

UGANDA / JUDGMENT

# Initiative for Social Economic Rights v Attorney General (Constitutional Petition 7 of 2019) [2024] UGCC 13 (13 May 2024)

[2024] UGCC 13

## COURT

Constitutional Court of Uganda

## BEFORE

Egonda-Ntende, JCC, Bamugemereire, JCC,  
Mulyagonja, JCC, Monica K. Mugenyi, JCC, Kihika,  
JA /JCC

## CASE / FILE NUMBER

Constitutional Petition 7 of 2019

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## THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA AT I(AMPALA

&lt;sup&gt;C&lt;/sup&gt;oram: Eg onda- Ntende, B amug emereire, Muly ag onj a, Mug e nyi &amp; Kihika, JJCC

## CONSTITUTIONAL PETITION NO 007 OF 20L9

## INITIATM FOR SOCIAL ECONOMIC RIGHTS::::::::: PETITIONER

## VERSUS

ATTORNEY GENERAL ::::::::::::::::::::!::::::::: RESPONDENT

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## JUDGMENT OF IRENE MULYAGONJA, JCC

This petition was brought under Article 137 (1) and (3) (b) and (4) of the Constitution of the Republic of Uganda and the Constitution (Petitions and References) Rules, SI 91 of 2005. The petitioner alleged that certain acts of the Government of Uganda through the Ministries of Finance, Planning and Economic Development and Health, and the Parliament of Uganda are inconsistent with certain provisions of the Constitution.

## Background

20 The background to the petitioners'grievances, as it could be discerned from the petition, is that sometime in February 20 13, FINASI SRL made a proposal to His Excellency the President of Uganda to build and manage specialised healthcare facilities at Entebbe Grade A Hospital and the Uganda Cancer Institute. The President directed the Ministries of Health and Finance, Planning and Economic Development to negotiate the project and its financing.

25 On 27th January 2016 the Government of Uganda (hereinafter "GoU") entered into a Project Services Agreement with the International Specialised Hospital of Uganda Ltd to undertake the operations and

management of the facilities of the Hospital for a period of 8 years. Subsequently, the Ministries of Health and Finance and Economic Development, on behalf of GoU entered into a Project Works Investment Agreement with Finasi/Roko Construction SPV Limited (Finasi/Roko).

5 This resulted in the two ministries entering into a Lenders Direct Agreement with the African Export-Import Bank and Others, to facilitate the construction of the Hospital.

In line with the said agreements, when Finasi/Roko presented the first Milestone Completion Certificate, duly certified, the Ministry of Finance was required to issue a Promissory Note within two weeks, which was due by t}e 22"a December 2018. However, GoU defaulted and was therefore liable to pay a penalty.

On the 12tr' February 2019, the Minister of State for Finance in Charge of Planning tabled a proposal before Parliament for GoU to issue 1s promissory notes, not exceeding USD 379.71 Million to Finasi/Roko for financing the design, construction and equipping of the Hospital. In March 2019, the Parliamentary Committee on National Economy, to which the proposal was referred by Parliament for consideration, observed that the necessary approval had not been granted by 20 Parliament but it went ahead to recommend that Parliament approves the issue of the promissory notes. A Minority Report was issued by some members of the Committee in which they opposed the recommendation but promissory notes were issued in spite of the Minority.

The petitioner is therefore aggrieved and asserts that the said actions of 2s the GoU and Parliament are in contravention of the Constitution of the Republic of Uganda on the following grounds:

- a) The Project Services Agreement entered into on 27tn January 2016 between the Ministries of Health and Finance, Planning and Economic Development on behalf of GoU and the Specialised

Hospital of Uganda to undertake the operations and facilities management thereof for a period of 8 years from the date of completion of construction contravened and was inconsistent with Articles 2 (7), 159 (2), (5) and (6) of the Constitution.

- b) The failure by the Minister of Finance, Planning and Economic Development to obtain parliamentary approval for GoU to issue a promissory note of USD 379.71 Million prior to execution of the Direct Agreement contravened Articles 159 (2), (5) and (6) and 2 (1) of the Constitution of the Republic of Uganda.
- c) The resolution of Parliament passed on 12th March 2019 to approve the proposal tabled by the Minister of Finance, Planning and Economic Development for GoU to issue the promissory note of USD 379.71 Million to Finasi/Roko Construction SPV Ltd. for financing of the design, construction and equipping of the International Hospital was in contravention of Articles 159 (2), (5) and (6), 2 (1), 1 (1) and 79 of the Constitution of the Republic of Uganda.
- d) The failure by Parliament, Ministry of Health and Ministry of Finance, Planning and Economic Development to involve the public and the petitioner in the process of conceptualisation and approval of the ISHU Project was against the democratic principles of governance and violated the public's right to participation in their own governance and thus contravened Articles 38, 8A, 1 (1), Objective 1 (i), II (i) and X of the National Objectives and Directive Principles of State Policy of the Constitution of Uganda, 1995, as amended.
- e) The International Hospital of Uganda (ISHU) Agreements in flouting the procedural requirements for approval by Parliament are illegal, null and void and contravene provisions of the Constitution of the Republic of Uganda, 1995, as amended. and are therefore void (sic).

The petition was supported by the affidavit of Salima Namusobya, Executive Director and founder of the petitioner, deposited on 3rd April 2019, in which she reiterated the contents of the petition. The petitioner then prayed for declarations in the same terms as the grounds reproduced above and for orders that:

- i) The ISHU agreements be voided;
- ii) Parliament of Uganda ensures and requires effective participation of the citizens of Uganda in the inception, conceptualisation, tabling, consultations, debating and approval of Public Private Partnership Projects to be undertaken by Government of Uganda;
- iii) Within one year from the determination of this petition, Parliament furnishes court with a comprehensive framework on how it intends to ensure effective citizen participation in the inception, conceptualising, tabling, consultation, debating and approval of Public/Private Partnership Projects;
- iv) The Ministers of Finance, Planning and Economic Development, Health and Government of Uganda do ensure that all necessary steps are taken to implement the International Specialised Hospital Project (ISHU) in line with the Public Private Partnership Act.

The respondent first filed an answer to the petition on 16th April 2019, but an amended answer was later filed on 25th August 2021. In it, the respondent denied all of the contentions in the petition, stating that the acts of the GoU, Parliament and the Ministries of Finance, Planning and

Economic Development and Health were not in contravention of any of the stated provisions of the Constitution. He also responded to the specific grievances of the petitioner, but without prejudice contended that: 25

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- a) The transactions and approvals that the petitioner complains about present no question for the interpretation of the Constitution;
- b) The petitioner's rights guaranteed by the 1995 Constitution have not been violated;
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- c) The petitioner's rights shall not in any way be prejudiced by the dismissal of the petition; and
- d) The petitioner is not entitled to any of the remedies claimed.

The Answer to the petition was supported by an affidavit deposed on 18th May 2021. by Ms Charity Nabasa, a State Attorney in the respondent's Chambers, in which she reiterated the contents of the Answer. A supplementary affidavit was deposed by Charles Victor Byaruhanga, Budget Advisor to the Ministry of Finance, Planning and Economic Development, on 4th November 2019. The petitioner filed an affidavit in rejoinder deposed on 19th November 2019 by Salima 10 15

Namusobya.

## Representation

At the hearing of the petition on 15th June 2023, Mr Wandera Ogalo and Joseph Munoba represented the petitioner. The respondent was represented by Mr Mukama Alan, State Attorney.

The parties filed written submissions and counsel for each of them applied that they be considered as the final submissions in resolving the petition. Their prayers were granted with judgment to be delivered on notice.

In his submissions, counsel for the petitioner addressed 9 issues for determination by the court, but the first was whether the petition as presented raises any questions as to the interpretation of the Constitution. Counsel for the respondent likewise addressed the issue 25

of the jurisdiction of this court as the first issue, though he too went on to address the rest of the 8 substantive issues that were framed.

Order 6 rule 28 of the Civil Procedure Rules, which is brought into operation by rule 23 of the Constitutional Court (Petitions and References) Rules, provides that:

"Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."

I will therefore first dispose of the preliminary point of law that was raised by the respondent since all of the parties filed submissions in that regard. I do so because if the preliminary objection is resolved in

**favour of the respondent, it would dispose of the whole petition. 15**

**Whether the petition raises any questions as to the interpretation of the Constitution.**

### **Submissions of Counsel**

Counsel for the respondent set down Article 137 of the Constitution and submitted that a petition filed in this court must raise a question as to the interpretation of the Constitution in order for this court to exercise its jurisdiction under the said provision. He referred to the decisions in *Ismael Serugo v. Kampala City Council & Attorney General*, Supreme Court Constitutional Appeal No. 2 of 1998 and *Jude Mbabaali v. Edward Ssekandi*, Constitutional Petition No. 28 of 2012.

Counsel went on to submit that the petition now before court shows that there is no question as to the interpretation of the Constitution because it seeks to impugn the Project Agreements entered into by the

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Ministry of Finance, Planning and Economic Development (hereinafter also denoted as "MoFPED") and Ministry of Health (MoH) for the construction of the ISHU, on the basis that they were concluded without prior parliamentary approval contrary to Articles 159 (2), (5) and (6) of the Constitution. Further, that the Resolution of Parliament approving

issuance of promissory notes to Finasi/Roko Construction SPV Ltd, contravened Articles 159 (2), (5) and (6), 1 (1) and (2) and 79 of the Constitution. He asserted that the petition was largely based on the violation of procedural requirements in Article 159, as it is shown in paragraph 34 of the affidavit in support of the petition. 10

Counsel went on to explain that whereas the petitioner pleads that the impugned act contravened the Constitution, the petition does not disclose any dispute that requires the interpretation of the Constitution; instead the petitioner seeks the application of the articles of the Constitution cited. He referred to the opinion of Kasule, JCC in *Jude Mbabaali* (supra) where he distinguished between this court interpreting a provision of the Constitution and any other court of law applying a particular provision of the Constitution to a particular set of facts to support his argument.

Counsel further submitted that the petitioner here could have sought and obtained redress in an action for judicial review in the High Court, by challenging the actions of entering into the ISHU agreements as ultra vires and having them quashed. That all that would have been required would have been the application of the stated provisions of the Constitution by the court. 20 25

He pointed out that the petitioner cites the Public Procurement and Disposal of Public Assets Act and the Public Finance Management Act and argues that the alleged contravention of the two statutes also contravened the Constitution. He contended that the alleged violation

would not have automatically given rise to a question as to the interpretation of the Constitution. He emphasised that the petitioner would have been at liberty to seek redress for such violations in competent courts. He referred to the decision in Attorney General v

- 5 Major General David Tineyfuza, Constitutional Appeal No 1 of 1997, cited by this court in the case of Jude Mbabaali (supra) as it relates to the jurisdiction of this court. He concluded that the petition ought to be dismissed for failure to disclose a question as to the interpretation of the Constitution.
- In his main submissions, counsel for the petitioner addressed the question of the jurisdiction of this court in this petition by citing Article 137 (3) (b), which provides that a person who alleges that any act or omission by any person or authority is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect and for redress where appropriate. He referred to the decision of the Supreme Court in Ismail Serugo v KCC (supra) in the opinion of Mulenga JSC, where he stated that a petition brought under the provisions of Article 137 (3) sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution alleged to have been contravened by the alleged act or omission and prays for a declaration to that effect. 10 15 20

Counsel went on to submit that in the instant petition, the petitioner is a local independent not-for-profit human rights organisation and has rights to bring the petition. That the petitioner has by its petition in paragraphs 5 to 15 stated the facts constituting the complaint. And in paragraphs 17 to 23 the petitioner states provisions of the Constitution believed to have been contravened by the impugned actions and omissions of the Permanent Secretaries of the Ministries of Health and Finance Planning and Economic Development on behalf of the 25 30

Government of Uganda on the one hand, and the Parliament of Uganda on the other. That the two put together constitute the cause of action.

He invited the court to find that the petition raises questions as to the interpretation of the Constitution; further that there is no legal bar against it, neither is it frivolous, prolix and or incompetent as alleged.

## Resolution of the Preliminary Objection

The petitioner's complaints in this petition are about the acts of the GoU, MoH and MoFPED entering into 3 agreements for the execution of works to construct the International Specialised Hospital of Uganda and for operations and management of the hospital, said to have contravened provisions of the Constitution. The petitioner also complains that Parliament sanctioned the issuance of promissory notes to the tune of United States dollars 379,710,000 million without following the procedures that are laid down in the Constitution, and thereby contravened them.

The jurisdiction of this court is provided for in Article 137 of the Constitution which states as follows:

137. Questions as to the interpretation of the Constitution.

- (1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.
- (2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.
- (3) A person who alleges that—
  - (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
  - (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a

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**declaration to that effect, and for redress where appropriate. \$\cdots\$**

Counsel for the petitioner referred court to an excerpt from the opinion of Mulenga, JSC in **Ismail Serugo v KCC** (supra) where he stated thus:

- \$\mathsf{S}\$ "A petition brought under this provision (137 (3)) in my opinion sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to have contravened by the act or omission, and prays \*for a declaration to that effect.\*"
- It is pertinent to note that the excerpt above refers to a \*"cause of action"\* 10 not the jurisdiction of the court as it is provided for in Article 137 of the Constitution. The two concepts do not always mean the same thing, as it was shown in *Attorney General v. Major General David Tinyefuza*, Supreme Court Constitutional Appeal No 1 of 1997.

- 15 In **Ismail Serugo** (supra) the court was divided on the interpretation of Article 137 of the Constitution in as far as it sets down the jurisdiction of this court. Kanyeihamba, JSC agreed with Wambuzi, CJ, Karokora and Kikonyogo, JJSC on the interpretation of the provision that was rendered in **Attorney General v David Tinyefuza, Constitutional Appeal No. 001 of 1997**, when he opined that: 20

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"... as far as the case of General D. Tinyefunza v. Attorney-General \*Constitutional, Appeal No.1 of 1997 [Unreported] is concerned. There is a\* number of facets to the decision of the Supreme Court in that case. \*Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a Constitutional Court, its decision in that case is that\* the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C. J., Tsekooko J. S. C., Karokora J. S. C., and Kanyeihamba J. S. C., is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of

\*Article 50 or any other Article of the Constitution without reference to the\* provisions of Article 137 which is the sole Article that breathes life in the \*jurisdiction of the Court of Appeal as a Constitutional Court.\*"

In the same case Wambuzi, CJ explained the jurisdiction of this court  $\$ \backslash \mathrm{mathsf{S}} \$$  succinctly in the following passage, at page 24 of his opinion:

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"In my view, jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances, I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction."

**\*{Emphasis added}\***

- In this case, the petitioners complain that the acts and omissions 15 alleged are in contravention of Article 159 (2), (5) and (6) of the Constitution which provides for the powers of GoU to borrow or lend. They also contend that the conceptualisation of the project for the ISHU and its approval was against the democratic principles of governance and violated the right of the public to participate in their own governance 20

- contrary to Articles 38, 8A and §1(1) as well as Objective 1 (i) of the National Objectives and Directive Principles of State Policy in the Constitution.

The petitioners therefore require this court to interpret Article 159 (2), (5) and (6) of the Constitution and determine whether the impugned 25 actions of the MoFPED and MoH, which were approved by a Resolution of Parliament to provide funds for the project, contravened the principles therein as well as those in Article 38 of the Constitution. I therefore find that the petition raises question as to the interpretation of the Constitution and will now proceed to address them. 30

### Submissions of counsel for the petitioner

Apart from addressing the preliminary objection that the petition raises no question as to the interpretation of the Constitution, counsel for the petitioner addressed 8 other issues in his submissions. However, he did not name them in the final submissions filed on the 20th January 2022. It appears they were stated in the conferencing notes which were made redundant when he filed the petitioner's final submissions. Counsel for the respondent in his submissions which were filed on 10th July 2022, on the basis of the petitioners conferencing notes, named the issues for determination of the court as follows:

- 1. Whether the petition raises questions for constitutional interpretation;
- 2. Whether the acts of the Ministers/Permanent Secretaries of Health and Finance Planning and Economic Development in concluding the Project Services Agreement (PSA) on behalf of the GoU with the ISHU is inconsistent with and/or in contravention of Article 159 (2), (6), and (5) of the Constitution of the Republic of Uganda, as amended;
- 3. Whether the acts of the Ministers/Permanent Secretaries of Health and Finance Planning and Economic Development in concluding the Project Works Investment Agreement (PWIA) on behalf of GoU with the ISHU is inconsistent with and/or in contravention of Articles 159 (2), (5) and (6) of the Constitution of the Republic of Uganda, as amended.
- 4. Whether the acts of the Ministers/Permanent Secretaries of the (Ministries of Health and Finance Planning and Economic Development in concluding the Direct Agreement (DA) on behalf of the GoU with Finasi/Roko Construction SPV Ltd, African Export-Import Bank and Barclays Bank is inconsistent with

and for in contravention of Article 159 (2), (5) and (6) of the Constitution of the Republic of Uganda, as amended.

- 5. Whether the acts of the Ministers/Permanent Secretaries and Finance Planning and Economic Development in concluding the PSA, PWIA and DA are inconsistent with and for in contravention of Article 8A of the Constitution of the Republic of Uganda, as amended.

- 6. Whether the resolution passed by Parliament on 12th March 2019 approving a proposal to issue promissory notes to Finasi/Roko Construction SPV Ltd, contravened Article 159 (2), (5) and (6), 8A and 79 of the Constitution of the Republic of Uganda, as amended.
- 7. Whether the entering into the DA, PSA, PWIA and the passing of a resolution by Parliament of Uganda approving the issuance of promissory notes to Finasi/Roko Construction SPV Limited contravened the people's rights to participation and is inconsistent with and/or in contravention of objectives 1 (i), II (i), and X of the National Objectives and Directive Principles of State Policy, and Articles 1 (1), 38 and 88 of the Constitution of the Republic of Uganda, 1995 as amended.
- 8. Whether the failure of the MOFPED to acquire parliamentary approval to issue promissory notes prior to execution of the Direct Agreement is inconsistent with Article 159 (2), (5) and (6) and 8A of the Constitution. 20
- 9. Whether the act of entering into an agreement to oversee the project works by the Ministers f Permanent Secretaries of Health, Finance Planning and Eccnomic Development and Finasi/Roko Construction SPV Ltd is inconsistent with and contravenes Articles 159 (2), (5) and (6) and 8A of the Constitution.

Counsel for the petitioner addressed issues 2, 3, 4, 5, 6, 7, 8 and 9 together. He addressed them under the headings: "Actions in 30

Contrauention of tLLe Constifution," "Parliamentary Approual" and "Participation of the Petitioner and tLrc Public."

### **Actions in contrqauention of the Constitutlon**

5 10 15 Under this head counsel for the petitioner submitted that pursuant to Article 8A of the Constitution, the National Objectives and Directive Principles of State Policy, stated at the beginning of the Constitution, were incorporated into the framework of the Constitution. Further, that all organs of the state are mandated to apply the said objectives and directives in implementing policy decisions relating to matters that attach to the Constitution and affect the people of Uganda. That Article 8A of the Constitution, and Objective I and X of the said principles must be read together with other provisions of the Constitution to give its effect and purpose. He went on to submit that the principles of national interest, rule of law and democratic/good governance enshrined in the National Objectives and Principles of State Policy require the strict observance of the law as it obtains in the country and its strict application on the one hand, and responsible conduct of public affairs

20 Counsel went on to submit that the events detailed in the affidavit in support of the petition in paragraphs 13 to 30 together contravene the democratic and constitutional requirements for the observance of the rule of law and provisions of the Constitution. Counsel went on to submit that the petitioner's contentions from the perusal of the impugned agreements show that: firstly, the DA in clauses 2 and 6 of

and efficient management of public resources on the other.

the PWIA committed the government to pay USD 345, 200,000, being the cost of construction works and compensation without a budgetary and procurement process. Secondly, that the casual announcement by the Honourable State Minister of Finance Planning and Economic Development to Parliament that Government entered into an agreement 25

with Finasi/Roko Construction SPV Ltd, and the agreements by deliberate omission of reference, suspended the operation of the procurement legal regime rendering the Public Procurement and Disposal of Public Assets Act (PPDA Act) useless. Thirdly, that the PSA in clause 9.3 in respect of the management of the ISHU and the PWIA

5 in clause 7.4 exempted a profit making company from paying taxes without the requisite legal process. And fourthly, that the agreements committed taxpayers to pay all taxes for the ISHU for a period of 8 years.

Counsel went on to submit that in Company Cause No. 10 of 2019,

Roko Construction Ltd v. Finasi/Roko Construction SPV Ltd & Finasi International FZC, some of the issues that arose were that the Government of Uganda issued promissory notes sometime in April 2019 to the tune of USD 86,379,904.13, in accordance with the Direct Agreement. Further that the sum was issued purportedly pursuant to provisions of clause 17 and 18.4 of the PWIA and clause 5.2 (iii) of the DA upon the completion of the 1<sup>st</sup> milestone and the issuance of a certificate to that effect. That the date of commencement of the contract which was given to be 10<sup>th</sup> June, 2019 was inconsistent with the date of 20<sup>th</sup> December, 2018 earlier certified by the Ministry of Health engineers, according to the report made to Parliament by the State Minister for Finance, and which was relied upon by the Parliamentary Committee of National Economy. 10 15 20

Counsel further submitted that the facts pointed to a fraud being committed against Parliament to receive promissory notes as payment without completion of the milestone set out by the parties regarding the project, in complete disregard of the democratic principles and the rule of law. That the suit between the parties to the agreements demonstrated that the 1<sup>st</sup> approved milestone completion certificate was irregularly issued by Government to the detriment of the taxpayer in Uganda and in abuse of democratic principles and the rule of law. That 25 30

Roko expended money which is contested by the SPV and that reimbursement of this money is likely to be borne by the taxpayer for the development which was not discussed and approved by Parliament.

5 Counsel for the petitioner then submitted that the actions of the Permanent Secretaries of the Ministries of Health and Finance in which the impugned agreements were concluded are inconsistent with the principles of national interest; rule of law and good governance as set out above.

## Approval of Parliament

Counsel went on to submit that under Article 159 (2), (5) and (6) of the Constitution the Government is mandated to guarantee payment and will raise a loan to another person only where Parliament has authorised the guarantee or authorisation under an Act of Parliament; or enter into an agreement only with the approval of Parliament. He added that this provision must be read together with the provisions of the Public Finance Management Act, Act No. 3 of 2015. He referred to section 36 (1) and (5) thereof which provide that the authority to raise money by loan and the issue of guarantees filed on behalf of Government shall vest solely in the Minister of Finance, and no other person. Further that the terms and conditions of the loan raised by the Minister shall be laid before Parliament and the loan shall not be permissible except where it is approved by Parliament, by resolution. 10 15 20

He went on to submit that the impugned agreements were all put in place to bring about the issuance of promissory notes to the tune of

USD 379,710,000 to Finasi/Roko SPV for the financing of the design construction and equipping of ISHU. That however the agreements were not laid before Parliament in as far as they sought to obtain a loan and seek government's guarantee to a third party. Further, that the 25

promissory notes amounting to USD 379,710,000 were committed to the development of the hospital without the necessary parliamentary approval prior to execution of the series of agreements, as it was shown in the Report of the Parliamentary Committee on National Economy.

5 Counsel pointed out that according to the Hansard Report for the 7th, March 2019, Parliament was informed that the investor was investing money to construct the hospital for 2 years. And that during the time of construction, at every milestone of completion, Government would issue a promissory note, not to be cashed there and then but to be spread over a period of six years. That this was understood to mean that the promissory note is a guarantee. That the Minister assured Parliament that the investor would build and government would later pay, making the House believe that a promissory note is a guarantee. That the Minister further explained that promissory notes issued at each stage of completion would not be cashed during the period of construction; they would instead be cashed after the hospital is operational and they were to be spread over a period of six years. 10 15

Counsel referred court to various provisions of the PWIA and submitted that there were inconsistencies and contradictions in the representations made to Parliament by the Minister of Finance on the one hand and the various impugned agreements concluded by the GoU on the other hand. That this was to the effect that the various clauses made payment due upon the presentation of promissory notes in contravention of Articles 8A, Objective I and X, and Articles 159 (2), (5) and (6) and 164 (3) of the Constitution. 20 25

He explained that this was all contrary to the facts that the works in respect of the first Milestone Completion Certificate were not undertaken but promissory notes were issued; substantial completion was not achieved but Parliament was made to believe that payment of

the first instalment was due; promissory notes were meant to be guarantees of payment should the SPV default to pay funders of the project and payable in six years after completion but they were made payable on presentment, contrary to what Parliament was made to

5 believe. Finally, that the issue of promissory notes as a guarantee to the funders of the project did not get the necessary approval in accordance with the Constitution.

Counsel went on to submit that the failure to present the impugned agreements to Parliament, in as far as they set out the guaranteed payments to the project financiers, was a deliberate move by Government to suspend the operation of the existing laws relating to procurement, revenue and taxation and Public Private Partnerships, without the necessary constitutional approvals. That in addition, it is clear that money from the Consolidated Fund was used and has been used for payment and had been disbursed for activities that have not been implemented in respect of the first Milestone Completion Certificate. 10 15

He reiterated, in conclusion, that the impugned agreements were to enable the borrowing, guarantee and raising of a loan by a company. That it was achieved without the necessary approval required by Article 159 of the Constitution and therefore it was inconsistent with it. 20

### **Participation of the Petitioner and the public**

With regard to the participation of the people which is provided for in Article 38 of the Constitution, counsel asserted that it was denied. He referred to the decision of the Supreme Court in *Male H. Mabirizi R. Kiwanuka v. Attorney General*, Civil Appeal No. 2 of 2018, where Katureebe, CJ explained the need for consultation of the people and their participation in the conduct of making legislation, and stated that 25

they have the sovereign right to choose who governs them. He submitted that this principle can be applied to the situation at hand.

Counsel then submitted that the actions of the Ministries of Health and Finance, Planning and Economic Development violated the rights of the people of Uganda to participate in the project, which ought to have been done under the Public Private Partnership law. That the actions and omissions were thus in contravention of the stated provisions of the Constitution.

### **Submissions of Counsel for the respondent**

- 10 The respondents' counsel addressed issues 2, 3, 4, 5, 6 and 9 together. The submissions thereunder were to address the petitioner's contentions that the acts of the Ministers/ Permanent Secretaries of the MoH and MoFPED in concluding the PSA, PWIA and the DA, and the act of Parliament passing a resolution approving the issue of promissory

- 1s notes was inconsistent with and/or in contravention of Article 159 (2), (5) and (6) of the Constitution of the Republic of Uganda.

Counsel submitted that while it was contended in the answer that the promissory notes that were issued did not amount to a guarantee of any loan payment obligation, after the filing of the pleadings and evidence, it was established that the Attorney General, in December 2018, issued legal advice to the MoFPED that the promissory notes which were provided for in the DA constituted a guarantee by Government to the lenders in support of the Fiansi/Roko Construction SPV. He accordingly conceded that due to the fact that the promissory notes were under the

Direct Agreement between Government and Finasi/Roko Construction SPV; African Export-Import Bank and Barclays Bank of Uganda ("the lenders"), by which Government was to make guarantees to both the SPV and the lenders, the promissory notes constituted a guarantee to 25

both the SPV and the lenders for the contemplated loans in support of the SPV. It was further conceded that the promissory notes by Government required parliamentary approval under Article 159 of the Constitution.

- 5 However, counsel for the respondent reiterated that the resolution of issues 2, 3, 4, 5, 6, 8 and 9 did not require or call for the interpretation of the Constitution. That the sum of the contentions in those issues did not require interpretation of Article 159 (2), (5) and (6). That indeed the petitioner correctly stated at page 6 of their conferencing notes that the words in Articles 159 (2), (3), (5) and (6) are clear and unambiguous and
- ought to be given their natural and ordinary meaning. Further that the terms and conditions of the loan agreement could not come into operation unless approved by a resolution of Parliament. 1"0
- Counsel then referred to paragraph 34 of the petitioner's affidavit in support and asserted that the complaint stated therein is that the petitioner is aggrieved by the flagrant abuse of the constitutional provisions and flouting of the procedure in agreements concluded by the Government of Uganda. He contended that allegations of violations of constitutional procedural requirements in Article 159 thereof calls for application of the said article, not its interpretation. He advanced the same argument with regard to Articles 1 (1), 2 (1), 8A and 79, also alleged to have been contravened due to the alleged procedural infractions. 15 20
- Counsel further asserted that it was the issue of promissory notes which required parliamentary approval under Article 159 of the Constitution, since the promissory notes amounted to guarantees by Government. That whereas the DA was concluded in December 2018 and parliamentary approval for the issue of the promissory notes was issued in March 2019, the petitioner does not contend that Government ever 25

issued the said promissory notes prior to obtaining the parliamentary approval. He denied that the provisions for the issue of promissory notes were not operationalised before Government obtained the requisite approval.

- 5 Counsel went on to explain that Article 159 (21) of the Constitution was operationalised by section 23 of the Public Finance Management Act (PFMA) which requires prior parliamentary approval for transactions which commit Government over multiple years. That the promissory notes in issue represent a commitment to pay amounts of money over
- more than one financial year. But as deposed in paragraph 19 of the affidavit of Charles Byaruhanga, clause 15.5 of the DA envisaged that the MoFPED and I\toH could continue to present the relevant financial commitments of the GoU in their annual budgets to Parliament. That as a result there is no need to seek parliamentary approval in respect of the issue of promissory notes under Milestone Completion Certificate No. 1 or any other Completion Certificate that may be issued by the 10 15

owner's engineer.

He finally submitted that the acts of the Ministers/Permanent Secretaries of the MoH and MoFPED in concluding project agreements, and the act of Parliament passing the resolution of 12tr, March 2029 did not contravene Articles 159 (21), (5), 1 (1), 2 (1) and 79 of the Constitution.

With regard to the 7th issue, counsel for the respondent submitted that the violation of the right to participate in the affairs of the state under Article 38 does not raise any question as to the interpretation of the Constitution. He went on to submit that it is clear that Ugandan citizens may exercise their right to participate in the affairs of government individually or through their representatives in accordance with the law. This is because elective democracy assumes that the acts done by 25

elected representatives in Parliament represent the will of the people. He added that the petitioner did not cite any requirement of law which would specifically require Government to ensure that the people (as opposed to their representatives) participate in the conceptualisation and implementation of the ISHU project-.

Further that it was not true, as the petitioner argued, that the project agreements failed to meet the objectives of the rule of law and accountability and good governance. That such an argument ignored the reality of the impugned agreements and the underlying project. That

the agreements for the specialised hospital contain accountability safeguard.s since they require completion of work on issuance of milestone completion certificates before money is paid by GoU. That it was therefore misconceived for a civil society organisation to vehemently oppose a project intended to cut spending on specialised healthcare abroad, and potentially make Uganda a destination for people from other countries requiring such specialised care. 10 15

## Analysis and determination

The petitioner's grievances, in short, are that the acts of the GoU through the Ministries of Health and Finance Planning and Economic 20 Development of entering into three agreements: the PSA, PWIA and DA without consultation of the people of Uganda contravened Article 38 of the Constitution. Further that the said agreements embodied terms that the GoU would issue

promissory notes to Finasi/Roko Construction SPV Ltd, without first obtaining the approval of Parliament, which 2s contravened Article 159 (2), (5) and (6) of the Constitution and by necessary implication, Article 8A thereof.

The petitioner also complained that entering into the said agreements was contrary to Objectives I (i), II (i) and X of the Principles of State

Policy. However, I did not deem it necessary to explore those principles because they were well established in the various provisions of the Constitution, as well as laws that have been enacted by the peoples' representatives in Parliament -o ensure that the said objectives are implemented or effected. It is therefore my view that as it is provided for in Objective I (i), the said objectives are only useful to this court as a guide in the interpretation of the Constitution. In this analysis therefore, I'll explore 4 issues as follows:

- i) Whether the acts of the Ministers and Permanent Secretaries of the MoH and MoFPED entering into the PWIA, PSA and DA contravened the provisions of Article 38 of the Constitution.
- ii) Whether the acts of the MoH and MoFPED entering into the PWIA, PSA and DA which included financing arrangements involving the issue of promissory notes, without first seeking and obtaining a resolution of Parliament, contravened Articles 159 (2), (5) and (6) of the Constitution.
- iii) Whether the resolution passed by Parliament on 12th March 2019 approving a proposal to issue promissory notes to Finasi/Roko Construction SPV Ltd contravened or was inconsistent with Article 159 (2), (5) and (6), 8A and 79 of the Constitution.
- iv) Whether the petitioners are entitled to any of the remedies claimed.

## Issue I

The transactions that are the basis of this petition, as I understand them, are summarised at page 4 of the "Report of ttrc Committee on 25

National Economy"r Annexure E to the affidavit of Salima Namusobya, as follows:

- 1. In November 2014, a Project Framework Agreement was signed to guide negotiation of the final project agreements;
- In May 2015, the Project Works Investment Agreement (PWIA) was signed for the design, finance, construction and equipping of a 240-bed hospital and staff training; wherein it was agreed that the project cost would be US dollars 249,900,000 and the financing cost would be US dollars 99,500,000; 5 11.

- In December 2015 the Project Services Agreement (PSA) was signed for the operation and maintenance of the hospital for a period of 8 years. It was agreed that the Ministry of Health, among others, would pay the hospital operations remuneration (management services remuneration) of US dollars 5,000,000 per quarter during the 1st year and US dollars 6,000,000 in the following years. In addition, the ministry would pay annual operations services remuneration to be agreed upon by the Ministry of Health and the hospital. 10 15
- In December 2018 the Direct Agreement was signed with the project's promissory notes' funders. 1V

The same Report indicates that the Committee had occasion to study the Ministry of Health's Contracts Committee decision on the approval of the Project Framework Agreement dated 28 August, 2014.

25 The petitioners now claim that they and the rest of the members of the public should have participated in making these decisions. And

<sup>1</sup>Report of the Committee on National Economy on the Proposal to Issue Promissory Notes not exceeding USS 379.71Million to Finasi/Roko Construction SPV Limited for the Financing of the International Hospital of Uganda at Lubowa, Wakiso; March 2019

that this is required by Article 38 of the Constitution which provides as follows:

### 38. Civic rights and activities

(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

(2f Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.

10 In support of the argument that the petitioners and the rest of the public had the right to participate in making the decision whether or not to build the ISHU at law, counsel for the petitioner cited the decision of the Supreme Court in the case of *Male H. Mabirizi v. The Attorney General* (supra). He specifically pointed us to page 37 of the decision, 1s the opinion of Katureebe, CJ, where he stated thus:

> "The basis for the requirement for consultation open participation of the public in the conduct of the discussions is based on recognition of the sovereignty of the people as enshrined in article 1 of the Constitution. The people have the sovereign right to choose who governs them and how they should be governed."

Counsel also referred us to the statement at page 14 of the same opinion as follows:

"So when the Constitution gives Parliament the power to make laws or to amend the Constitution, that power is being given to the representatives of the people. To me therefore, the primary responsibility of the people of Uganda on any proposed legislation, and more particularly

in the constitutional amendment, must fall squarely first and foremost on the elected representatives of the people. There is nobody in Uganda who does not belong to a constituency, including the special constituencies, so as to be able to access a member of Parliament to give them their views. The facilitation of Shs. 29 million given to each of the Members of Parliament must be seen in this context to enable them perform their constitutional duty of consulting the people of Uganda on an important constitutional amendment. "

There is no doubt from the excerpt above that the decision in *Male H. Mabirizi's* case that counsel for the petitioner sought to rely upon related to the amendment of the Constitution. What was being debated in Parliament was a bill to amend the Constitution under Articles 259 to 262 of the Constitution. Article 259 of the Constitution required that an amendment thereunder had to be passed under an Act of Parliament in accordance with the provisions of Chapter 18 of the Constitution. The passing of such a bill thus of necessity required broad consultation of the people by their representatives in Parliament.

- 10 I am therefore of the view that the process of amending the Constitution of the Republic of Uganda must be distinguished from the process of entering into agreements by Government and its Ministries, Departments and Agencies, which is not governed by any direct provision of the Constitution but by laws enacted for that purpose. 15 Counsel for the petitioner referred us to the Public Procurement and Disposal of Public Assets Act, as the law that operated at the time, as well as the Public Finance Management Act. The Report of the Committee of Parliament referred to above shows that there was a
- decision made by the Contracts Committee of the Ministry of Health 20 approving the Project Framework Agreement, dated 28th August 2014. This implies that processes under the PPDA Act were adverted to in the process.

The powers and functions of the Contracts Committee are stated in sections 28 and 29 of the PPDA Act. Section 28 (d) provides that one of the functions of the Contracts Committee is to approve procurement and disposal procedures. Its powers are stated in section 29 and they include authorising the choice of procurement procedure and awarding contracts in accordance with the approved procurement and disposal procedures, as the case may be.

The Parliamentary Committee Report, at page 9, described the project as follows:

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"The project is comprised in the current PIP (Project Code 1393) as 1 of the health sector planned multi-year projects. It is indicated as an ongoing public-private partnership (PPP) project. It has been described as finance, design, build, operate and transfer publicprivate partnership. The project start date is July 2016 and it is expected to be completed in June 2020. The PIP estimated project costs is UGX 955 billion (aprox. US\$ 258 million).

Counsel for the petitioner therefore contends that all of the contracts in 10 dispute ought to have been entered into under the Public Private Partnerships Act. However, that statute came into force on the 1<sup>st</sup> October 2015 on the publication of the Public Private Partnerships Act, (Commencement) Instrument, 2015, No 57 of 2015. The PPP Act apply retrospectively to agreements that therefore could not 15 Government entered into through the Ministry of Health and Finance before that date.

The petitioner did not initially exhibit the PWIA in these proceedings. However, **Annexure K** to the supplementary affidavit of Salima Namusobya deposed on 9<sup>th</sup> July 2019, an opinion of the Attorney 20 General dated 12<sup>th</sup> April 2019 and addressed to the African Export-Import Bank, indicated that the PWIA was signed on 27<sup>th</sup> May, 2015 between the Government of Uganda acting through the MoFPED and MoH on the one part, and Finasi/Roko Construction SPV Limited on the other. The PWIA was imported into these proceedings through 25 Annexure to copies of the pleadings in a suit between Roko Construction and Finasi/Roko SPV. And though it was signed on 4<sup>th</sup> December, 2018 after the coming into force of the PPP Act, the DA was a supplement or amendment of the PWIA. I came to that conclusion because, clause 3.2 of the PWIA provided that the SPV shall arrange 30

financing of the works and the GoU agreed that in order to facilitate

that, the SPV would enter into a Lenders Direct Agreement, a condition precedent to the Facility Agreement. Clause 4.1 (b) of the DA then provided as follows:

"The company confirms that it will remain liable to perform all its obligations under the PWIA, as amended and supplemented by the Direct Agreement, and the company and the GOU acknowledge that the Security Agent is under no obligation of any kind whatsoever under the PWIA, as amended and supplemented by this agreement, nor under any liability whatsoever in the event of any failure by the company to perform the obligations of the company under the PWIA, as amended and supplemented by this agreement."

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The DA was therefore also signed under laws and policies that obtained before the PPP Act came into force.

I observed that the PSA was executed on 30<sup>th</sup> December 2015, after the coming into force of the PPP Act on the 1<sup>st</sup> October 2015. However, this 15 contract was envisaged in the concept plan submitted to GoU to finance, design, construct, equip and operate the hospital on 29<sup>th</sup> October 2014, as it was stated in the PSA.

With regard to PPPs, at the time that the transactions in contest in this 20 petition arose, the Government of Uganda, through the Ministry of Finance, Planning and Economic Development had already put in place and gazetted the Public-Private Partnership Framework Policy which was approved by Cabinet on March 10<sup>th</sup> 2010. With regard to the objectives of the policy it was stated therein that:

25 This PPP Policy ("Policy") provides a framework that enables public and private sectors to work together to improve public service delivery through private sector provision of public infrastructure and related services.

The objectives of the Policy are to:

- i) put in place an enabling environment that will stimulate 30 investment in public infrastructure and related services
- ii) encourage private sector investment and participation in public infrastructure and related services where value for money can be clearly demonstrated;
- iii) streamline the PPP procurement process; and
- iv) clearly articulate accountability for outcomes.

It was to apply to Uganda Government Ministries, Autonomous Local Authorities Government Departments, and Statutory Corporations, directly responsible for delivering public services. It was also stated that it would be used when selecting and developing public infrastructure and any related services as potential PPPs in the context 10 of meeting Uganda's overall economic and social development objectives and priorities. The PPP Unit formed in the MoFPED was assigned the lead role and it was to assist other Government Departments in operational work on project management and procurement. This is amply demonstrated in the transactions that are challenged by the 15 petitioner here.

I would therefore find that the acts of the Ministers and Permanent Secretaries of the MoH and MoFDED entering into the impugned contracts could not have contravened the provisions of Article 38 of the

Constitution. Instead, GoU entered into the contracts pursuant to a 20 Policy that was adopted by Cabinet constituted of the representatives of the people of Uganda, and according to the democratic processes that were agreed upon in the Constitution.

## Issue 2

The \$2^{\text{nd}}\$ issue framed was whether the acts of the MoH and MoFPED 25 entering into the PWIA, PSA and DA, which included financing arrangements involving the issue of promissory notes, without first seeking and obtaining a resolution of Parliament, contravened Articles 159 (2), (5) and (6) of the Constitution. \$(5)\$

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In his supplementary affidavit deposed on 4th November 2019, Charles Byaruhanga, Development Finance Specialist and Budget Advisor to the MoFPED states, in paragraph 15, that in the PWIA it was agreed that the Company, Finasi/Roko SPV, would arrange the project financing on

5 a floating LIBOR basis and the costs of the hedging (fixed rather than variable price) arrangement with the financiers, and that the cost of such hedging would be covered by GoU and be added to the cost reflecting the time value for money of USD 95,300,000 paid to ISHU over a period of 8 years. That the cost of the project increased by agreement between the parties, as a consequence of changes in the market conditions, between May 2015 and September 2018 when the project negotiations were concluded, from the sum of USD 345 million to USD 366,883,881. 10

He further averred that it was agreed in the PWIA that during the construction period, payment of the sums above would accrue upon achievement of each milestone and issuance of a Milestone Completion Certificate by the Owner's Engineer. Further that the GoU would pay the company by quarterly instalments according to an agreed payment schedule. He explained that to ensure that payments from the GoU are 15

- readily available, it was agreed that an Escrow Account be opened in the Bank of Uganda with an amount equal to a minimum of two future quarterly instalments. Further, that by this it was intended that if the company did not receive any payment as it would fall due from the GoU, then the company would withdraw money from the Escrow Account. To 20
- this end the GoU would ensure that its annual budget includes the payments required to be made to the company under the PWIA. 25

The funding arrangements under the PWIA therefore did not amount to a loan taken by the government of Uganda. The requirement was to periodically put money upfront in an Escrow Account which would

support a continuation of the project in the event that the Government 30

failed to make the direct payments that were expected after issue of its Completion Certificates. It therefore cannot be said that the GoU or its representatives initially entered into the PWIA in contravention of Article 159 of the Constitution.

Counsel for the petitioner argued that the PSA that was executed with 5 the ISHU to undertake the operations and facilities management of the hospital for a period of 8 years was among the agreements that were put in place to bring about the issuance of promissory notes to the tune of US\$ 379,7 million to Finansi/Roko SPV, for the design, construction and equipping of ISHU. That the PSA was not laid before Parliament in 10 as far as it sought to obtain a loan to seek government's guarantee to a \$3<sup>rd</sup> party.

However, the PSA shows, in clause 8 thereof, that it provided for General Remuneration, Management Services Remuneration and Operations Services Remuneration. Clause 9 thereof provided for payments 15 generally, and it was stated therein that all payments made by the MoH pursuant to the PSA would be made to the accounts of the company notified to the GoU, from time to time. Further, that payments would be calculated and be made free of set-off or counterclaim, and that there would be no tax deductions. The payment arrangements were provided 20 for in clause 10 of the agreement as follows:

"In order to give comfort as to the timelines of payment, the GOU shall set up an escrow account (the "Services Escrow Account") secured in favour of the company to secure the new payment of all amounts due from the GOU to the company under this PSA. The Services Escrow Account shall be operated and maintained in the Bank of Uganda (the "Services Escrow Agent") and subject to Uganda law and an Escrow Agreement (the "Services Escrow Agreement") to that effects will be entered into between the company, MOH/MOF and the Bank of Uganda."

The parties further agreed that as a condition precedent to the commencement date, the GOU would establish the Services Escrow Account, enter into an effective Escrow Agreement and ensure that the Services Escrow Account has a long-standing amount to its credit (at least 90 days prior to the commencement date) which amounted to the aggregate of the next 2 quarterly payments of the Management Services

Remuneration (the Management Remuneration Reserve Account) and the Operational Services Remuneration due to the company (The Operational Remuneration Reserve Account).

- The PSA further provided that following the commencement date, the GoU would ensure, on 30th June and 31st December of each year, for the duration of the service period, that the Services Escrow Account is funded and has standing to its credit the Management Remuneration Reserve Amount, to the extent that an amount equivalent to the hospital revenue reserve amount is standing to the credit of and retained in the 10
- Hospital Revenues Account and the Operations Remuneration Reserve Account. 15

It is clear from the PSA that it was not based on any loan by Government or the MoH to facilitate payments to the company. The PSA therefore required no Resolution of Parliament to authorise borrowing. It could not have been entered into contrary to the provisions of Article 159 of the Constitution. 20

Going on to the Direct Agreement which was signed on 4th December, 2018 as a deed between the GoU, the company, Africa Export-Import Bank, as the Note Purchaser of Promissory Notes on behalf of and as trustee for the Note Funders, as well as Administrative Agent of the Note Funders and the Security Trustee of the Senior Creditors and Barclays Bank of Uganda Ltd as Local Administrative Agent, it was stated to be a variation to the PWIA.

It was stated in the background to the DA that the GoU represented by the MoH and MoFPED entered into the PWIA with the company pursuant to which the company had undertaken to perform the activities and carry out works relevant to the financing, design, construction and equipping of the specialised hospital facility for cancer and other specialised medical treatment known as the International Specialised Hospital of Uganda (the "Project"). It was also stated that the company was required to secure the financing for the project but that the company as seller entered into a Note Purchase Agreement with, amongst others, the Note Purchaser, the Administrative Agent and the Security Agents pursuant to which the Note Funders agreed, subject to the terms and conditions of the Note Purchase Agreement, to fund the purchase by the Note Purchaser of promissory notes that would be issued by GOU to the company in connection

with the Project.

It was emphasised in the Direct Agreement that it was for a fixed price 15 contract to be completed in **24 months** and that the contract was a design–build form tailored to deliver a fully built and equipped hospital. It was then specifically agreed, among others, that there would be supplemental provisions relating to the PWIA. The date of the agreement

in the PWIA would be 27<sup>th</sup> May, 2015. That the long stop date as defined 20 in the PWIA was extended to 31<sup>st</sup> December, 2018 and both parties to the PWIA waived any right of termination that may have accrued under clause 17.2 of the PWIA, prior to the date of the Direct Agreement. It was then further stated that given the nature of the financing arranged

- by the company, the parties agreed and acknowledged that: 25
- any reference in the PWIA to the "Facility Agreement" and the  $(i)$  "Lenders" shall be read as a reference to the Note Purchase Agreement and the Note Funders, respectively;

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there is no longer a requirement for the Escrow Account agreement  $(ii)$  and the obligations of the GOU with respect to the same under the PWIA are no longer applicable (including for the purposes of clause 17.1 (construction effective date) of the PWIA); and

- $(iii)$  the GOU and the Fixed-Rate Advisor have or will be entering the Fixed Rate Advisory Mandate agreed between the GOU, the Fixed-Rate Adviser and the Arrangers, in order to provide the Fixed Rate for the purposes of calculating the Face Value of each Promissory Note. The Fixed Rate Advisory Mandate shall be the interest hedging arrangements referred to in clause 6.2 of the PWIA and the GOU is obliged to pay the costs of implementing the hedging arrangement required for the provision of the Fixed Rate in accordance with the **Fixed Rate Advisory Mandate**.
- It was further agreed that the provisions of the PWIA shall be interpreted 10 accordingly. It was also confirmed by the GOU to all parties that for purposes of clause 17.1 relating to the effective date of construction stated in the PWIA, the condition precedent about the escrow agreement was waived by the DA. The terms of financing were set out in the DA as

15 follows:

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## 5.2 Terms of financing

- a) the GOU confirms its support for the project and acknowledges that pursuant to clause 10.1.1 of the PWIA the terms of the financing for the project must be acceptable to it and accordingly the GOU hereby: (i) acknowledges and accepts that the Project will be financed through the proceeds of the sale by the Company to the Note Purchaser (acting on behalf of the Note Funders of the Promissory Notes that will be issued by the GOU in accordance with

the terms of this Agreement and subsequently endorsed in favour of the Note Purchaser, and (ii) confirms that the terms set out in the Note Purchase Documents (copies of which have been provided pursuant to paragraph (a) of clause 5.1 (supplemental provisions relating to the PWIA) above) are reasonably satisfactory and acceptable to the GOU.

- b) \ldots

c) The parties agree that:

each purchase of a Promissory Note under the Note (i) Purchase Agreement shall be conditional upon, inter alia, the delivery: (A) to the Local Administrative Agent, of a Milestone Completion Certificate executed by the Owners Engineer and an approved Milestone Completion Certificate (in the form set out in Schedule 4 (Form of Approved Milestone Completion Certificate)

of this agreement) executed by the GOU's Authorised Signatory, and (B) to the Local Administrative Agent of the relevant Promissory Note (in the form set out in Schedule 5 (Form of Promissory Note) of this executed by the Promissory Agreement) Note Authorised Signatory and for an aggregate Face Value equal to the amount calculated and included in the **Cash Flow Statement**:

- (ii)  $\overline{a}$

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(iii) The approved Milestone Completion amount for the first approved Milestone Completion Certificate is to be executed by the GOU's Authorised Signatory in accordance with the PWIA as supplemented by this agreement (as well as the related Promissory Notes executed by the Promissory Note Authorised Signatory) shall cover the total expenses that shall have been or will be incurred by the Company and notified in writing to the GOU and the Administrative Agent in connection with the Works and the raising of financing for the Project including and not limited to:

- (A) All costs and expenses in connection with scoping studies, feasibility studies, risk assessment, concept design, medical planning and related inquiries;

- (B) preliminary costs related to production and approval of designs;
- (C) construction costs related to, inter alia, obtaining applicable permits, study of project site, negotiation of construction contracts and mobilisation advance payment for contractors, insurance premia, fees and costs of advisors and consultants (subject to limitations agreed with the company);
- (D) any upfront fees or commitment fees payable to the Senior creditors at the Initial Purchase;
- \$(E)\$ the aggregate agency fees payable to the Administrative Agent and the Local Administrative Agent under the Note Purchase Agreement (such fees to be paid upfront into a pre-identified bank account held in the name of the Administrative Agent with the Local Agent as specified in the Note **Purchas Agreement**;
- (F) the upfront aggregate fees of the Technical Advisor payable in accordance with the Technical Advisor's

Terms of Reference and the Note h,rrchase Agreement; and

(G)the Fixed Rate Advisory Mandate fees payable for implementing the Fixed Rate pursuant to the Fixed Rate Advisory Mandate,

### **in each case as set out in the Cashflow Statement.**

With regard to the payment of promissory notes it was stated in clause 5.3 that the GoU acknowledges that the company will endorse any or all of the promissory notes in favour of the Note Purchaser from time to time for the benefit of the Note Funders. Further, that once a Promissory Note has been so endorsed, payments under it shall be made by GoU, acting through the Paying Agent, the Note Purchaser or to its order.

The Attorney General admits that a "Promissory Note" as understood in the Direct Agreement constitutes a guarantee by the GoU to pay money

- reflected therein to the Note Purchaser by the Paying Agent. It was averred in the Supplementary Affidavit of Salima Namusobya that according to Charles Byaruhanga's affidavit in Misc. Application No. 370 of 2019, the GoU issued Promissory Notes to the tune of US\\$ 86,379,954.13 sometime in April 2019, upon the issue of the first 15
- Milestone Completion Certificate. Further, that according to the same affidavit the commencement date determined by the Owner's Engineer was 10ft June 2019. 20

She further averred that from the said deposition, not only was there no approval from Parliament as is required by the Constitution, but also

- the Promissory Notes issued for the first Milestone Completion Certificate were issued illegally since 10th June 2019 was the commencement date, as set out in clause 17 of the PWIA, and by this date the conditions precedent set out therein had not been met. That the failure to satisfy the condition precedent in clause 17.1.2 of the 25
- PWIA amounted to the Promissory Notes issued in accordance with the 30

Resolution passed by Parliament authorising payment having been passed illegally and in violation of the PWIA.

Clause 17.1.2 of the PWIA provided for the procurement and issuance of performance insurance in respect of the Works, acceptable to GOU (the "Works Performance Security"). It was not clear to me why the petitioner came to the conclusion that the Company did not obtain the requisite Works Performance Security as a condition precedent to the commencement of the Works, in spite of contents of documents produced by it.

## I

10 The PWIA was imported into these proceedings as Annexure C to the affidavit of Mark Koehler, Managing Director of Roko Construction, the applicant in Misc. Application i/o 370 of 2015, arising from Compang Cause No. 10 of 2019; Roko Construction Ltd u. Finasi/ Roko Construction SPV Ltd & Another. So was the Performance Security which was 1s Annexure H to the affidavit of Mark Koehler.

In paragraph 14 of his affidavit, Mark Koehler averred that in November 2017, the 1st respondent, Finasi/Roko Construction SPV requested Roko to provide a Performance Security for the Works for the ISHU. That Roko provided a Performance Security worth US\$ 7,908,515.60 to Finasi/Roko SPV. The Performance Security was issued by Sanlam General Insurance on the 7th December 2018. It shows that it was issued for the sum of US\$ 7,908,515.60, and it would be valid until a date 28 days from the issue of the Certificate of Completion. It also stated that,

25 "For the avoidance of doubt, the bond shall remain in force until the principle has fully discharged its obligations in accordance with the Terms and Conditions of the Contract entered into between the two parties, but no later than 37": December 2021."

The contention that the first Milestone Completion Certificate and the issue of the first Promissory Notes was illegal for non-compliance by the company with the conditions precedent in clause 17 of the PWIA therefore does not hold water. Moreover, the conditions precedent to the a

- 5 issue of the first Milestone Completion Certificate were stated in the DA. Clause 5.2 (c) (iii) thereof provided that the first approved Milestone Completion Amount for the first Approved Milestone Completion Certificate to be executed by the GoU Authorised Signatory, according to the PWIA as supplemented by the DA, would cover the items listed

- therein in paragraphs A-G (reproduced at pages 35-36 of this judgment) and that these were set out in the Cashflow Statement. 10

As to whether the financial arrangements by the issue of promissory notes introduced in the DA required a resolution of Parliament before execution thereof under Article 159 (2), (5) and (6) of the Constitution, I deemed it necessary to set down the whole provision here so that the impugned clauses are interpreted within their context. It provides as follows:

### 159. Power of Government to borrow or lend

| 20 | (1) Subject to the provisions of this Constitution, Government may borrow from any source. |

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| | (2) Government shall not borrow, guarantee, or raise a loan on behalf of itself or any other public institution, authority or person except as authorised, but under an Act of Parliament. |

| 25 | (3) An Act of Parliament made under clause 121 of this article shall provide - |

| | (a) that the terms and conditions of the loan shall be laid before Parliament and shall not come into operation unless they have been approved, but a resolution of Parliament; and, |

| 30 | (b) that any monies received in respect of that loan shall be paid into the Consolidated Fund and form part of that fund or into some other public fund, which is existing or is created. |

| | .for the purpose of the loan. |

(4) The President shall, at such times as Parliament may determine, cause to be presented to Parliament such information concerning any loan as is necessary to show—

(a) the extent of the total indebtedness by way of principal and accumulated interest:

(b) the provision made for servicing or repayment of the loan; and

(c) the utilisation and performance of the loan.

(5) Parliament may, by resolution, authorise the Government to enter into an agreement for the giving of a loan or a grant out of any public fund or public account.

(6) An agreement entered into under clause (5) of this article shall be laid before Parliament and shall not come into operation unless it has been approved by Parliament by resolution.

(7) For the purposes of this article, the expression "loan" includes any money lent or given to or by the Government on condition of return or repayment and any other form of borrowing or lending in respect of which—

> (a) monies from the Consolidated Fund or any other public fund may be used for payment or repayment; or

> (b) monies from any fund by whatever name called, established for the purposes of payment or repayment whether in whole or in part and whether directly or indirectly, may be used for payment or repayment.

(8) Parliament may by law exempt any categories of loans from the 25 provisions of clauses \$(2)\$ and \$(3)\$ of this article, subject to such conditions as Parliament may prescribe.

{\*Emphasis supplied\*}

Having conceded that the promissory notes to be issued under the DA constituted loans, counsel for the respondent opined that the Public 30 Finance Management Act, 2015 is the law that operationalised Article 159 (2) of the Constitution. He referred court to sections 23 and 36 thereof.

Section 36 of the PFMA authorises the Minister of Finance to raise loans as follows:

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36. Authority to raise loans.

(1) Subject to the Constitution, the authority to raise money by loan and to issue guarantees for and on behalf of the Government shall vest solely in the Minister and no other person, public corporation, state enterprise or local government council shall, without the prior approval of the Minister, raise any loan, issue any guarantee, or take any other action which may in any way either directly or indirectly result in a liability being incurred by the Government.

\$(2)\$ For the purposes of subsection \$(1)\$, the Minister may raise a 10 loan-

- (a) to finance a budget deficit;
- (b) for the management of a monetary policy;
- (c) to obtain foreign currency;
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(d) for on-lending to an approved institution; or

(e) for defraying an expenditure which may lawfully be defrayed.

(3) The Minister may raise a loan by issuing Government bills, bonds or stock or using any other method the Minister may deem expedient, including a fluctuating overdraft.

- (4) The value of Government bills, bonds or stocks issued in a financial year to raise a loan in subsection (2), except a loan specified in sub-section \$(2)(b)\$ or a loan raised through the issuance of securities shall not exceed the value indicated in respect of that loan in the annual budget for that financial year.
- (5) With the exception of a loan raised for the purpose of subsection \$(2)\$ (b) or a loan raised through issuance of securities, the terms and conditions of a loan raised by the Minister shall be laid before Parliament and the loan shall not be enforceable except where it is approved by Parliament, by a resolution.
- (6) A loan raised under this section shall be paid into the Consolidated Fund and shall form part of the Consolidated Fund and shall be available in the manner in which the money of the Consolidated Fund is available, except for a loan raised for the purpose of sub-section \$(2)(b)\$ , which shall be held in a special fund.

{\*Emphasis added\*}

A promissory note is defined in Black's Law Dictionary, 11<sup>th</sup> Edition as "an unconditional written promise, signed by the maker, to pay absolutely and

in any event a certain sum of money either to, or to the order of, the bearer or a designated person."

The Form of Promissory Note to be issued by the GoU was provided for in Schedule 5 to the DA. I observed that it was stated in its heading that the Note was to be issued by the GOU represented by the MOH and  $\$ \text{MoFPED}$ ; but to facilitate a better understanding of the payment arrangements reached in the DA, I found it useful to set out the undertakings therein by the MoFPED to the beneficiary, Finasi/Roko Construction SPV, and they were as follows:

- The Government of the Republic of Uganda represented by the 10 Ministry of Finance, Planning and Economic Development (the "Issuer") for value received promises to pay to the Payee (or to its order) the sum of [insert amount in words) (\\$ insert amount in numbers) on (insert maturity date].
- All payments shall be made in US dollars in immediately available 15 cleared funds in full and without any set-off, deduction or withholding.

This promissory note is payable on demand upon presentation and surrender of this promissory note at the Bank of Uganda at Plot 37/45 Kampala Road, Kampala, Uganda.

The Issuer hereby waives any demand, diligence, presentation, protest and notice of any kind and warrants to the Payee that all actions and approvals required for the execution and delivery of this promissory note as a legal, valid and binding obligation of the Issuer, enforceable in accordance with the terms thereof, have been duly obtained and are in full force and effect.

This promissory note and every part hereof shall be binding upon the Issuer and its successors and shall ensure to the benefit of and be enforceable by the payee and any of its endorsees and other successors or assigns.

The Issuer may not assign or otherwise transfer any of its obligations under this promissory note without the Payee's prior written consent.

This promissory note and all non-contractual or other matters or obligations arising out of or in connection with it are governed by 35 English Law.

In accordance with the PWIA (as amended and supplemented by the Direct Agreement):

- (a) the amount above shall be paid by us by redeeming the Promissory Note issued by us with respect to the Milestone Completion Certificate referred to above; and

$\$S$

- (b) we enclose the following promissory notes, each with a face value calculated in accordance with the Direct Agreement and payable on the Payment Dates specified in the Promissory Note Redemption Schedule set out opposite the relevant promissory note.

(Table showing notes, amounts payable and payment date)

- (c) we hereby irrevocably instruct the Bank of Uganda as our Paying Agent to make payment against each of the Promissory Notes listed above (i) to the Company, as original payee, or (ii) following any endorsement of any of the promissory notes listed above, to the endorsee  $\$d$
- Schedule 3 to the Direct Agreement set out a list of 27 Promissory Notes 20 with their maturity dates spanning from 30<sup>th</sup> November 2020 to 3<sup>rd</sup> December 2026. It then becomes apparent that it was expected that the payments would be made over a period of 5 years, making it a multiyear commitment.

Pursuant to section 36 (2) (e) of the PFMA, the Minister of Finance is by  $\$25$  law authorised to obtain "a loan for defraying any expenditure which may lawfully be defrayed." Subsection (3) thereof goes on to provide that "The Minister may raise a loan by issuing Government bills, bonds or stock or using any other method the Minister may deem expedient,

including a fluctuating overdraft." I am of the view that a promissory 30 note is not excluded from this list, where the Minister deems it to be expedient to raise a loan by promising to pay in the future.

It is also important to note that subsection (5) of section 36 PFMA provides that, with the exception of a loan raised for the purpose of

subsection  $\$(2)$  (b) or a loan raised through issuance of securities, the terms and conditions of a loan raised by the Minister shall be laid before Parliament and the loan shall not be enforceable except where it is approved by Parliament, by a resolution.

The loan that is challenged here was, in my view obtained under the  $\mathsf{S}$  second limb of clause (3) of section 36 PFMA. My understanding of the requirement in section 36 (5) then is that it does not require approval of the terms of the loan to be laid before Parliament before the instrument under which the loan is obtained is executed. What is required is that the terms must be laid before Parliament and approved 10 before the loan is enforced.

With regard to the promissory notes that are challenged by the petitioner, which spanned over a period of 5 years, section 23 of the PFMA provides as follows:

23. Multi-year expenditure commitments. 15

> (1) A vote shall not enter into a contract, transaction, or agreement that binds the Government to a financial commitment for more than one financial year or which results in a contingent liability, except where the financial commitment or contingent liability is authorised by Parliament.

> (2) Parliament may, in the annual budget, authorise a vote to make a multiyear expenditure commitment, and where Parliament authorizes, the annual budget shall indicate the commitment approved for the financial year and the approved multiyear commitments.

> (3) For avoidance of doubt, subsection (2) shall only apply where the multiyear commitment is consistent with the objectives of the Charter for Fiscal Responsibility and the Budget Framework Paper.

> (4) The Minister shall for every financial year submit to Parliament a report on the performance of the multiyear commitments made.

Section 2 of the PFMA defines a "vote" as "an entity for which an appropriation is made by an Appropriation Act or Supplementary

Appropriation Act." Both the MoH and the MoFPED are Votes for which appropriation is made by Parliament. Their authority to enter into multi-year contracts to commit Government is therefore limited by section 23 of the PFMA.

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- 5 The Direct Agreement was dated 4th December 2018, which placed it in the Financial Year 2018/2019. According to the affidavit of Charles Byaruhanga referred to above, the first Milestone Completion Certificate was issued by the Owner's Engineer on 20th December 2018. But the promissory notes were not issued until April 2019, within the same
- Financial Year. However, by that date Parliament had passed the Resolution, on 12th March 2019, approving the proposal by the MoFPED for Government to issue promissory notes worth US\$ 379.71 Million to the Contractor. 10
- And going forward, in relation to section 23 (2) pursuant to which 1s Parliament may authorise a vote to make a multi-year expenditure commitment, which should then be indicated in the Annual Budget, clause 15.5 of the DA referred to the commitments required

by the PFMA in the Annual Budget. It provided that the MoFPED shall deliver to the Administrative Agent the documents and evidence in relation to 20 the annual budget cycle, showing the budget appropriations required for payments relating to the promissory notes falling due in the relevant year as follows: (i) the budget framework paper approved by Parliament and the approved budget; and (ii) legislation on appropriation approved by Parliament.

- <sup>25</sup> In conclusion, the provisions in Article 159 (2), (5) and (6) of the Constitution were satisfied by sections 23 and 36 of the PFMA. The DA was laid before Parliament which scrutinised it through the Committee on National Economy and the requisite Resolution was passed by Parliament. The execution of the Direct Agreement in respect of the

ISHU was therefore not in contravention with or inconsistent with Article 159 (2), (5) and (6) of the Constitution.

The analysis and conclusion about the second issue that I framed disposes of the 3'd issue, which was whether the Resolution passed by Parliament on the 12th March 2019 approving a proposal to issue promissory notes to Finasi/Roko Construction SPV contravened or was

inconsistent with Articles 159 (2), (5) and (6) and 79 of the Constitution.

Though the impugned Resolution was passed after the MoH and MoFPED entered into the Direct Agreement for the financing of the 10 ISHU, the agreement did not come into operation until the resolution was passed, as is required by Article 159 (5) of the Constitution. The imperative in Article 79 that no person or body other than Parliament shall have power to make law was satisfied because it is the same that Parliament applied to enter into the impugned contracts. The 1st Constitution was therefore effectively protected by the Law and by Parliament.

This petition therefore fails and I would find that the petitioner is not entitled to any of the remedies claimed. I would dismiss it with no order as to costs.

20 Dated at Kampala this <sup>I</sup>Br<sup>\*</sup> day of ru<sup>\*.1</sup> <sup>2024</sup>

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JUSTICE OF THE CONSTITUTIONAL COURT

**I**

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA [Coram: Egonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi & Kihika, JJCC] CONSTITUTIONAL PETITION NO 007 OF 2019 INITIATIVE FOR SOCIAL ECONOMIC RIGHTS :::::::::: PETITIONER VERSUS

ATTORNEY GENERAL ::::::::::

## **JUDGMENT OF CATHERINE BAMUGEMEREIRE, JCC**

I have heard the opportunity to read the draft opinion of Mulyagonja, JCC.

\$I\$ agree with her and have nothing to add.

(Beafgaa

Hon. Lady Justice Catherine Bamugemereire, Justice of the Constitutional Court

## THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende; Bamugemereire, Mulyagonja, Mugenyi & Kihika, JJCC)

### CONSTITUTIONAL PETITION NO. 7 OF 2019

INITIATIVE FOR SOCIAL ECONOMIC RIGHTS (ISER) ..... PETITIONER

### VERSUS

ATTORNEY GENERAL .....

### JUDGMENT OF MONICA K. MUGENYI, JCC

I have had the benefit of reading in draft the lead judgment of my sister, Irene Mulyagonja, JCC in this matter. I agree with the decision therein that the Petition be dismissed for the reasons advanced.

Dated and delivered at Kampala this .....

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\\*Monica K. Mugenyi Justice of the Constitutional Court

\\* This judgment was signed before this judge ceased to hold that office.

## IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Egonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi & Kihika, JJCC

### CONSTITUTIONAL PETITION NO 007 OF 2019

INITIATIVE FOR SOCIAL ECONOMIC RIGHTS :::::::::: PETITIONER

### VERSUS

ATTORNEY GENERAL ::::::::::

$\$S\$\mathit{}$

### JUDGMENT OF OSCAR JOHN KIHICA, JCC

I have had the benefit of reading in draft the lead judgment of Lady Justice Irene Mulyagonja.

I agree that this petition fails and I also agree that the petitioner is not entitled to any of the remedies claimed. I would also dismiss this petition with no order as to costs.

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Dated at Kampala this.....

OSCAR JOHN KIHICA

JUSTICE OF THE CONSTITUTIONAL COURT 20

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

\*Coram: Egonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi\* & Kihika, JJCC

**CONSTITUTIONAL PETITION NO 007 OF 2019 BETWEEN**

INITIATIVE FOR SOCIAL ECONOMIC RIGHTS=====PETITIONER

**AND**

ATTORNEY GENERAL \$==\$ \$==\$ \$==\$ \$==\$ \$==\$ \$==\$ \$==\$ \$==\$ \$RESPONDENT\$

**JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC**

- I have had the opportunity of reading in draft the judgment of my sister,  $[1]$  Mulyagonja, JCC. I agree with it and have nothing useful to add.
- $[2]$  As Bamugemereire, Mugenyi, and Kihika, JJCC, agree, this petition is dismissed with no order as to costs.

Signed, dated, and delivered this  $\iota$  day of MAY 2024

Fredrick Egonda-Ntende **Justice of the Constitutional Court**

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Prepared on 13 October 2026 · Esheria