL and made recommendations that the loss of USD 17,826,036.94 to the Government of Uganda be recovered, she could not thereafter legally make a turnabout and discharge QCIL on the basis of the advice from the Attorney General that in fact there was no loss as originally found. The Appellant argued that under the law of Uganda, the IGG was an independent institution, and once it had made its decision and / or recommendations it had no legal power to review, appeal or revise the decision and / or recommendation. The Appellant argued that in writing the impugned letter the IGG acted outside her constitutional and statutory mandate; which was to eliminate and not promote corruption. It is here that the Trial Court erred when it found that the IGG had the discretion to change her opinion under Article 230 (2) and Section 14 (6) of the IGG Act. Counsel for the Appellant gives 6 reasons for this argument.

(a)86. The first reason is that the law of Uganda does not give the IGG that broad and unfettered discretion as this would be contrary to the very intent and purpose of the law. Counsel for the Appellant argued that any decision taken by the IGG must be as a result of ***;***

a) her investigations and findings; and

b) must be necessary and appropriate in the circumstances.

87. Counsel for the Appellant submitted that the impugned letter did not meet the above test.

88. Save for acknowledging the IGG's powers under Article 230 of the Constitution and Section 14 of the IGG Act, Counsel for the Respondent did not address this matter of the IGG's discretion under the said provisions of the law.

89. For us to address our minds to the matter of the IGG's discretion, it will be necessary for us to analyse Uganda's internal/domestic law. We are alive to the fact that this Court's jurisdiction is limited under Article 27 (1) of the Treaty to the interpretation and application of the Treaty. However this Court, on a number of occasions has made it clear that where in interpreting and/ or applying the Treaty in respect of compliance by a Partner State, then this Court will look at the domestic law of a Partner State, in the context of interpreting the Treaty. In the case of **Henry Kyarimpa V The Attorney General of Uganda** Appeal No. 06 of 2014 this Court held as follows;

> *"...Where the complaint is that the action was inconsistent with internal law and, on that basis, a breach of a Partner State's obligation under the rule of law, it is this Court's inescapable duty to consider the internal law of such a Partner State in determining whether the conduct complained of amounts to a violation or contravention of the Treaty..."*

90. We shall exercise our inescapable duty in relation to this dispute to address our mind to the law of Uganda as to the legal power of the IGG under the laws of Uganda.

91. The Trial Court found that the IGG under Article 230 of the Constitution and Section 14 (6) of the IGG Act, have similar wording in their titles, ***"Special Powers".*** The operative words in the two pieces of law are that the IGG may:-

> *"...during the course of his or her duties or as a consequence of his or her findings make such orders and give such directions as are necessary and appropriate in the circumstances..." (Emphasis ours).*

92. Our understanding is that, it is this reference to the ***"special powers"*** of the IGG given by the Trial Court that the Appellant has interpreted to mean unfettered discretion. The phrase **"special powers"** of the IGG is lifted from the title of Article 230 of the Constitution (i.e. "Special Powers of inspectorate"). So it is the Constitution that clothes the IGG with special powers. The IGG Act also uses the same title to Section 14 of the Act. So the IGG Act re-echoes special powers given to the IGG in the Constitution and makes them statutory powers as well. Nowhere in its judgment does the Trial Court (in our reading) interpret or find that these special powers, amount to or give the IGG an unfettered discretion in the performance of her duties. That challenge by the Appellant, in our finding is clearly unfounded.

93. Counsel for the Appellant further submitted that such orders and directions given by the IGG must be a result of:-

a) her investigations and findings; and

b) must be necessary and appropriate in the circumstances.

94. Whereas the above analysis is partially correct, a more thorough reading of Article 230 (2) of the Constitution of Uganda and Section 14 (6) of the IGG reveals that the Appellant understated the provisions of the Constitution and the Act on this matter because they also provides that the IGG Act may make orders and give directions

"...during the course of his or his her duties..."

95. It is therefore our further finding that both Article 230 of the Constitution and Section 14 of the IGG Act give the IGG, during the course of his or her duties, wide discretion to make such orders and give such directions as are necessary and appropriate in the circumstances of the case. The IGG therefore has a wide though not unfettered discretion to make orders and give directions under the above provisions of the law of Uganda.

96. The second reason given by the Appellant why the IGG could not write the impugned letter, is that the IGG is an administrative tribunal or body that has to comply with the rules of natural justice, which in this case the IGG did not. Counsel for the Appellant submitted that the IGG instead reversed, reviewed, quashed or shelved her Report of 20th December 2011 with **"a mere stroke of a pen"** thus adversely affecting the rights of the Appellant without a hearing. This Counsel submitted was illegal. It was argued that the IGG is accountable for her actions and must lay before Parliament once every six months a Report of what she has done for further action. The IGG therefore could not reverse herself with respect to the 20th December 2011 Report before laying it before Parliament for

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further action. Counsel for the Respondent again did not specifically respond to this reason.

97. There is no gainsaying that the right to be heard is a cardinal principle of the rule of law. In the case of **The Inspector General of Government V Gordon Sentiba and 3 Others** MA 659 of 2007 it was held that;

> *"The Inspectorate of Government is a new feature in the governance of the country, first introduced by the NRM Government for the main purposes of ensuring strict adherence to the rule of law and principles of natural justice in administration as well as the elimination of corruption, abuse of authority and of public office, amongst others..."*

98. The question therefore we ask ourselves is whether the principle of the right to be heard, was breached by the IGG in reversing her position on the Report of the 20th December, 2011. We answer this in the negative for the following reasons. First, the Appellant is a complainant in this matter and not the subject of this investigation. It is therefore the person complained against in the investigation and not the complainant, who should not be condemned unheard. Secondly, it is not the Appellant's rights and duties that were under scrutiny here. Black's Law Dictionary 8th Edition at page 2109 defines a ***"hearing under administrative law"*** as;

> *"... [a] proceeding in which a person's rights and duties are decided after notice and an opportunity to be heard..."*

99. There is no doubt in this matter that it was QCIL, whose rights and duties were to be decided upon and not the Appellant's. We find therefore, that this right to be heard was misconceived.

100. The third reason which Appellant gave why the impugned letter could not be written was based on the legal principle of estoppel. Counsel for the Appellant submitted that the IGG was estopped from going against her word in the 20th December 2011 Report because the Appellant had relied on the express representation therein that the USD 17,826,038.94 would be recovered and that the Appellant would as a result get a reward of 5% of the money recovered. Counsel further submitted that the Appellant suffered detriment because of the IGG's turnabout. This he argued amounted to promissory estoppel.

101. This was yet another area of argument that the Respondent did not directly address us on.

102. The legal doctrine of promissory estoppel was well espoused in the famous case of **Combe V Combe [1951] 2 KB 215** (which is discussed in detail the **High Trees case [**supra] cited to us by Counsel for the Appellant) where Denning LJ held and defined it thus;

> *" where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. He must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word..."*

He further held that estoppel could be used as a **"shield"** and not a **"sword".**

103. In this case can it be said that the Appellant is applying the doctrine of promissory estoppel as a shield? Certainly not. He is applying it as a sword against the IGG and therefore again misapplying the law in his favour, which we reject.

104. We also find that there was no legal relationship between the IGG and the Appellant and therefore no representation was made to him. We further find that there was no representation in the letter of the 20th December, 2011 that any sum of money would be recovered and that the Appellant would get a reward of 5% of the money recovered. The letter had only contained a recommendation to the Government to consider recovery. The IGG and AG could not guarantee the success of the recovery proceedings.

105. The fourth reason raised by the Appellant as to why the IGG could not write the impugned letter was based on the legal doctrine of *functus officio*. The Appellant argued that the IGG having written her Report and submitted it to the Government of Uganda, could not thereafter make a turnabout on her Decision. He gave the following reasons why the IGG was *functus officio*. First, that when the Appellant wrote to the IGG on the 22nd October 2012 requesting for payment of his reward, she replied on the 14th December 2012 saying she has no further role to play after the submitting the Report. She wrote as follows;

> *"...the role of the inspectorate of Government ended upon the issuance of the report to Government. The Inspectorate of*

Government therefore has no obligation and indeed no capacity and/or the resources to satisfy your claim..."

106. Secondly, whereas the Trial Court relied heavily on Article 230 (2) Constitution and Section 14 (6) of the IGG Act to reach its decision, there was no equivalent section in the **Whistleblowers Protection Act,** to forgive a wrong doer as that would defeat the very purpose of the Act. Thirdly, the reference to **"appropriate action"** in the context of the **Whistleblowers Protection Act** (Sections 8 and 18), meant referring the matter to Court to be determined on its merits. However in this case, the IGG instead went on to re-evaluate the evidence and do a turnabout for which there was no legal mandate under that Act.

107. Counsel for the Respondent disagreed that the principle of *functus officio* was applicable to this matter, because the 20th December 2011, Report did not bring about finality in the matter. He argued that the said IGG Report did not create in favour of the Appellant an unchallengeable entitlement to a 5% reward. There was no final order for the receipt of the 5% reward, so in effect there could be no turnabout on any such order.

108. We agree with the concise response of the Respondent on the principle of *functus officio*. The 20th December 2011 Report did not create any finality in the investigation as the money was yet to be recovered. The IGG took enormous pains, to explain this to the Appellant in her letter to him dated 14th December 2012. The IGG in that letter made it clear to the Appellant, what the legal position is under the Whistleblowers Protection Act, namely that a whistleblower could only be paid six months after the recovery of the money. In this case there had been and still there is no recovery of the said money. The IGG added that the claim for payment by

the Appellant was not only premature ***"but also most probably misconceived".*** We agree. Not only was the claim for payment misconceived, but also was the application of the principle of *functus officio.*

109. The fifth reason why the Appellant submitted that the impugned letter could not be written, was that the IGG heeded the advice of the Attorney General and yet there was no law for her to do so. Counsel for the Appellant argued that the IGG failed to assert her independence against the Attorney General like she had previously done in the reported case of **Attorney General and IGG V Afric Coop** (supra). In so doing the IGG abetted in an action of corruption.

110. Counsel for the Respondent strongly disagreed with this argument and submitted that the Offices of the IGG and the Attorney General were not in conflict with one another. Counsel argued that both institutions had acted within their legal mandate under the law. There could therefore be no breach of the law if both institutions acted within their mandates. He emphasised that Article 119 (3) of the Constitution provided that the Attorney General was the principal legal adviser of the Government. Counsel for the Respondent submitted that the 20th December 2011 Report did not amount to a directive by the IGG to the Government and the Attorney General in particular to recover the money. This is because the IGG in her letter used the words ***"Should Consider"*** which gave the Government some latitude as to what to do. He also argued that there was nothing unlawful with the IGG agreeing with the legal advice of the Attorney General.

111. Here again we agree with the concise response of Counsel for the Respondent on the relationship between the IGG and the Attorney General. We find that it is incorrect to state and insinuate that the Attorney General interfered with the independence of the IGG. Actually the Attorney General in his letter dated 12th April 2012, stated that the IGG could go on with the investigations into the complained matter, if she so wished. This to us does not reflect interference with the work of the IGG. Counsel for the Respondent submitted that the Courts in the case of **Bank of Uganda V Banco Arabe Espanol** (supra) held that the advice of the Attorney General should be accorded the highest respect by Government public institutions and their agents and that it would be preposterous to find that Respondent breached the Treaty by accepting the said advice. We agree with that submission. In this case we find no evidence that the Attorney General had exceeded his Constitutional mandate with regard to advising on this dispute.

112. The sixth reason why the Appellant submitted that the impugned letter could not be written, was that the IGG as an authorised officer under the **Whistleblowers Protection Act,** could not under that Act make a turnabout on her decision in the manner in which she did. He pointed out that this was because the wording under the said **Whistleblowers Protection Act** was different from the wording found under the Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. Counsel for the Appellant argued that the Trial Court erred when it held that the IGG could make a turnabout in her decision under the Act whereas other authorised officers listed under the **Whistleblowers Protection Act** could not.

113. Counsel for the Appellant submitted that Section 8 of the **Whistleblowers Protection Act** provided that an authorised officer had to investigate a complaint and then take ***"appropriate action".*** In his view, appropriate action meant, taking such action as would lead to recovery of lost money and thereby entitle the Appellant to a 5% reward under Section 19 of the **Whistleblowers Protection Act**. In this case the IGG in making a turnabout on her decision to recover the money, created an antitheses to the meaning of ***"appropriate action"*** and therefore this amounted to a breach of the fundamental and operational principles of the Treaty. He argued again that the IGG had no business evaluating the merits or demerits of a successful recovery of the lost money (especially so by only considering the opinion of the Attorney General) and this should have been left to the Courts of law.

114. Once again, the Respondent did not directly address us on this argument.

Section 8 (1) of the Whistleblowers Protection Act provides;

> *"... Where a disclosure of impropriety is made to a person specified under section 4, the authorised person shall investigate or cause an investigation into the matter and take appropriate action..."*

115. There is not much legal commentary on the phrase ***"appropriate action"*** but to our minds, this means action that is befitting in the circumstances. Clearly this gives an authorised officer wide discretion to take such action as is befitting in the circumstances. However, does this mean that the authorised officer is limited to only taking such action as would lead to recovery of money? This we answer in the negative. An

investigation into a disclosure of impropriety in our understanding is an investigation into an alleged impropriety. Such an investigation may lead to a finding that there is or is not an impropriety in fact. Even in this case, where there was a positive initial finding of an alleged impropriety, still further action may be required to confirm or corroborate that initial finding before a recovery could be made. All this in our finding, is part of the process of ***"taking appropriate"*** action. In this regard we further find that the **Whistleblowers Protection Act** with regard to the powers of the IGG is in conformity with Article 230 (2) of the Constitution and in *pari materia* with Section 14 (6) of the IGG Act to ***"make such orders and give directions as are appropriate in the circumstances"***. That being the case we find that the Trial Court did not err in finding that the IGG as an authorised officer is still subject to Article 230 (2) of the Constitution and Section 14 (6) of the IGG Act. The **Whistleblowers Protection Act,** therefore, did not bar the IGG from writing the impugned letter.

116. Before we take leave of this matter we need to address the issue that Counsel for the Respondent took exception to, when Counsel for the Appellant kept referring to the QCIL as a **"thief"** or to the funds as **"stolen funds"**. He argued that it was misleading to refer or say that the IGG **"caught and then forgave the thief"**. We agree that these words and phrases are misleading as there was no final finding that there was theft or that there was a thief. One cannot refer to these words and phrases as figures of speech, they were sensational and unfair to parties who had not been adjudged as such. Counsels to parties should stick to professional presentation of their cases and avoid sensational outbursts or

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dramatisation of their cases as these do not sway the Court in the discharge of its duty.

117. All in all, we find that the Appellant must fail in the first issue because even though he has raised not less than six distinct arguments why the IGG could not write the impugned letter, we find that she had the legal right to do so. In so writing the impugned letter she was within the law, she did not violate Ugandan law and furthermore did not violate the Treaty as alleged.

<u>Issue No. 2</u>: Whether or not the Hon. Learned Justices of the First Instance Division erred in Law when they failed to apply the principles of legitimate expectations in the context of the principle of good governance, rule of law, accountability and transparency in determining whether the contents and implication of inspector General of Government's letter dated 8th July 2013 breached and infringed Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

118. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue.

Both Parties put up spirited arguments on the principle of legitimate expectation which, the Appellant believed had been denied him. It is indeed an interesting proposition. However, before we delve into whether the Appellant is correct or not in his assertion, we have to address what is a preliminary matter raised by the Counsel for the Respondent, that this is a new ground being raised on appeal. Indeed a reading of the Judgement of the Trial Court does not reveal a finding on the subject of legitimate expectation. Mindful of our jurisdiction as an Appellate Division under

Article 35A of the Treaty and Rule 77 of the Rules of this Court (supra) we can only determine an appeal from "the Judgment or Order" of the Trial Court. In this matter, the issue of legitimate expectation was not pleaded (as per the Amended Reference dated 22nd March 2013) nor was it argued before the Trial Court. Consequently there is no judgment or order to appeal from the issue of legitimate expectation as a point of law. It is a departure from the Appellant's original pleadings, which we cannot allow. This has been the clear position of this Court that new matters in a dispute cannot be introduced on appeal (**see Attorney General of Tanzania V Network for Animal Welfare** Appeal No 3 of 2014).

119. Furthermore, appeals are creatures of the law and indeed there were no appeals to this Court until the introduction of Article 35A to the Treaty in 2007. **Black's Law Dictionary** 9th Edition at page 112 defines an appeal as;

> *"A proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower Court's or agency's decision to a higher court for review and possible reversal ...Also termed petition in error..."*

120. Appeals are therefore correctional in nature and not an opportunity for a party to take *"a second bite at the pie".*

121. This ground presents nothing for this Court to reconsider, review or reverse. So we answer it in the negative.

<u>Issue No. 3</u>: Whether or not the Hon. Learned Justices of Court of First Instance Division erred in Law when they declined to make a finding on and decide the issue of whether the inaction,

refusal and / or failure by the Government of Uganda to recover US $ 17,826,038.94 Dollars from Quality Chemicals Limited was a breach and an infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

The Appellant's submissions.

122. Counsel for the Appellant submitted that this issue arises from issue No. 5 in the Trial Court where it found as follows:-

> *"...This issue is a corollary of the two foregoing issues in so far as it cannot be read and interpreted in isolation. Once we have determined that there has been no violation of Articles 6 (d), 7 (2) and 8 (1) (c), then Issue No 5 is untenable..."*

123. Counsel for the Appellant disagreed with the finding of the Trial Court and argued that the refusal and/or inaction by the Government to implement the IGG's Recommendations to recover the USD 17,826,038.94 was a breach of the rule of law and good governance.

124. He further argued that the law requires that the IGG's orders and directions in whatever form or however called should be complied with. In this case the government, in his view, refused to implement the IGG's recommendations and instead caved in and made a complete turnabout resulting in the impugned letter of the 8th July, 2013.

With specific reference to the **Whistleblowers Protection Act** Counsel for the Appellant submitted that the said refusal or inaction to recover the lost money amounted to a denial of the legitimate expectation of the Appellant to receive the 5% reward. This refusal to recover the money meant that

Government had reneged on its statutory duty to the detriment of the Appellant who expected to receive the reward.

In support of his submissions Counsel for the Appellant referred the Court to Section 35 (c) of the IGG Act which provides;

"A person who:

a) ...

b) ...

c) Without reasonable excuse refuses or fails to comply with any order or direction of the inspectorate; or

d) ....

Commits an offence..."

125. He further referred us to Section 37 of the same Act which provides;

"Any person who does any act with intent to frustrate or obstruct the discharge of the functions of the inspectorate, commits an offence and is liable on conviction to a fine not exceeding fifty currency points or imprisonment not exceeding twelve months or both..."

126. Counsel for the Appellant wondered that if non compliance with the orders and directions of the IGG attracts criminal sanctions, then what happened to the people in Government who refused to implement the IGG's recommendations? He further argued that since the refusal to implement the IGG's recommendations is a criminal offence, it followed that the refusal to implement such recommendations by Government or a Government agency is a breach of law and good governance.

He further argued that such a breach of law and good governance has a systematic effect on the whole infrastructure of the law and leads to anarchy. In support of this assertion Counsel referred us to the words of the

US Supreme Court Justice Felix Frankfurter in the case of **United States V United Mine Workers of America (1947)** where he stated

> *" in our country law is not a body of technicalities in keeping of specialist or in the services of any special interest. There can be no free society without law administered through an independent Judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate Judicial tribunal, this court, beyond any other organ of sociality, is the trustee of law and charged with the duty of securing obedience to it."*

127. Counsel for the Appellant prayed that we consider these arguments together with his submissions in respect of legitimate expectations and uphold this issue.

Respondent's submissions.

128. Counsel for the Respondent submitted that the Trial Court found that the IGG's letter dated 8th July 2013 did not breach or infringe Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty. It therefore followed that the action under the said letter also did not breach the provisions of the Treaty. There could be no inaction if the IGG did not breach the Treaty.

He argued that it would have been superfluous for the Trial Court to determine whether the inaction, refusal and/ or failure by the Government of Uganda to recover the US $ 17,826,038.94 was a breach of Articles 6 (d), 7 (2) and 8 (1) (c) of the Treaty when there was in fact no loss as alleged.

129. Counsel for the Respondent prayed that this Court uphold the finding of the Trial Court on this issue.

The Appellant's replying submissions.

130. Counsel for the Appellant insisted that the legal opinion of the Attorney General overriding the IGG's Report clearly proved that there was inaction, refusal and failure by Government to recover the USD 17,826,038.94.

131. He argued that a legal opinion of the Attorney General, cannot overturn a finding of fact by the IGG. He pointed out that the Attorney General did not have evidence from parallel investigations on record to justify his opinion *"reviewing, revisiting or re-evaluating"* the facts found by the IGG.

132. Counsel for the Appellant consequently reiterated his earlier submissions that issue No 3. be determined in the affirmative and/ or in favour of the Appellant.

The determination of the Court.

133. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue for which we are grateful.

134. A reading of this issue, to our minds shows that it is connected to the first issue on which we have already pronounced ourselves that the IGG did not breach the Treaty by writing the impugned letter. This issue is therefore duplicitous. We agree with the finding of the Trial Court when it held that;

> *"...This issue is a corollary of the two foregoing issues in so far as it cannot be read and interpreted in isolation. Once we have determined that there has been no violation of Articles 6 (d), 7 (2) and 8 (1) (c), then Issue No 5 is untenable..."*

That being the case we answer this issue in the negative.

<u>Issue No. 4:</u> Whether or not the Learned Justices of the First Instance Division erred in Law when they decided that the Appellant is not entitled to the relief's and remedies sought in the Reference against the Respondent.

<u>The Appellant's submissions.</u>

135. Counsel for the Appellant submitted that the Appellant sought the reliefs as laid out in paragraphs 4.1, 4.2, 4.3 and 4.4 (reproduced in detail supra) of the Amended Statement of Reference. He submitted that this Court has the jurisdiction and mandate to interpret the provisions of the Treaty and also to enforce compliance of the Treaty against a Partner State as provided for under Article 23 (1) which states;

> *"...The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty..."*

136. He further argued that it is a State obligation to adhere to the principles of rule of law, good governance, democracy, accountability and transparency. Where a Partner State is found to have breached the aforesaid principles, the Court is empowered to ensure compliance by reversing them i.e. to right the wrong.

137. Counsel for the Appellant submitted that the Appellant has shown that he was personally aggrieved as a whistleblower when his disclosure of impropriety was initially upheld by the IGG entitling him to a reward of 5% but later the IGG deemed the lost money recovered thus denying him his reward.

138. The Appellant prayed that all his prayers for relief be granted and that he also be awarded costs for pursuing the appeal.

The Respondent's submissions.

139. Counsel for the Respondent submitted that the Appellant is not entitled to any of the remedies sought in his Reference as the Respondent has clearly demonstrated that all actions of the IGG and the Attorney General were within the provisions of the law.

140. Counsel for the Respondent agreed with the Trial Court that it could not make an adverse finding against QCIL to pay the USD 17,826,038.94 without hearing its side of the story as would go against the principles of natural justice.

141. As to costs, Counsel for the Respondent submitted that cost should be awarded to the Respondent because Rule 111 (1) of the East African Court of Justice Rules provides that;

"...costs in any proceedings shall follow the event unless the Court shall for good reason otherwise order..."

He finally submitted that this appeal be dismissed with costs.

The Appellant's replying submissions.

142. Counsel for the Appellant reiterated his earlier submissions that issue No 4. be determined in the affirmative and/ or in favour of the Appellant and he be granted all the reliefs prayed for.

The determination of the Court.

143. We have considered the Record of Appeal and the opposing submissions of both counsels on this issue for which we are grateful.

None of the grounds in this Appeal have been successful and therefore the Appellant is not entitled to any of the reliefs and remedies as prayed for under the Amended Reference. We cannot fault the Decision of the Trial Court and accordingly uphold it in its entirety.

Conclusion.

145. The foregoing being our findings and holdings, we accordingly dismiss this Appeal with costs to the Respondent.

We so Order.

DATED, DELIVERED AND SIGNED AT ARUSHA THIS 26TH DAY OF MAY 2016.

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Emmanuel Ugirashebuja

PRESIDENT

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Liboire Nkurunziza

VICE-PRESIDENT

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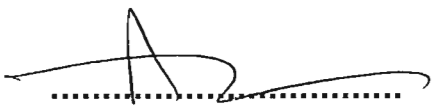
Edward Rutakangwa

JUSTICE OF APPEAL



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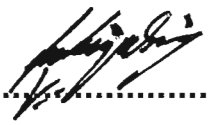
Aaron Ringera

JUSTICE OF APPEAL



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Geoffrey Kiryabwire

JUSTICE OF APPEAL