

RWANDA / JUDGMENT

GATSIBO DISTRICT v. V.CO LTD

RLR V.1-2025

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Supreme Court

DECIDED

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Text

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GATSIBO DISTRICT v. V.CO LTD [Rwanda Supreme Court – RS/INJUST/RCOM 00007/2022/SC (Mukamulisa, P.J., Muhumuza and Karimunda, J.) 26 May 2023] Contract – Additional contract – An additional contract is considered as a new contract related to the duration of the new works – Additional works performed after the first contract must be paid for as it is considered as a new contract different from the previous one. Contract – Requesting payment for an additional contract is not considered as a change in the price agreed in the contract – The procuring entity cannot refuse to perform its obligation to pay the invoices issued by the contractor for the additional works performed, alleging that this is considered as an increase in the bidding price presented in the financial submission. Facts: This case originates from the contract V.CO Ltd entered into with Gatsibo District to monitor and supervise the construction works of Kabarore Art and Craft Center (Agakiriro) that should be carried out by a company called ECOTRAP. V.CO Ltd. ECOTRAP. V.CO Ltd claims to have carried out additional works upon the request of the District, but the latter refused to pay for it, which led ECOTRAP. V.CO Ltd to file a claim before the Commercial Court, requesting the payment of 28,068,133 FRW for which the Company alleges to have worked for a period of 15 months and 26 days in addition to the 24 months that were

provided for in the contract, and it also requests the payment of various damages. The Commercial Court found that Article 9 of the contract between V.CO Ltd. and the District stipulated that the price

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of the contract is known and cannot be increased even if the duration of the contract is extended, so the request for payment related to additional time is not provided for in the contract, and ordered to it to pay to Gatsibo District the damages related to the expenses of proceedings. V.CO Ltd was not satisfied with the judgment and appealed against it before the Commercial High Court requesting to determine whether claiming for the payment for the additional contract is changing the price agreed upon in the contract. The Commercial High Court found that the price mentioned in the contract has not been changed but what has been changed is the duration of the works which were extended and it ordered to Gatsibo District to pay to V.CO Ltd the cost of the works carried out during the additional time. Gatsibo District applied for the review of the judgment on the grounds of injustice, alleging that the injustice is based on the fact that the District was ordered to pay 28,068,133 FRW in addition to the 42,456,000 FRW agreed upon in the contract, yet V.CO Ltd was already paid, that the Commercial High Court disregarded the elements of evidence produced and the relevant legal provisions. V.CO Ltd contends that the contract for the monitoring and supervision of the construction works of Kabarore Art and Craft Center (Agakiro) would last for 24 months, from 16/02/2015 to 16/02/2017 at the bidding price of 42,456,000 FRW, that it does not provide for the lump sum price, it contends that, after ECOTRAP failed to build, the tender was awarded to the Reserve Force, the works to be done carried out and the construction materials changed, and the duration of the contract was extended, this immediately affected the contract V.CO Ltd entered into with Gatsibo District.

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Held: 1. The additional contract is considered as a new contract related to the duration of the new works. Additional works carried out after the first contract must be paid for as they are considered as a new contract different from the previous one.

2. The procuring entity cannot refuse to perform its obligation to pay the invoices issued by the contractor for the additional works carried out, alleging that this is considered as an increase in the bidding price given in the financial submission. The application for review of the judgment on grounds of injustice is unfounded, The court fee is borne to the respondent. Statutes and statutory referred to: Law n°45/2011 of 25/11/2011 governing contracts, article 65. No cases were referred to

Judgment

I. BACKGROUND OF THE CASE

On 16/02/2015, V.CO Ltd entered into the contract N° 012/GAT/INFRA/14-15 with Gatsibo District to monitor and supervise the construction works of Kabarore Art and Craft Center that should be carried out by the company called ECOTRAP. The works were mentioned in the contract N° 009/GAT/INFRA/14-15 of 23/03/2015 that the District had entered into with ECOTRAP.

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V.CO Ltd had to carry out the supervision works for a period of 24 months at a cost of 42,456,000 FRW, they should be completed on 16/02/2017. ECOTRAP started construction works while V.CO Ltd was carrying out the supervision, but ECOTRAP later failed to accomplish the works and it was necessary for the District to change the contractor, and it entered into a new contract with the Reserve Force which continued the construction works of Kabarore Art and Craft Center.

V.CO Ltd filed a claim before the Commercial Court requesting that Gatsibo District should be forced to pay to it 15 months and 26 days in addition to the time stipulated in the contract. It explains that as per the contract the District entered into with Reserve Force, there were changes in terms of materials and the duration of the work, thus affecting the contract V.CO Ltd also had with the Gatsibo District because the supervision scope had changed, both for the quantity and the duration of the works. It alleges that the supervision which should be conducted by V.CO Ltd in 24 months was carried out in 39 months and 26 days due to the change of the contractors who had to be supervised, and in terms of the works that had to be carried out; that at the end of the 24 months of the supervision, the District asked to V.CO Ltd to continue the works and informed it in three different times, that the contract was extended.

V.CO Ltd states that it claimed for the payment of additional works (that is, 15 months and 26 days in addition to the time stipulated in the contract for reasons beyond its control) but the District refused to pay for them. V.CO Ltd requested to the Commercial Court to order to Gatsibo District to pay 28,068,133 FRW for a period of 15 months and 26 days calculated at 1,769,000 FRW per month and to pay various other damages including the incurred loss.

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Gatsibo District admitted that on 16/02/2015, it entered into an agreement N° 012/GAT/INFRA/14-15 with V.CO Ltd. It was about the supervision of construction works of Kabarore Art and Craft Center which was supposed to last for twenty-four (24) months because it was supposed to end on 16/02/2017, both sides agreed on the price of contract amounting to 42,456,000 FRW. It alleges that as the successful bidder did not comply with the schedule in the contract, it was necessary for V.CO Ltd to extend the time to complete the works related to the tender awarded to it, the contract was extended three times and V.CO Ltd was notified through various letters. The District also informed it that, apart from the extension of time, other clauses of the contract did not change. The District alleges that it is was surprised to hear V.CO Ltd requesting the payment of another amount of 28,068,133 FRW alleged to originate from the works done during the additional time, but as per the contract both parties had agreed on the total amount of money that would be paid after the end of the whole contract.

On 30/09/2020, the Commercial Court rendered the judgment RCOM 00648/2020/TC, it held that the claim of V.CO Ltd is groundless. It found that Article 9 of the contract V.CO Ltd entered into with the District stipulated that the price of the contract is known and cannot be increased even if the duration of the contract is extended, that the request of V.CO Ltd for additional payment is not provided for in the contract because both parties agreed that the price of the whole tender should not be changed, whether it ends before or after the scheduled time. It ordered to V.CO Ltd to pay to Gatsibo District 600,000 FRW for the expenses of the proceedings.

V.CO Ltd appealed against that judgment before the Commercial High Court requesting it to determine whether claiming for the payment related to the additional contract is

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changing the price, its case was registered under N° RCOMA 00670/2020/HCC.

At the appeal level, Gatsibo District alleged that the grounds of appeal of V.CO Ltd were not relevant because the Commercial Court delivered justice based on the facts and the elements of evidence that had been produced.

On 26/05/2021, the Commercial High Court rendered the judgment RCOMA 00670/2020/HCC, ordered to Gatsibo District to pay to V.CO Ltd 28,068,133 FRW of additional works as provided for in Article 64 of Law n°45/2011 of 25/11/2011 governing contracts, and 1,500,000 FRW for procedural and advocate fees.

The Commercial High Court found that the price mentioned in the contract was not changed, but what was changed is the duration of the works because they were extended, and the price remained the one given in the financial submission and was accepted by Gatsibo District when it was included in the contract showing the amount to be paid for the works that corresponds to that given by the contractor in the financial submission.

The Commercial High Court also found that it would be considered as if the price had been changed in case V.CO Ltd would have been requesting for the payment for additional works to provide a price higher than the 1,769,000 FRW which was provided in its financial submission; therefore, article 9 of the contract between the two parties does not stipulate that the mentioned amount would be paid for all the works to be carried out, but what it precludes is changing the price either during the execution of the works or in case of an additional agreement.

Gatsibo District was dissatisfied with the judgment, thus on 22/06/2021, it wrote to the President of the Court of

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Appeal requesting that the judgment N° RCOMA 00670/2020/HCC rendered by the Commercial High Court should be reviewed on the grounds of injustice. The President of the Court of Appeal wrote to the President of the Supreme Court requesting that the case be reviewed on grounds of injustice.

After considering the request, the President of the Supreme Court made the decision 044/CJ/2022, that the judgment RCOMA 00670/2020/HCC rendered by the Commercial High Court be reviewed on the grounds of injustice, and the case was registered under RS/INJUST/RCOM 00007/ 2022/SC.

The case was heard in public on 18/10/2022, the District was represented by Counsel Rugamba Théoneste and Counsel Uwamahoro Marie Grace, V.CO Ltd. was represented by KALISA Théogène assisted by Counsel Habineza Jean Paul. During the hearing, the Court explained to the parties the importance of mediation, they agreed to resolve their dispute amicably, and chose Counsel Rwabigwi Augustin to be the mediator.

After receiving the mediator's report indicating that the mediation failed, the hearing of this case was set for 21/02/2023, but on that day, the hearing was not held, it was adjourned until 18/04/2023 because Counsel Uwamahoro Marie Grace was unable to attend the hearing due to illness.

On 18/04/2023, the case hearing was held, the District was represented by Counsel Uwamahoro Marie Grace and Counsel Bunani Bonaventure, V.CO Ltd. was represented by Kalisa Théogène, assisted by Counsel Habineza Jean Paul.

During the hearing, the parties argued over the issue of whether Gatsibo District should be ordered to pay to

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V.CO Ltd for the works carried out during the additional duration of the contract, to refund the procedural and advocate fees claimed at this level. II. ANALYSIS OF LEGAL ISSUES OF THE CASE
i. Determining whether Gatsibo District should be ordered to pay to V.CO Ltd for the works carried out during the extension of the contract

Counsel Uwamahoro Marie Grace and Counsel Bunani Bonaventure pleading on behalf of Gatsibo District, allege that in this case, the injustice is based on the fact that the District was ordered to pay 28,068,133 FRW in addition to the 42,456,000 FRW agreed upon in the contract, and V.CO Ltd had already been paid, which is evident that the Commercial High Court disregarded the elements of evidence produced and the laws related to the case.

They explain that the Commercial High Court reached that decision by disregarding the following elements of evidence: - Articles 2 (4), 9 and 111 of the contract dated 16/02/2015 stipulate that the works will last 24 months at an invariable cost of 42,456,000 FRW even if the duration of the agreement is reduced or extended, therefore, the contract extension letters on which relies V.CO Ltd should not be considered as a new contract but should be understood as an extension of the contract signed by both parties;

1 This Article provides that: “This contract is concluded for a period of 24 months starting from the date of signing of this contract by both parties, unless terminated earlier or extended by agreement of the parties in an executed addendum to this contract.”

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- Article 4, paragraph 2, 2 of the contract lists the hierarchy of elements of evidence as determined by both parties. This hierarchy of elements of evidence is as follows: (a) Contract, (b) Terms of reference (TOR), (c) Minutes of negotiations, (d) Notification, (e) Request for proposal, (f) Financial proposal. - Terms of Reference on page 43 of the tender document indicate that V.CO Ltd would be paid based on the percentage of the works carried out instead of the number of months in which the works were accomplished, which is also confirmed by the fact that V.CO Ltd has never issued a monthly invoice.

They also allege that in paragraph 20 of the judgment under review on grounds of injustice, the Commercial High Court based its decision on the financial proposal that is in sixth position on the list of elements of evidence, yet it should not outweigh the contract, Terms of Reference and other elements of evidence in the case file are more valuable. They explain that the financial proposal is considered as one of the documents that are part of the contract and V.CO Ltd also claims that it is an offer that can be changed because after it the price is discussed (contract negotiation), the agreement turns into a contract.

They conclude by alleging that another ground of injustice is that the Commercial High Court disregarded articles 63, 3 64 and 66 of Law No. 45/2011 of 25/11/201

2 That paragraph states: “should there be any conflict or ambiguity any of the above listed documents, priority shall be given in the order as listed above” 3 That article states that “Interpreting a contract or a clause thereof is to give the meaning of the purpose and promise under the contract.”

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governing contracts because there was no way to find out the agreement and the intention of both parties which had become binding on them except in the Agreement and the Terms of Reference. They note that the Court did not validate the fact that the price was a lump sum and could not be changed, which is contrary to Article 45, the second and third paragraphs of Ministerial Order No. 001/14/10/TC dated 19/ 02/2014 establishing regulations on public procurement, standard bidding documents and standard contracts that provides that no price

change is possible after the date set in the contract, except in case of the mutual consent of both parties, after amending the contract.

Kalisa Théogène, representing V.CO Ltd and Counsel Habineza Jean Paul, assisting him, allege that the contract for the construction works of Kabarore Art and Craft Center should last for 24 months, from 16/02/2015 to 16/02/2017 at a price of 42,456,000 FRW, that there is no provision that the price is a lump sum. They explain that after ECOTRAP failed to carry out the construction works, and after the extension of the period of execution, the Reserve Force was awarded the tender, the works to be carried out and the construction materials changed, and the duration of the contract was extended, this immediately affected the contract V.CO Ltd had with Gatsibo District because what had been being supervised had changed both in terms of the quantity and the duration of the execution.

They allege that ECOTRAP had won the tender worth 650,578,520 FRW while the second contractor was supposed to take over ECOTRAP's works, but it was awarded additional work worth 990,354,430 FRW, which led to the supervision V.CO Ltd had to do in 24 months, was carried out in 39 months and 26 days.

They also state that after 24 months of supervision in the first contract, Gatsibo District wrote to V.CO Ltd on

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16/02/2017, the same day the first contract was terminated, requesting it to keep on carrying out the works until the 16 /08/2017, on that date it was sent another letter awarding it an additional contract until 16/12/2017, and on the third time, it received a letter giving it a contract from 19/03/2018 to 15/07/2018. They explain that the fact that V.CO Ltd requested the payment for the additional time after the initial contract was not the change of contract, because the agreed upon work duration was extended.

They also contend that the allegations that the price was a lump sum because the contract had a fixed term, calculated for 24 months at a price of 42,456,000 FRW, which means it was 1,769,000 FRW per month as shown in the financial submission, that up to date Gatsibo District did not prove that this price has ever changed because the payment requested was based on the monthly price based on the duration of the Extension Contracts. They note that the allegations of Gatsibo District that the Commercial High Court disregarded the elements of evidence, the provisions of law or the regulations, which caused injustice that is obvious to everyone, are irrelevant, but that it misinterprets the elements of evidence and the provisions of law because claiming for the payment of additional works does not mean changing prices. DETERMINATION OF THE COURT

Article 65 of Law No 45/2011 of 25/11/2011 governing contracts provides that: " a contract shall not only cover the subject matter but also the effects that equity, practices or law impute to the obligations according to the nature of the contract". And article 66 of that Law provides that "interpreting a contract or a clause thereof is to give the meaning of the purpose and promise under the contract".

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Article 9 of the contract dated 16/02/2015 signed by both parties signed and upon which they agreed provides that the works will be carried out in 24 months and that its cost is 42,456,000 FRW, and that the price should not change whether the contract ends earlier or later or is extended. 4

The debate between the parties is based on the interpretation of Article 9 of the contract entered into by both parties. The District alleges that the contractor should not request payment for additional works because the agreed upon price is invariable, whether the contract is completed within the agreed time or if the time has changed and extended or shortened. V.CO Ltd found that the period of 24 months which was equivalent to the value of 42,456,000 FRW elapsed, but the works were not completed, because the new contractor changed the responsibilities and the cost changed, Gatsibo District gave it another contract until the works were completed, and would request for the payment for the additional works.

As per the case file, in paragraph 20 of the judgment under review on grounds of injustice, the Commercial High Court found that, based on Article 4 of the contract which stipulates that the document called financial submission proposal is one of the components of the contract, there has been no changing of the prices as alleged by Gatsibo District, because it is obvious that the tender price of 42,456,000 FRW divided by 24 months was in the contract, equals 1,769,000 FRW per month.

4 The contract prices for the consultancy services is forty-two million, Four Hundred Fifty-Six Thousands Rwandan Francs Only/For all project (42,546,000 FRW) all taxes inclusive, in the period of Twenty-Four (24) months. The contract price is fixed and cannot be revised during the course of the contract, or during an extension of time thereof

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The Court finds that Gatsibo District acknowledges the letter dated 31/01/2017, that of 01/08/2017 and that of 18/04/2018 whose subject was the contract extension as follows: i. The first letter extends it from 31/01/2017 to 16/08/2017; ii. The second letter extends it from 16/08/2017 to 16/12/2017; iii. The third letter extends it from 19/03/2018 to 15/07/2018.

The Court finds that the provisions of Article 9, the first and second paragraphs, of the contract dated 16/02/2015 between Gatsibo District and V.CO Ltd that the invariable price of the contract is 42,456,000 FRW within 24 months of the execution of the contract or during an additional period that must be considered within the scope of the contract and what both parties intended, because

the contract could have ended in 24 months as planned, or ended earlier because the contractor with the primary tender (ECOTRAP) hastened the work or delayed the completion because the primary contract was suspended for a period of time and later resumed, and V.CO Ltd. which would not pay at that time the initial contract was terminated because it also did not perform any supervision works.

The Court finds that article 45 of the Ministerial Order N° 001/14/10/TC of 19/02/2014, the legal counsel of Gatsibo District allege that the Commercial High Court disregarded it, does not apply to the facts related to the contract between V.CO Ltd and Gatsibo District because the contract was not changed, and the prices were not revised.

5 It is obvious that between the second and third letters, V.CO Ltd had been executing the works for two (02) months and three (03) without an extension contract.

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Instead, what happened was that the time of completion of the works was extended and that was foreseen in the contract between the two parties. Also, the amount requested by the respondent in this case is the one contained in the contract based on financial submission proposal which is part of the contract, as explained in other paragraphs of this case.

The Court finds that all additional works carried out by V.CO Ltd after 24 months contained in the provisions of Article 9 of the contract or in the Terms of Reference would be contrary to the agreement of both parties because: i. The duration of the contract cannot not exceed 24 months, yet the price of the contract remains the same, unless there is a suspension of work that causes the time to be extended; otherwise, it would mean that the article is stipulated only in the interest of Gatsibo District, yet it is common to the synallagmatic for valuable consideration contracts; ii. If the contract period is exceeded, the agreed upon price does not correspond to the additional period, which would give rise to illicit enrichment for the party who made the offer;

If the duration of the contract exceeds the agreed upon one, and the price remains as it is, it would mean that the contract signed by Gatsibo District stipulates that the contractor who was awarded the initial tender would not finish the works within the agreed upon period of time, and that would be contrary to the law because that clause would be tainted with bad faith; however, the parties to the contract have the responsibility to perform it in good faith.

The Court finds that the interpretation of the terms of the contract provided for by Article 71 of Law n°45/2011 of 25/11/2011 governing contracts, which provides that in

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choosing a reasonable meaning of a promise, a contract or a clause thereof, the meaning which operates against the party who supplied the words or a writing shall generally be preferred. This is what is emphasized by the scholar Philippe Le Tourneau who also explains that doubting about the clauses of the contract should be interpreted against who undertakes an obligation. 6

What is clear to the Court is that the contract dated 16/02/2015 expired after 24 months, Gatsibo District did not make an addendum or a new contract as it was provided for in article 11 of that contract. This means that Gatsibo District does not allege that the same contract went on being executed even though its duration had expired.

The Court finds that, apart from the duration of the contract, Gatsibo District asked to V.CO Ltd at different times to carry out additional works based on the terms agreed upon in the contract dated 16/02/2015, so it should be considered that each document of the extension contract was a new contract as far as the duration of the works is concerned.

The Court therefore finds that the allegations of Gatsibo District that the Commercial High Court disregarded the provisions of Article 647 of Law No. 45/2011 of 25/11/2011 governing contracts, or the provisions of Article 45 of Ministerial Order n° 001/14/10/TC of 19/02/2014 because it did not realize that what V.CO Ltd did was to change the agreed upon prices in the contract, are irrelevant, because what happened was to extend the duration of the works and it was done by Gatsibo District, concerning the prices, these were already

6 See Philippe Le Tourneau, *Droit de la responsabilité et des contrats, régime d'indemnisation*, Paris, Dalloz, 2014, p. 1156. 7 This article provides that contracts made in accordance with the law shall be binding between parties.

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provided for in the contract as shown and financial submission proposal as one of the documents which is part of the contract.

The Court finds that when V.CO Ltd was requesting for the payment for additional works, Gatsibo District should have been realistic as provided for by Article 65 of Law No. 45/2011 of 25/11/2011 mentioned above, and paid the invoices of the contractor without delay, because that would be performing the obligation to implement the commitments in the contract⁸. In this context, as per the case file, that after the decision of the Commercial High Court, the District first expressed its willingness to pay to V.CO Ltd, and also indicated when it would be done if funds are available in the 2022-2023 budget, but later on changed its position.

Based on what has just been elucidated above, this Court finds that, regarding the principle that V.CO Ltd should be compensated for the additional works carried out, nothing was disregarded by the Commercial High Court. However, it is clear to the Court finds that V.CO Ltd worked for 37 months and 26 days (24 months in the agreement dated 16/02/2015, 6 months in the letter dated 31/01/2017, 4 months in letter of 16/08/2017 and three months and 26 days in the letter of 19/03/2018), which means that the amount to be paid is 1,769,000 FRW x 13 months and 269 days equal to 24,530,133 FRW . ii. Determining whether the damages should be granted in this case

Counsel Uwamahoro Marie Grace and Counsel Bunani Bonaventure argue that that in paragraph 24 of the

8 Article 7.2: The Client shall a.: Pay the invoices submitted by the Consultant within the time limit specified in this contract. 9 Instead of 39 months and 26 days as alleged by V.CO Ltd.

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judgment under review on the grounds of injustice, the Commercial High Court ordered to Gatsibo District to pay to V.CO Ltd the damages amounting to 1,500,000 FRW for procedural and advocate fees as well as the payment of 60,000 FRW as Gatsibo District dragged it into unnecessary court proceedings by refusing to perform its obligations, causing V.CO Ltd to lose some assets, but it also caused injustice because the Court disregarded the law and the contract between the two parties, which shows that Gatsibo District did not fail to fulfill its obligations, but that it was involved in frivolous cases.

They also allege that in paragraph 25 of that judgment, the Commercial High Court ordered that the damages claimed by Gatsibo District amount to 2,500,000 FRW, including the advocate fee of 2,000,000 FRW and 500,000 FRW for procedural fee are irrelevant as the elements of evidence were disregarded; so they request the Supreme Court to confirm that the damages are relevant.

Kalisa Théogène assisted by Me Habineza Jean Paul allege that no damages should be granted to Gatsibo District because it triggered the lawsuits. They rather request to the Supreme Court to consider the request of V.CO Ltd and consider it because it has been dragged to courts continuously, especially since the District had started the payment procedure as evidenced by the documents from its management that showed how it had planned to pay V.CO Ltd using the 2022-2023 budget. They pray the Supreme Court to order to Gatsibo District to pay to V.CO Ltd 3,500,000 FRW for procedural fee and be reimbursed 1,000,000 FRW paid to the advocate who represents it before the Supreme Court. DETERMINATION OF THE COURT

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The Court finds that the various damages claimed by Gatsibo District in this case should not be granted because it has not won the case.

The Court finds that the procedural fee claimed by V.CO Ltd in this case shall be granted because it is obvious that it won the case in the Commercial High Court but Gatsibo District was not satisfied with the decision and continued the case, making it continue following up court proceedings. However, the Court finds that the procedural fee claimed by V.CO Ltd amounting to 3,500,000 FRW is not substantiated by the elements of evidence, so, in its discretion, the Court grants to it 300,000 FRW.

The Court also finds that the advocate fee claimed by V.CO Ltd is relevant because it deemed it necessary to hire an advocate to represent it, so the fact that Gatsibo District loses this case gives rise to its obligation to pay to V.CO Ltd 500,000 FRW at this level, determined in discretion of the Court. III. DECISION OF THE COURT

Holds that the application filed by Gatsibo District seeking the review on grounds of injustice of the judgment RCOMA 00670/2020/HCC rendered by the Commercial High Court on 26/05/2021, has no merit;

Holds that the judgment RCOMA 00670/2020/HCC rendered by the Commercial High Court on 26/05/2021, is overruled only in relation to the amount of money for additional works that Gatsibo District must pay to V.CO Ltd;

Orders to Gatsibo District to pay to V.CO Ltd 24,530,133 FRW;

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Orders to Gatsibo District to pay to V.CO Ltd the procedural fee amounting to 300,000 FRW and the advocate fee equivalent to 500,000 FRW, the total is 800,000 FRW.

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