

RWANDA / JUDGMENT

J.V. Piron Thomas & Piron Grand Lacs Ltd (TPGL) v Dr Clean Project.

RCOMA 0038/12/CS & RCOMA 0039/12/CS

COURT

Supreme Court

DECIDED

19 September 2014

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J.V. Piron Thomas & Piron Grand Lacs Ltd (TPGL) v Dr Clean Project.

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Text

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J.V. Piron Thomas & Piron Grand Lacs Ltd (TPGL) v Dr Clean Project. [Rwanda URUKIKO RW'IKIRENGA – RCOMA 0038/12/CS & RCOMA 0039/12/CS (Hatangimbabazi , P.J., Gatete na Mukamulisa , J.) 19/09/2014] Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Amasezerano – Imirimo y'isukura y'inyongera yakozwe nyuma y'igihe giteganyijwe mu masezerano – Mu gihe uwakoze imirimo y'isukura yakomeje kubihomberamo ashora amafaranga agendanye n'iyi mirimo ku mpanvu y'inyubako zatinze kurangira, uwakorewe isuku ntakwiye kunangira yanga kuyishyura kandi yari izi neza ko iyi mirimo itakomeje gukorwa biyiturutseho, kandi inabyungukiramo – Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 64. Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Inyungu zibariwe ku gipimo cya 18% ku mwaka – Indishyi z'akababaro – Igihembo cy'Avoka – Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 258. Amategeko agenga imiburanishirize y'imanza z'imbonezamubano – Igihano gihatira kwishyura – Igihano kiba kigamiye guhatira kwishyura gitangwa mu gihe hari

impungenge zuko ubwishyu bushobora kubura – Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y’imanza z’imbenezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, ingingo ya 216. Incamake y’ikibazo: Dr Clean Project yagiranye amasezerano na JV-TPGL yo gukora isuku y’inzu ya RSSB. Ayo masezerano yagombaga kumara igihe kingana n’ibyumweru bitatu ariko byabaye ngombwa ko imirimo yo gukora isuku ikomeza, irenza igihe cyari giteganyijwe mu masezerano. Bitewe n’uko Tpgl yanze kuyishyura imirimo y’ikirenga (Travaux supplémentaires) yakozwe, Dr clean Project yareze TPGL mu Rukiko Rukuru rw’Ubucuruzi isaba kwishyurwa amafaranga angana na 43.196.568 akomoka ku mirimo yo gusukura iyo nzu yakozwe mu gihe kirenze ibyumweru bitatu. Uru rukiko rutegeka ko JV-TPGL yishyura Dr Clean Project amafaranga angana na 3.144.405 Frws y’akazi kakozwe mu minsi y’inyongera, ay’ikurikiranarubanza n’ayigihano gihatira kurangiza urubanza. Ababuranyi bombi bajuririyemo Ururiko rw’Ikirenga. TPGL ivuga ko umucamanza wa mbere yamutegetse kwishyura Dr Clean ikiguzi cy’imirimo y’ikirenga yakozwe kandi nta ruhushya rwanditse rwa TPGL rwabayeho rwemera ko iyo mirimo y’ikirenga ikorwa ikanacibwa igihano gihatira kwishyura (astreinte) nta mapanvu. Dr Clean Project yo ikavuga ko yajuririyemo bitewe n’uko umucamanza wa mbere yabaze nabi amafaranga y’ikiguzi cy’imirimo y’ikirenga. Uburanira TPGL avuga ko itagombaga kwishyuzwa imirimo y’ikirenga yakozwe na Dr Clean Project kuko nta nyandiko itanga uruhushya yakozwe yemereye Dr clean gukomeza gukora iyo mirimo. Ababuranira Dr Clean bavugaga ko TPGL yabonaga ukuntu imirimo yakomeje gukorwa ariko ntiyihagarikye, kandi abayikoze bakababwira barahembwe ku mutungo wa Dr Clean Project. Ku birebana n’inyungu hamwe n’indishyi TPGL yishyuzwa, Dr Clean ivuga ko kutishyurirwa igihe byakomeje kuyitera igihombo, ikaba isaba ko yakwishyurwa inyungu zibariye ku gipimo cya 18% ku mwaka ndetse ikabyishyurira n’indishyi z’akababwira yatewe n’iyo mwitwarire.

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Naho uhagarariye TPGL avugaga ko muri uru rubanza inyungu z’ubucuruzi n’indishyi zisa nkaho ari kimwe, ariko urukiko rwabigenye nta kimenyetso gifatika rushyirahamwe. Incamake y’icyemezo: 1. TPGL ntiyakwaga kwishyura imirimo y’ikirenga ivugaga ko nta nyandiko itanga uruhushya yakozwe yemera ikorwa ry’iyo mirimo y’inyongera mu gihe hari izindi nyandiko yayandikiye iyishimira imirimo myiza yakozwe. N’ikimenyetso cyemeza ko iyo mirimo yabayeho. Bityo TPGL ikaba igomba kwishyura Dr Clean amafaranga ahwanye na 37.286.667 Frws, akishyurwa nkuko ingingo ya 10 y’amasezerano impande zombi zagiranye abiteganyije.

2. Kuba mu masezerano impande zombi zagiranye nta hataganyijwe ko uzayateshukaho azishyura undi inyungu zibariye ku gipimo runaka, ntaho urukiko rwahera ruzigena, ariko Dr Clean ikagenerwa mu bushishozi indishyi zihwanye na 500.000 Frws kubera ko TPGL yakomeje kwirengagiza kwishyura kandi hari imirimo yakorewe. Naho igihembo cya Avoka nticyagombaga kugendera byanze bikunze ku gipimo gihwanye na 10% cy’amafaranga yishyuzwa, ahubwo hakwitabwaho imiterere y’urubanza rukurikiranwa, bityo mu bushishozi Dr Clean yagenerwa igihembo cya Avoka gihwanye na 500.000 Frws.

3. Kubera ko TPGL yaragaragaje ubushake buke bwo kwishyura niyo mpamvu igihano gihatira kwishyura ari ngombwa, ariko na none kubera ko uburemere bwacyo butagenwa hakurikije byanze bikunze agaciro k'ibyishyuzwa, mu bushishozi bw'urukiko gikwiye kuguma ku mafaranga rwf 50.000 buri kwezi uherye mu gihe TPGL itishyuye ku neza. Ubujurire bwa Dr Clean bufite ishingiye naho ubwa TPGL nta shingiro bufite; Imikirize y'urubanza RCOM 0280/12/HCC ihindutse mu ngingo zose; Amagarama y'urubanza aherereye kuwareze. Amategeko yashingiweho: Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 64 n'ya 258, Amasezerano TPGL na Dr Clean bagiranye kuwa 15/09/2011, ingingo ya 10, Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 216. Nta manza zifashishijwe: Urubanza I. IMITERERE Y' URUBANZA
1. Kuwa 15/09/2011 Dr Clean Project Ltd yagiranye amasezerano na JV - TPGL Ltd yo gukora isuku y'inzu ya RSSB (Insurance Plaza). Ayo masezerano yagombaga kumara igihe cy'ibyumweru 3 kuva kuwa 15/09/2011 kugeza kuwa 10/10/2011, Dr Clean ikishyurwa rwf 4.700.000, ariko ikavuga ko bitewe nuko kubaka iyo nzu byatinze kurangira, byabaye ngombwa ko n'imirimo yo kuyisukura itarangirira ku gihe kiri mu masezerano, ahubwo ikaba yarakomeje kugeza kuwa 29/02/2012.

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2. Dr Clean Project Ltd yareze TPGL mu Rukiko Rukuru rw'Ubucuruzi isaba kwishyurwa rwf 43.196.568 akomoka ku mirimo yo gusukura iyo nzu yakozwe mu gihe kirenze ibyumweru 3 byari biteganyijwe mu masezerano (akazi kakozwe kuva kuwa 15/09/2011, karangira kuwa 29/02/2012) ku makosa ya TPGL, bitewe nuko inzu yubakwaga yatinze kuzura bigatuma Dr Clean itinda kurangiza imirimo mu gihe cyari cyumvikanyweho mu masezerano, bikayiteza igihombo gikabije.
3. Kuwa 06/02/2013, Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza rutegeka ko JV-TPGL Ltd yishyura Dr Clean Project Ltd rwf 3.144.405 y'akazi kakozwe mu minsi y'inyongera, no kwishyura amafaranga y'ikurikiranarubanza angana na rwf 314.440, JV -TPGL Ltd kandi yategetswe kwishyura igihano gihatira kurangiza urubanza kingana na rwf 50.000 buri kwezi, no kwishyura amagarama angana na rwf 6.200.
4. Ababuranyi bombi bajuririye Urukiko rw'Ikirenga, muri make TPGL ikavuga ko umucamanza wa mbere yategetse ko yishyura ikiguzi cy'imirimo yakozwe na Dr Clean mu minsi 167 irenga ku byumweru 3 byari biteganyijwe mu masezerano (marché à forfait), nyamara nta ruhushya rwanditse rwa TPGL rwabayeho rwemera ko iyo mirimo y'ikirenga ikorwa, ikindi akaba ari icibwa ry'igihano gihatira kwishyura (astreinte) nta mpamvu kandi nta rubanza rwabaye itegeko yanze ko rurangizwa. Dr Clean yo ivuga ko yajuriye bitewe nuko umucamanza wa mbere yabaze nabi amafaranga y'ikiguzi cy'imirimo y'ikirenga (travaux supplémentaires) yakoze mu minsi 167, yitiranya indishyi zisanze n'inyungu z'ubucuruzi, ndetse agena igihano gihatira kwishyura ku mafaranga make cyane.

5. Urubanza rwaburanishijwe kuwa 22/07/2014, TPGL iburanirwa na Me Kazungu, naho Dr Clean iburanirwa na Me Masumbuko Nde Emile afatanyije na Me Buzayire Angèle, muri uru rubanza hakaba hagomba gusuzumwa niba imirimo yakozwe nyuma y'igihe giteganyijwe mu masezerano ikwiye kwishyurwa, bibaye ngombwa hakagenwa ikiguzi cyayo ; ikibazo cy'inyungu z'ubucuruzi n'indishyi zasabwe, ibyerekeye igihano gihatira kwishyura (astreinte) ndetse n'igihembo cya Avoka. II. ISESENGURA RY'IBIBAZO BIGIZE URU RUBANZA Ikibazo cyo kumenya niba imirimo yakozwe itari iteganyijwe mu masezerano ikwiye kwishyurwa n'icyo kugena agaciro kayo.
6. Uburanira TPGL avuga ko imirimo y'inyongera (travaux supplémentaires) yakozwe na Dr Clean mu minsi 167 irenga ku byumweru 3 byari biteganyijwe mu masezerano batagomba kuyishyuzwa bitewe nuko hakurikijwe ibiteganywa n'ingingo ya 440 y'Igitabo cya III cy'urwunge rw'amategeko mbonezamubano, nta nyandiko itanga uruhusa yakozwe yemera ikorwa ry'iy mirimo, ahubwo ko hagomba kubahirizwa ingingo ya 64 y' itegeko n°45/2011 ryo kuwa 25/11/2011 rigenga amasezerano iteganya ko amasezerano afatwa nk'itegeko hagati y'abayagiranye.
7. Ababuranira Dr Clean biregura bavuga ko TPGL yitwaza ingingo ya 64 y'itegeko rigenga amasezerano kandi iyo ngingo ari nayo iteganya ko amasezerano arangizwa nta buryarya hagati y'abayagiranye, ko kuba imirimo yo gukora isuku mu byumweru 3 yari kuwa kuwa 15/09/2011 ikarangira kuwa 10/10/2011, ariko bitewe nuko kubaka bitari byakarangiye, bigatuma imirimo

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ikomeza mu minsi 167 irenga ku gihe cyari cyateganyijwe, igakorwa TPGL ibireba ntiyihagarike kandi abakoze iyo mirimo bakaba barahembwe ku mutungo wa Dr Clean, kubera iyo mpamvu TPGL igomba kwishyura ikiguzi cyayo nkuko umucamanza wa mbere yabyemeje, cyane cyane ko kuwa 29/02/2012 TPGL yemeye iyo mirimo kuko yandikiye Dr Clean iyishimira imirimo myiza yakoze, ko rero iyo nyandiko ari ikimenyetso gihagije cyemeza ko iyo mirimo yabayeho, TPGL ikaba igomba kwishyura ikiguzi cyayitanzweho Uko Urukiko rubibona.

8. Urukiko rurasanga ababuranyi bombi bemeranywa ku ngingo yuko nyuma y'igihe cyari giteganyijwe mu masezerano, Dr Clean yakomeje gukora imirimo y'isukura, ikindi akaba aruko TPGL yari izi neza ko iyo mirimo y'isukura yakomeje gukorwa.
9. Urukiko rurasanga ingingo ya 440 yavuzwe haruguru TPGL ishingiraho yanga kwishyura imirimo y'inyongera ari amasezerano y'akazi yerekeye ubwubatsi kandi akaba ashingiye ku ipula (plan) yemeranijwe n'abayagiranye ayo masezerano, bivuze ko amasezerano yo gukorera isuku inyubako avugwa muri uru rubanza atagomba kubarirwa mu masezerano y'akazi ashingiye ku giciro mbumbe yumvikanyweho mu bwubatsi, bitewe nuko gukora isuku atari ubwubatsi.

10. TPGL ntiyakwitwaza ko itagomba kuriha imirimo y'isuku yakozwe nyuma y'itariki igaragara mu masezerano, mu gihe ariyo yatumye iyo mirimo ikomeza gukorwa, igakorwa kandi ibizi, kubera gutinda kwayo mu bwubatsi kwatumye hakomeza kubaho imirimo y'isuku. Mu gihe kandi yari izi neza ko iyo mirimo ikomeje gukorwa biyiturutseho, ntikwiye kunangira yanga kwishyura mu gihe ibyungukiramo, ku rundi ruhande Dr Clean ibihomberamo mu gihe yakomeje gushora amafaranga agendanye n'imirimo y'isukura ku mpamvu ziturutse ku bikorwa bya TPGL.
11. Urukiko rurasanga rero ruherereye ku byumweru 3 (21 jrs) bari barumvikanyeho igiciro cya rwf 4.700.000, wayabarira ku minsi 167 ihwanye n'ibyumweru 23.8 by'akazi kakozwe, akaba ahwanye na rwf 37.286.667 TPGL igomba kwishyura Dr Clean, akishyurwa nkuko ingingo ya 10 y'amasezerano impande zombi zagiranye kuwa 15/09/2011 abiteganyaye. Ku byerekeranye n'inyungu (intérêts commerciaux de 18%) ndetse n'indishyi TPGL yishyuzwa.
12. Dr Clean isaba ko TPGL iyishyura inyungu z'ubucuruzi zibariye ku mafaranga yakagombye kuba yarishyuye, kubera ko kutishyurirwa igihe bikomeje kuyitera igihombo, ikaba isaba ko yakwishyurwa inyungu zibariye ku gipimo cya 18% ku mwaka, ndetse ikabyishyurira n'indishyi z'akababaro yatewe n'yo myitwarire.
13. Uhagarariye TPGL avuga ko muri uru rubanza inyungu z'ubucuruzi n'indishyi zisa nkaho ari kimwe, kubera ko zireba ibyatakajwe n'usaba kwishyurwa, ariko nyamara Urukiko rukaba rwarabigennye nta kimenyetso gifatika (instrument juridique) rushingiyeho.
14. Akomeza avuga kandi ko kuba umucamanza yaravuze ko indishyi n'inyungu z'ubucuruzi zitagomba gusabwa zombi icyarimwe, aruko zihuje intego imwe yo gusaba gusubizwa

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ibyatakajwe, ibyo bisobanuro bikaba byari bishingiye cyane cyane ku ngingo ya 51 y'Igitabo cya III cy'urwunge rw'amategako mbonezamubano. Uko Urukiko rubibona.

15. Urukiko rusanga mu masezerano impande zombi zagiranye, nta hateganyijwe ko uzayateshukaho azishyura undi inyungu zibariye ku gipimo runaka, akaba ariyo mpamvu ntaho rwahera ruzigena. Rusanga ariko, hashingiwe ku ngingo ya 258 C.C. L. III, Dr Clean ikwiye kugenerwa mu bushishozi indishyi zihwanye na rwf 500.000 kubera ko TPGL yakomeje kwirengagiza kwishyura kandi hari imirimo yakorewe. Ku byerekeye igihano gihatira kurangiza urubanza (astreinte).
16. Abahagarariye Dr Clean basobanura ko umucamanza wa mbere yagennye igihano gihatira kurangiza urubanza gihwanye na rwf 50.000 buri kwezi, ayo mafaranga bakaba basanga ari make cyane kubera ko yari yibeshye yibwira ko Dr Clean yishyuzaga gusa rwf 2.096.270, kandi mu by'ukuri yari rwf 43.196.568, akaba ariyo mpamvu hagenwe rwf 500.000 yari yasabwe bitaba ari ikirenga.

17. Uhagarariye TPGL avuga ko nubwo igihano kiba kigamije guhatira kwishyura, hirengagijwe ihame ry'uko gitangwa mu gihe hari impungenge zuko ubwishyu bushobora kubura, ku bwe rero akaba asanga nta gaciro byahabwa.
18. Urukiko rurasanga TPGL yaragaragaje ubushake buke bwo kwishyura, akaba ariyo mpamvu, hashingiwe ku ngingo ya 216 y'Itegeko n° 21/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruza, iz'umurimo n'iz'ubutegetsi, igihano gihatira kwishyura ari ngombwa ko kijyaho muri uru rubanza kubera impamvu zasobanuwe, ariko na none kubera ko uburemere bwacyo butagenwa hakurikije byanze bikunze agaciro k'ibyishyuzwa, mu bushishozi bw'urukiko gikwiye kuguma ku mafaranga rwf 50.000 buri kwezi uhereye tariki ya 19/10/2014 mu gihe TPGL itishyuye ku neza. Ku byerekeye igihembo cya Avoka.
19. Abahagarariye Dr Clean banenga umucamanza wa mbere uburyo yagennye igihembo cya Avoka kibariye ku mibare itariyo, hakaba hakwiye kugenwa igihembo gihwanye na 10% cy'amafaranga yishyuzwa nkuko bisanzwe bikorwa. Uhagarariye TPGL we asanga nubwo icyo gihembo kidakwiye kubera ibyo yasobanuwe, cyaragenwe mu bushishozi bw'urukiko.
20. Urukiko rusanga umucamanza ataragombaga guhatirwa kugendera byanze bikunze ku gipimo gihwanye na 10% cy'amafaranga yishyuzwa, ahubwo hakwitabwaho imiterere y'urubanza rukurikiranwa, uburemere bwarwo bukaba aribwo butanga icyerecyezo cy'ingano za serivisi zatanze zikwiye kugenerwa ibihembo, akaba ariyo mpamvu mu bushishozi Dr Clean ikwiye kugenerwa igihembo cya Avoka gihwanye na rwf 500.000.

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III. ICYEMEZO CY'URUKIKO

21. Rwemeje ko ubujurire bwa Dr Clean Project Ltd bufite ishingiro kuri bimwe, naho ubujurire bwa JV Piron-Thomas & Piron Grands Lacs Ltd nta shingiro bufite;
22. Rutegetse JV Piron-Thomas & Piron Grands Lacs Ltd kwishyura Dr Clean Project Ltd rwf 37.286.667 nkuko byasobanuwe mu gika cya 11 cy'urubanza ;
23. Ruyitegetse no kwishyura Dr Clean Project Ltd frw 1.000.000 nkuko byasobanuwe mu gika cya 15 n'icya 20 cy'urubanza;
24. Ruyitegetse na none kwishyura igihano gihatira kurangiza urubanza gihwanye na rwf 50.000 buri kwezi nkuko byasobanuwe mu gika cya 18 cy'urubanza ;
25. Ruyitegetse no kwishyura amagarama y'urubanza ;
26. Ruvuze ko imikirize y'urubanza rwajuririwe R COM 0280/12/HCC rwaciwe ihindutse mu ngingo zose.

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