

TANZANIA / JUDGMENT

meeco unisys ltd vs electric supply co ltd another 2005 tzhccomd 22 22 march 2005

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 36 OF 2004 MEECO UNISYS LIMITED.....PLAINTIFF VERSUS
TANZANIA ELECTRIC SUPPLY COMPANY LIMITED..... 1st DEFENDANT
PARASTATAL SECTOR REFORM COMMISSION..... 2nd DEFENDANT

JUDGEMENT

KALEGEYA. J. The Plaintiffs have sued the Defendants for breach of contract. The 2nd Defendants have been sued as necessary parties because under the law [The Public Corporations Act, 1992 as amended by Act 16 of 1993] they are Receivers cum Managers of the 1st Defendants (in terms of The Bankruptcy Ordinance), a Specified Public Corporation. The Plaintiffs are being represented by Mr. Ringia, Advocate. Mr. Msefya, Advocate, represents 1st Defendants while Mr. Baravuga, Advocate, represents the 2nd Defendants. Each party called one witness. The Plaintiff tendered 9 Exhibits (Exh.Pl - 9) while the 1st Defendants tendered one, Exh.Dl. 2 A substantial part of what transpired is not disputed and it is as follows. Sometime in early 2004, Plaintiffs secured a tender from the 1st Defendants for "Supply and Installation of Server Hardware, Software and citrix services" worth US\$ 229,780.12. Though belatedly, the 1st Defendants advertised, to the general public, the tender award notice vide Exh.Pl. Plaintiffs and 1st Defendants proceeded and drew up a Contract document after holding various contract negotiations in April and May, 2004. These negotiations included a meetings held on 5/4/2004; 11th - 12th May, 2004 and 13th May, 2004. Parties then came up with ADDENDUM NO.1. The said ADDENDUM NO.1 was made part of the Agreement. It has three Annexures - Minutes of the meeting held on 11th - 12th May, Annex 1; Minutes of the meeting held on 13th May, Annex 2 and a letter from the Plaintiffs' dated 12th May, as Annex 3. The ADDENDUM NO.1 was signed on 31.5.2004. On the 5 April, 2004, when parties met, as per minutes, they agreed, among others as follows:- "3. CONTRACT 3.1..... 3.2..... 3.3..... 3.4 On delivery of goods, TANESCO requested a quicker implementation time and Meeco committed to 3 (three) weeks on delivery period and 22 days on installation and commissioning. Meeco Unisys confirmed to proceed with hardware and associated 3 software ordering process provided there has been a confirmation of signing of the contract for the same supply and services..... 3.10. Meeco requested for clarification on the commissioning. TANESCO confirmed that the date of commissioning of the supply and

installation will be based on the first site installation of the application software. This safeguards the contractor in case there is a delay in installation of the next other applications software caused by TANESCO not being ready. ” At the 11th May meeting, 1st Defendants sought further confirmation from the Plaintiffs, regarding, among others, “Delivery, installation and completion dates.” The said Minutes in part state: “ MECCO UNISYS responded as follows: Delivery/ Installation Program

1. Hardware was ordered from IBM UK on the 16 April 2004.
2. IBM had shortage of spares/items which has contributed to this delay, otherwise the hardware was supposed to have been delivered by now.
3. Due to this delay, the hardware is expected to be at Dar es Salaam customs on 26th May 2004.
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4. At least 2 days were required to clear the goods. Installation and testing will be complete in five days. TANESCO required the following from MECCO UNISYS:
 1. Confirmation of order from IBM
 2. Confirmation of what is being delivered (additional features added to the hardware)
 3. Confirmation of air freighting date and arrival date of the hardware
 4. Confirmation of date of clearance at customs
 5. Date for Installation and testing.
 6. Confirmation on maintaining the same price for the hardware despite additional features added to the hardware
 7. Confirmation on whether the hardware specifications for which TANESCO is to sign the Contract are the same as the hardware that is to be delivered.
 8. Confirmation on whether the terms of payments were still valid. * Note that, there was no meeting held on 12th May 2004, but some response on issues raised by TANESCO was received on that day. ” Possibly, to cement what had been discussed above, the Plaintiffs further confirmed in writing on 12th thus, 5 “ Our ref: MU/CON/TAN-04/002 12 May, 2004 Managing Director, Tanzania Electric Supply Co. Ltd. P.O.Box 9024, Dar es Salaam Dear Sir, RE: CONTRACT FOR SUPPLY AND INSTALLATION OF SERVER HARDWARE, SOFTWARE AND CITRIX SERVICES Further to our meeting of 11th May 2004. We wish to confirm that all equipment for your project was ordered on 16th April 2004. However, delivery has been delayed due to the fact that IBM had discontinued the manufacture of some servers offered. The servers (x225 model) have been upgraded with 2.8GHz processor instead of 2.6GHz processor. The x225 model has also been upgraded with 2.2 Ghz processor and 2MB Cache Memory instead of 2.0 Ghz processor and 1MB cache. All other specifications remain the same. The upgraded servers are going to be supplied without any additional cost. We have been assured by IBM that equipment will arrive in Dar es Salaam latest 26th May 2004. Goods will

then be delivered to TANESCO within the first week of June 2004. Provided the necessary information and resources requested to TANESCO vide our email dated 27th April 2004 are made available, MEECO will start installation within the contractual agreed parameters (i.e 5 days for two engineers) immediately AFTER DELIVERY OF goods. We again thank you for giving us the opportunity to serve your esteemed organization. 6 Yours Sincerely, Meeco Unisys Ltd. Signed by G.B. Gondwe Director, "(emphasis mine)". However, it would seem this letter did not satisfy 1st Defendants either. On 13th May, yet another meeting was held by the parties. They came up with the following minutes:- " TANESCO confirmed to have received the letter from MECCO UNISYS and still wanted confirmation on delivery, installation and commissioning date so that TANESCO can start charging the liquidated damages for late delivery, installation and commissioning. MECCO UNISYS respondend as follows:

1. Delivery of the Goods by the Supplier to the Purchaser shall be made at the latest by 4,h June 2004.
2. The Supplier shall start installation of the Goods on 7th June 2004.
3. The supplier shall commission the works on 11th June 2004. The parties agreed that these minutes of the meeting will form part of the Contract to be signed. " It is after this step that parties came up with ADDENDUM No. 1. Save for the Annexures whose relevant parts have already been quoted, the whole body of the Addendum is here below reproduced:- 7 "

CONTRACT FOR SUPPLY AND INSTALLATION OF SERVER HARDWARE, SOFTWARE AND CITRIX SERVICES ADDENDUM NO.1 In accordance with the terms and conditions of the above stated Contract, signed on 17th May, 2004, it is hereby agreed that the following amendments to the Contract shall be made:- SECTIONIV. SPECIAL CONDITIONS OF CONTRA CT Clause 10 Delivery and Documents 10.1 Delivery of the Goods by the Supplier to the Purchaser shall be made at the latest by 4th June 2004 in accordance with the terms specified by the Purchaser in the Technical specifications with the following changes:

 - The servers (x225 model) upgraded with 2.8 GHz processor instead of 2.6GHz processor.
 - The x225 model upgraded with 2.2GHz processor.
 - 2MB Cache Memory instead of 2.0GHz processor and 1 MB Cache. Installation and Commissioning The Supplier shall commence installation of the Goods on 7th June, 2004. The Supplier shall commission the works on 11th June, 2004. Clause 16 Prices Irrespective of the changes made under Clause 10 of this Amendment the Supplier confirms that the upgraded servers were to be supplied at no extra cost to the Purchaser. The following documents identified as Annexes 1,2 and 3 form part of this Addendum:-
 - i) Minutes of meeting between the Supplier and the Purchaser dated 11th and 12th May, 2004.
 - 8 ii) Minutes of meeting between the Supplier and the Purchaser dated 13th May, 2004. Hi) Letter from the Supplier ref no. MU/CON/TAN-04/002 DATED 7 nr 2004 including an rEmailmnr 12'\TH May,• 7 7« t~» •7 form IBM. Save as specifically amended herewith, all other terms and conditions contained in the Contract stated above remain the same. IN

WITNESS WHEREOF, the parties hereto have caused this addendum No.1 to the Contract to be signed in their respective names as of the 31st day of May, 2004.....m..... Further to the above, as a precautionary security for possible non- performance by the Plaintiffs, the 1st defendants demanded and secured a performance Bond (Exh.P7) whose contents are as under: 16" APRIL 2004 MANA GING DIRECTOR TANESCO P.O.BOX 9024 DAR ES SALAAM Dear Sir, PERFORMANCE BOND NO. 005/2004 Whereas MEECO UNISYS LTD of P.O>Box 6984, Dar es Salaam (hereinafter called "the Supplier") has undertaken, in pursuance of the Contract No.SM/PSO/16/152 dated 2nd April 2004 against tender No. PC/01/2004 to supply and to install hardware/software and citrix services (hereinafter called "the Contract"). 9 AND WHEREAS it has been stipulated by you in the said Contract that the supplier shall furnish you with a Bank Guarantee by a reputable Bank for the sum specified therein as security for compliance with the Supplier's performance obligations in accordance with the Contract. AND WHEREAS we, EURAFRICAN BANK (T) LTD P.O.BOX 3054 DAR ES SALAAM having our registered office at NDC DEVELOPMENT HOUSE, KIVUKONI/OHIO STREET DAR ES SALAAM have agreed to give the Supplier a Guarantee: THEREFORE WE hereby affirm that we are Guarantors and responsible to you, on behalf of the Supplier, up to a total of USD 23,000(say Twenty Three Thousand US Dollars only) and we undertake to pay you, upon your first written demand declaring the Supplier to be in default under the Contract and without cavil or argument, any sum or sums within the limits of USD 23,000 (say Twenty Three Thousand US Dollars only) as aforesaid, without your needing to prove or to show grounds or reasons for your demand for the sum specified therein. This Guarantee will remain in force up to and including 31st day of August 2004 and any demand in respect thereof should reach the Bank not later than the above date. On 31st August 2004 our liability hereunder will cease and the Guarantee should accordingly be returned to the Bank. Notwithstanding the above, this Guarantee once expired will be null and void irrespective of whether or not the Guarantee is returned to the Bank for cancellation. For and on behalf of EURAFRICANBANK (T) LTD SIGNED BY PAUL MTEBE ETIENNE SIL VESTRE BRANCH MANAGER CHIEF OPERATION MANAGER. " 10 The Contract agreement is Exh.P2. " SECTION 1 of the said Agreement, entitled " CONTRACT FORM" runs as under:- " SECTION 1. CONTRACT FORM THIS AGREEMENT made this 17th day of MAY 2004 Between TANZANIA ELECTRIC SUPPLY COMPANY LIMITED of P.O.BOX 9024, DAR-ES- SALAAM, TANZANIA (Hereinafter called " the Purchaser") of the one part and MEECO UNISYS LTD of P. O.BOX 6984, DAR ES SALAAM TANZANIA (hereinafter called "the Supplier") on the other part WHEREAS the Purchaser is desirous that certain Goods and ancillary Services should be provided by the Supplier, viz, Supply and Implementation of the Pre- Payment Meter Vending System and has accepted a bid by the supplier for the supply of those Goods and Services in the sum of USD 229,780.12 (United States Dollars Two Hundred and Twenty Nine Thousand Seven Hundred and Eighty and Cents 12) hereinafter "the Contract Price. NOW THIS AGREEMENT WITNESSTH AS FOLLOWS:

1. In this Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Conditions of Contract referred to.
2. The following documents shall be deemed to form and be read and construed as part o this Agreement, viz:
 - a. The Bid form and the Price Scheduled submitted by the Bidder; 11
 - b. The Schedule of Requirements.
 - c. The Technical Specifications;
 - d. The General Conditions of Contract;
 - e. The special Conditions of Contract f The Purchaser's Notification of Award
 - g. Minutes of Contract Negotiations dully signed by parties on 5th April 2004.
3. In consideration of the payments to be made by the Purchaser to the Supplies as hereinafter mentioned the Supplier hereby covenants with the Purchaser to provide the Goods and services and remedy defects therein in conformity in all respects with the provisions of the Contract.
4. The Purchaser hereby covenants to pay the Supplier in consideration of the provision of the Goods and Services and the remedying of defects therein, the Contract price or such other sum as may become payable under the provisions of the Contract a the times and in the manner prescribed by the Contract..... ft Although this section provides that the Agreement was signed on 17th May, 2004, the truth of the matter is that it was not. Parties are agreed that they signed on different dates. The Plaintiffs unchallengedly impressed, in the evidence of PW1, that they signed on 8/5/2004 and dispatched the three copies to the 1st Defendants. The latter signed on undisclosed date and returned a copy to Plaintiffs on 1/6/2004 as per their covering letter stating as follows:- 12 “ DIS/C/1 June 1, 2004 Director, MEECO UNISYS Ltd, P.O. Box 6984, DARES SALAAM Att: Mr. G.B.GONDWE SUBJECT: SUBMISSION OF CONTRACT FOR SER VER HARDWARE, SOFTWARE AND CITRIX SERVICES Refer the above heading. Enclosed herewith, please find one (1) original contract between Tanzania Electric Supply Company Limited and MEECO Unisys Limited for supply and installation of Server Hardware, Software and Citrix Services and one (1) set Addendum No. I to the mentioned contract signed by both parties for your records. Please acknowledge receipt of the same. Yours faithfully, For: TANZANIA ELECTRIC SUPPLY COMPANY LIMITED SIGNED For: MANAGING DIRECTOR. ” If they had jointly signed on 17th May, 2004 as the “Contract Form” purports to indicate or on any other date, the obvious would have been that each party would have left the scene with his own copy hence authoring the letter dated 1/6/2004 would not arise. 13 It is also agreed that while the contract negotiations were going on, the Plaintiffs pressed orders for the software and hardware which were duly delivered as per Exh.P4-6. All the above brings us to the center of controversy, which however is very fine indeed. On 9/6/2004, the 1st Defendants terminated

the contract and forfeited the performance Bond, in terms of Exh.P9 whose contents are as follows: SEC. 388/6/2004 9th June, 2004 THE DIRECTOR, MEECO UNISYS LIMITED, SIMU STREET, DAR ES SALAAM, P.O.BOX 6984, DAR ES SALAAM- TANZANIA Attn: Mr. Godfrey B. Gondwe Tel No.=255-22-2139230/2113345 Fax No.=255-22-2113398 RE: NOTIFICATION OF TERMINATION OF THE CONTRACT FOR SUPPLY AND INSTALLATION OF SERVER HARDWARE, SOFTWARE AND CITRIX SERVICES MADE THE 17TH DAY OF MARCH 2004 BETWEEN TANESCO LTD AND M/S MEECO UNISYS LIMITED (Made Under Clause 22.1 of The Contract) 14 PLEASE BE INFORMED THAT Tanzania Electric Supply Company Limited of P.O.Box 9024, Dar es Salaam, the PURCHASER under the Contract, hereby terminates the above-cited contract entered between itself and M/S MEECO UNISYS LIMITED of P.O.Box 6984, Dar es Salaam, as SUPPLIER. Please be further NOTIFIED that Tanesco Ltd besides terminating the contract with all its incidents in addition thereto now invokes the provisions of section 21.2 of the contract and forfeits the Performance Security furnished by way of PERFORMANCE BOND No. 005/2004 dated 16th April, 2004 by M/S EURAFRICAN BANK (T) LTD of P.O.Box 3054 Dar es Salaam to Tanesco Ltd and imposes upon M/S MEECO UNISYS LTD liquidated damages to be hereafter computed in accordance with section 22.1 of the contract for the company's inexcusable default in completely failing to perform its contractual obligations under the contract. Tanesco Ltd reserves to itself the right to further require your Company to fully compensate it for any special and general damages which have arisen on its part in the course of its reasonable expectation of your company performing its obligations under the terminated contract. This notice of termination takes immediate effect upon being delivered at your respective address as specified under section IV clause 8. Yours faithfully, For: TANZANIA ELECTRIC SUPPLY COMPANY LIMITED C.G.Huysen MANAGING DIRECTOR CGNH/LF/jjm " The Plaintiffs could not stomach this. They instructed their lawyers who issued a protest notice [Exh.P8] calling for cancellation of the contract termination notice. The 1st Defendants having not obliged, the Plaintiffs mounted the present case against them, complaining on breach of contract and praying for judgment and decree against them as follows:- 15 " (a) A Declaration that the termination of the contract for supply and installation hardware, software and citrix services by the Defendant unlawful.

- (a) That the Defendant be ordered to pay the Plaintiff the sum of USD 23,230 that was deposited as bond
- (b) That the Defendant be ordered to pay the Plaintiff the sum of USD. 161,912 and T.shs 2,096,055 in specific damages.
- (c) That the Defendant be ordered to pay the Plaintiff general damages as this Honourable Court may assess
- (d) That the Defendant pay the Plaintiff interest on the principal amount in prayer (b), (c) and (d) herein above at commercial rate (25%) from the date of the unlawful termination till

Judgement.

- (e) That the Defendant pay the Plaintiff interest on prayer (b), (c) and (d) (b) herein above at the courts rate from the date of Judgement till the date the decree is satisfied in full
- (f) Costs of this suit be providedfor
- (g) Any other and further relief(s) the Court may deem fit. " Now, for the merits. As I have already stated above, each party called a sole witness. However, these witnesses are powerful individuals in their respective enterprises (especially PW1 and DW1) such that they have a full picture concerning the transaction. 16 PW1, Geoffrey Gondwe is the Plaintiffs' Managing Director who dealt with the tendering; participated in the drawing up of the Contract document, attended the various meetings striking the numerous agreements on salient features in the negotiations including the Addendum No.1. He is a signatory to Exh.P2. Equally involved is DW1, Nazarius Chonya, who is the 1st Defendants' Director, Information Systems and whose daily activities include advising the said 1st Defendants on all issues related to Information technology. Save for the mere act of signing Exh.P2, of which he is not a party, he was fully involved in the transaction from start to end. DW2, Thobias Laizer, is a legal Consultant working with the 2nd Defendants who simply insisted that as the 1st Defendants are not under Receivership but have been placed under restructuring process, PSRC's duty is not to bless "contracts as this one.....but rather TANESCO should have sought prior approval. " He concluded that 2nd Defendants having not been a party to the contract, dragging them into the suit is not proper and that therefore the said suit should be dismissed against them and should be awarded damages and costs for the botheration. Issues framed are as follows: " 7. Whether the 1st Defendants ' termination of the Contract for the supply and installation of hardware, software and citrix services by Plaintiffs was unlawful and unjustified?
- 2. If the answer is in the affirmative, whether the Plaintiffs suffered specific damages totaling USS 175,142(US\$23,230 + USS 161,912) and Tshs 2,096,055? 17
- 3. Whether Defendants ' forfeiture of the performance Bond No.005/2004 and imposition on Plaintiffs liquidated damages were lawful?
- 4. To what relief are the parties entitled? " I have observed above that the center of contention in this controversy is very fine indeed. Basically, the main question is as regards contract performance dates, especially the equipment supply date and consequences thereof. The 1st Defendants insist that in terms of the contract, the equipment supply date was 4/6/2004 and that as the Plaintiffs did not supply them on that date they were in breach of the contract entitling them to terminate the contract and forfeit the performance Bond as they did vide Exh.P9. On the other hand, it is the Plaintiffs' contention that time did not start running until 1/6/2004 when they received Exh.P9 duly signed by the 1st Defendants. Having carefully considered the testimonies of PW1 and DW1 and the documentary Exhibits tendered in support thereof, I should outrightly state that the whole transaction was shrouded in non-trasparency clouds. Starting with advertisement of the tender, although

PW1 testified that the award was made to them as per the 1st Defendants award letter dated 2/4/2004, he never bothered to tender this document. Nevertheless, as the 1st Defendants did not dispute this element we should take it to be true. Not 18 easily comprehensible however, while failing to tender that letter, PW1 was quick to tender an advertisement in the Guardian Newspaper (Exh.Pl) notifying the general public tender awards made. This document shows that there were many tenders awarded and the Plaintiffs' tender is number 7 on the list. There is yet a further very surprising element. Although the award letter is said to have been served on 1st Defendants in early April, the tender awards' notice to the general public was advertised over two months later! Exh.Pl is a Guardian Newspaper dated 9/6/2004: surprising again, the very date when the termination letter (Exh.P9) was authored! One would really doubt the existence of transparency in such transaction because advertisements are made by Newspaper publishers in accordance with the customer's direction on dates. Generally, tender awards are published immediately after they are awarded. The 1st Defendants cannot reasonably explain the delay in the advertisement as per Exh.Pl. There must have been a good undisclosed reason for that, and without drawing unnecessary inferences, it is unlikely that it was good intentioned. I have made the above observation purposely. It would seem that the Plaintiffs and 1st Defendants were in close relationship of dealings and trust until something went wrong in June. PW1 unchallengedly deposed, "Our Company has been providing professional IT Services to 1st Defendant since 1996. We were supplying and installing hardware for Customer Services. This is the Computer System installed in Tanesco 19 Regional and District offices in the whole country for billing purposes." And he again unchallengedly stated that the equipment which is subject of the controversial tender award was intended to replace the equipment they had earlier on installed, and further that todate they are still servicing the old equipment which is still in use as the one to whom the tender was re-award has failed to supply the required equipment. The above deep relationship, in my view, led to laxity and hence the wanting formulation of the contract and the seemingly protracted negotiations resulting into patching of the said contract here and there let alone the unclear wording which has now brought them to where they are. The above observed however, let us go back to the burning issue between the parties: when exactly was the Plaintiffs supposed to perform their part of the contract? In the whole main body of the contract, dates are surprisingly not specified! However, Clause 2(g) of the "Contract Form" makes minutes of the Contract Negotiations of 5th April, 2004 part of the Contract. These minutes however simply provide generality on time expected to be taken. The next mention on time is reflected in clause 10 entitled "Delivery and Documents" under which sub-clause 10.1 runs as follows:- 20 "Delivery of the Goods shall be made by the supplier in a accordance with the terms specified by the Purchaser in its Schedule of Requirements and special condition of contract." Almost same wording is repeated under clause 21 (sub-clause 21.1). Timing is next seen under section VII wherein the Minutes of 5/4/2004 are brought in. Up to this point it would seem, apart from "quick implementation" desire, the 1st Defendants had no specific dates of implementation in mind as vividly exposed in clause 3.4, of the said minutes "On delivery of goods, TANESCO requested a quicker implementation time and MEECO committed to 3 (three)

weeks on delivery period and 22 days on installation and commissioning. Mecco Unisys confirmed to proceed with hardware and associated software ordering process provided there has been a confirmation of signing of the contract for the same supply and services. ” That the above is open ended and specifies no date of implementation does not require an expert on calendaring. It should however be noted that the Plaintiffs’ intention was clear: whatever step was to be gauged on the signing of the contract. This takes us to the next point in the contract process - the Addendum No.1 (quoted). In here it is provided that the terms and conditions of the contract signed on 17/5/2004 are varied as indicated. The Addendum No.1 21 specifies the delivery date as 4/6/2004; commencement of installation as 7/6/2004 and Commissioning on 11/6/2004. This Addendum was signed on 31.5.2004, just ten days before the termination of the contract, and, it adopted the parties’ meetings minutes of 11-12th May 2004; 13th and the letter by Plaintiffs to TANESCO. The minutes of the meeting held on 13th indeed specify the dates as reflected (the contents thereof are already quoted). The Minutes of the above stated meetings were signed on 19/5/2004. From the above, I am satisfied that while in the main body of the contract there are no specific dates provided for the performance of the contract, as contract negotiations went by, parties came to agree on specific dates. This element of contract performance dates by the Plaintiffs is traceable from generality to specificity treading on the following picture. As already indicated, clause 10.1 and 20.1 are just of general application with no particular dates. The Contract form however adopts the minutes of 5/4/2004. As clearly displayed, what the 1st Defendants wanted at that point in time (5/4/2004) was “quick implementation”. The Plaintiffs offered 3 weeks period for delivery and 22 days on installation and commissioning provided the contract is signed. However, as is the case with clause 10 and 20, these are just general commitments and which even then were yet to be accepted by 1st Defendants. 22 In the meeting of 11th May, as per Annex. 1 to the Addendum, the Plaintiffs expressed their fears on possible delays by IBM as the hardware was expected on 26/5/2004 and they implored, “ We have been assured by IBM that equipment will arrive in Dar-Es- Salaam latest 26th May, 2004. Goods will then be delivered to TANESCO within the first week of June, 2004” (emphasis mine) The above notwithstanding, the 1st Defendants, at the meeting held just the following day (as per Annex. 2 to the Addendum), 13 , still insisted on specificity of dates and Plaintiffs committed themselves on delivery on 4th; commencement of installation on 7/6/2004 and commissioning on 11/6/2004. What in effect does this mean? I am of the settled view, that at this point the negotiations on performance dates crystalised. All the previous statements on time are rectified and replaced by the dates as agreed upon on 13th. In view of the above, I don’t subscribe to part of PWI’s testimony impressing, “ We were supposed to deliver the equipment within 3 weeks from the date the contract became effective. The contract became effective on 1/6/2004 when we were notified that it was signed. ” The above argument would have held water if the contract terms had remained as provided for under clauses 10 and 20 and also as per minutes of 23 5/4/2004, as in those minutes the Plaintiffs were very specific that the performance dates would be pegged on signing of the contract. That position however was subsequently abandoned during negotiations as displayed, more specifically by the minutes of 13th, May. The Plaintiffs cannot utilize both the generality clause and the

specific clause simultaneously. I should pose and observe that in stating the above, I am mindful of clauses 17 and 18 of the Contract Agreement. Clause 18 entitled “Contract Amendments” provides:- “Subject to clause 17, no variation in or modification of the terms of the contract shall be made except by written amendment signed by the parties.” S. 17 refers to amendments/changes that could be asked for by the Purchaser. As stated already, the generality provision on performance dates was changed to specificity vide the Addendum No.1. Although the changing minutes are those of the meeting held on 13 May and which were signed on 19/5/2004, under the contract, in terms of clause 18, the changes became effective when the Addendum No.1 was signed. The said addendum was signed on 31.5.2004. It is on that date that the specific performance dates became part of Exh.P 1. That however does not change the situation in favour of Plaintiffs. The signing of the Addendum was simply formal incorporation into the 24 contract what parties had agreed upon. This was not intended to make the signing date a milestone for counting any days let alone the performance dates. Yes, it would have counted if parties’ negotiations on dates had remained on generality in terms of the minutes dated 5/4/2004. I should hastily add however add that the way parties behaved here is another evidence proving how laxy they were in the whole transaction. If all the negotiations were complete by 13th May as already established and they purported to sign the Contract Agreement on 19/5/2004, why was the Addendum not signed in time and incorporated. Why was it signed on 31.5.2004? What did parties sign then on 19/5/2004! Total lack of transparency and wanting behaviour are again unreservedly displayed. Those wanting circumstances aside, on the whole it boils down to this. Plaintiffs committed themselves to specific dates but failed to comply. They are technically knocked down on this. The above said however, the question is whether under the contract, the penalty for such failure to supply the goods on 4th June, 2004, was termination of the contract as conveyed vide Exh.P9. Having carefully perused the contract Agreement, I am satisfied that under the clause they used, the 1st Defendants should not have terminated the contract. The 1st Defendants, vide Exh.P9, purport to have acted under clause 22(1) of The Contract (Exh.P2). The said clause and what the 1st Defendants did however are miles apart. The said clause provides:- 25 “22.1 Subject to Clause 25, if the Supplier fails to deliver any or all of the Goods or perform the Services within the time period(s) specified in the contract, the Purchaser shall, without prejudice to its other remedies under the Contract, deduct from the contract Price, as liquidated damages, a sum equivalent to 2% percent of the delivered price of the delayed Goods or unperformed Services for each week of delay until actual delivery or performance, up to a maximum deduction of 15% o the delayed Goods or Services contract price. Once the maximum is reached, the Purchaser may consider termination o the Contract.” Clause 25 is not relevant here as it refers to termination on insolvency of the supplier. Clause 22 as clearly entitled relates to penalties in terms of “Liquidated Damages” and not termination. While clause 22 is without prejudice to other penalty clauses, clearly 1st Defendants could not have acted on this to enforce termination. There is a specific provision for termination and this is clause 23 entitled, “Termination for Default” with the following wording, “23.1 The Purchaser may, without prejudice to any other remedy for breach of contract, written notice of default sent to the supplier, terminate

the Contract in whole or in part:

- a. if the supplier fails to deliver any or all of the Goods within the time period(s) specified in the Contract, or any 26 extension thereof granted by the Purchaser pursuant to Clause 22;
- b. if the supplier fails to perform any other obligation(s) under the Contract. ” If indeed they had intended termination of the Contract, 1st Defendants could not have failed to indicate the clear provision of clause 23 which comes immediately after clause 22 they purportedly used. In the circumstances, they should be taken to have indeed intended using clause 22 which is for liquidated damages. I am fortified in my finding upon full consideration of the relationship that existed between the parties; the “quick implementation” requirement expressed by 1st Defendants, which to their knowledge, made the Plaintiffs, in good faith, to make necessary orders of the goods long before the contract was signed, and the 1st Defendants’ clear intention in requiring specific dates in terms of the minutes of 13th May, which was simply to enable them (1st Defendants) to “start charging the liquidated damages for late delivery, installation and commissioning. ”. The hasty termination in the circumstances, as is the case with the other cloudy elements in the whole transaction already observed upon, is incompatible with transparency let alone the contract. In conclusion, though indeed the Plaintiffs did not abide by the schedule for the performance of the contract, the circumstances prevailing at that stage deserved a penalty for liquidated damages and not termination. I am satisfied that in a contract where various penalties are prescribed, a party 27 seeking to enforce any of such penalties would be bound by the specific clause which he states to be the basis of his action and not the contents of the notice. Here, the 1st Defendants relied on clause 22 although the contents are for clause 23 and are therefore bound by the former. I should hurriedly observe that I have concluded on issue one while bearing in mind clause 21 of the Contract on “Delays in the Supplier’s Performance” which states as follows:- “ 21.1 Delivery of the goods and performance of Services shall be made by the Supplier in accordance with the time schedule specified by the Purchaser in its Schedule of Requirements. 2 1.2 An unexcused delay by the Supplier in the performance of its delivery obligations shall render the Supplier liable to any or all of the following sanctions: forfeiture of its performance security, imposition of liquidated damages, and/or termination of the contract for default. ” As indicated, the 1st Defendants having decided to act using clause 22, the sanction which they were bound to impose was limited to only liquidated Damages and not termination of contract or other sanctions. The contents of the notice (Exh.P9) should have reflected liquidated damages as prescribed by clause 22 and not the irrelevant, termination. The 1st Defendants were not precluded from employing simultaneously clauses 21.2, 22 and 23. However, they didn’t. They chose clause 22 but wrongly plastered it with contents falling under clause 23! For the reasons discussed, I answer issue 1 affirmatively. We turn to issue 2 and 3 which will be dealt with together. 28 Starting with issue three, I should outrightly state that forfeiture of the performance Bond under clause 22 of the Contract is unlawful. The said clause has already been quoted. It is for liquidated damages and nothing more. The wording thereof needs no interpolation. On same grounds, regard being had to the same wording, liquidated damages are the

consequences flowing therefrom. Charging liquidated damages under clause 22 as the 1st Defendants intended to do is lawful. On the 2nd issue, PW1 unchallengedly deposed, “Termination caused injury to us. We have suffered damages of USD 161,912 being costs of equipment ordered. T.shs 2,096,055 being preshipment Inspection fees as required by government; USD 23000 forfeited by Tanesco as performance Bond.” The Defendants did not challenge the above. It should be taken to have been admitted. In terms of S.73(in part) of The Law of Contract Ordinance, “ 73. - (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, 29 or which the parties knew, when they made the contract, to be likely to result from the breach of it.

- (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.” The sums stated cannot be said to fall under s.73 (2). They are indeed the natural consequences of the breach. The plaintiffs may be forced to keep the goods that may not usefully and profitably be applied anyhow or anywhere. Under the law they are entitled to the amounts used in their acquisition. Similarly, as clause 22 does not cover performance Bond, the Plaintiffs are entitled to recover the sums stated. The answer to issue two is that the Plaintiffs are entitled to specific damages totaling to USS 175,142 and T.shs 2,096,055/=. Before I conclude, I should briefly observe on 2nd Defendants’ position in the controversy. DW2’s bold arguments are neither here nor there. Whether 1st Defendants were specified for receivership or restructuring and whether what was required of them (PSRC) was their “approval” and not “blessings”(which, with respect I term this to be semantics), what is relevant is that they (PSRC) are, under the laws, as already indicated, the 1st Defendants’ Receivers Cum Manager and are therefore necessary parties in such actions and responsible for whatever befalls their baby (1st Defendants). They are equally liable. 30 In conclusion, judgement is hereby entered in favour of the Plaintiffs against Defendants as per the prayers’ paragraph, sub-paragraphs (a), (b) and (c). The prayer under sub-paragraph (d) on general damages is refused because although I have found that the procured software and hardware may not profitably be used, and although I am not an expert in IT, I believe that with some configuration the Plaintiffs may find use to which they can be put. If they were now useless pieces of equipment lying in their stores the Plaintiffs would not have failed to point it out. In the circumstances, giving them both specific damages and general damages would be unjustifiably enriching them. I also refuse the claimed interest on sub prayer (e) as the Plaintiffs also had their share in the blame - failure to supply the goods in time attracting in the circumstances at least liquidated damages as a sanction. I however award them interest at 7% p.a on the decretal sum from the date of judgement till payment in full. Before concluding on reliefs, I am of the considered opinion that although Plaintiffs have been awarded specific damages, 1st Defendants on the other hand, are entitled to liquidated damages in terms of clause 22 of Exh.P2 upon which they acted. These should be calculated in terms of the formula displayed thereunder [clause 22] and in relation to the period of breach, that is, between 4th June, 2004 and the date of authoring the termination

notice (9/6/2004). The amount that would be arrived at should be deducted from the specific damages that have been awarded to Plaintiffs. 31 On costs, as in this saga each party (particularly Plaintiffs and 1st Defendants) have had a share in the blame, each party to bear own costs. L.B. KALEGEYA, JUDGE Delivered. L.B.KALEGEYA, JUDGE 22/3/2005 6,930 - words 'h's is a tru<> and correct o t h e o r; ? ■ ment Kull in g ... Registrar Commercial Court Dsm Date ~Z-,

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