GREAT LAKES CEMENT LTD v. DAMCO TANZANIA LTD

[Rwanda URUKIKO RW'IKIRENGA – RCOMA0162/12/CS (Nyirinkwaya, P.J., Mukandamage na Kanyange, J.) 12 Kamena 2015]

Amategeko agenga ububasha bw'inkiko – Amasezerano y'ubwikorezi – Ububasha bw'urukiko mu gihe humvikanywe ko impaka zizavuka mu masezerano zizakemurwa n'Urukiko rwo mu mahanga – Kuba mu masezerano y'ubwikorezi impande zombi zakoze harateganyijwe ko urukiko rwa London arirwo ruzababuranisha mu gihe hazavuka impaka hagati yabo nta gaciro byahabwa kubera ko ababisaba batagaragaza ko urwo rukiko rufite ububasha bwo kuburanisha bushingiye ku kiburanwa cyangwa se ngo bagaragaze ko ari byo biboroheye kurusha kuburanira mu nkiko z'u Rwanda harebwe ibigenda ku rubanza n'agaciro k'ikiburanwa – Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, ingingo ya 121.

Amategeko agenga amasezerano – Inyungu z'ubucuruzi n'iz'ubukererwe – Umwe mu bakoze amasezerano ntiyavuga ko nta nyungu z'ubukererwe zayavuzwemo kandi ko izisabwa n'urundi ruhande ari ikirenga mu gihe impande zombi zumvikanye uburyo amafaranga y'inyungu z'ubukererwe azishyurwa mu gihe hatabayeho kubahiriza amasezerano – Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 168.

Incamake y'ikibazo: DAMCO TANZANIA Ltd yareze GREAT LAKES CEMENT Ltd mu Rukiko Rukuru rw'Ubucuruzi iyisaba kuyishyura 85.805USD yasigaye ku giciro cy'ubwikorezi bw'ibicuruzwa byayo yavanye mu Bushinwa ibigeza i Musanze mu Rwanda, inasaba inyungu zitandukanye hamwe n'igihano gihatira kwishyura. GREAT LAKES CEMENT Ltd nayo yahise itanga inzitizi zo kutakira ikirego cya DAMCO TANZANIA Ltd ivuga ko iyi igomba gutanga ingwate y'amagarama itangwa n'abanyamahanga baburanira mu nkiko zo mu Rwanda, inasaba indishyi z'akababaro ivuga ko DAMCO TANZANIA Ltd yayiteje igihombo kuko itikoreye ibicuruzwa byayo byose ndetse n'umuyobozi wayo ahamagarwa kuri police. Ikomeza ivuga ko uru rukiko rudafite ububasha bwo kuburanisha uru rubanza kubera ko mu masezerano y'ubwikorezi impande zombi zagiranye bumvikanye ko zizaburanishwa n'Urukiko Rukuru rwa London. Urukiko rwemeza ko DAMCO TANZANIA Ltd itagomba gutanga ingwate itangwa n'abanyamahanga kuko ari sosiyete yo mu gihugu cyo mu muryango wa Africa y'Iburasirazuba.

Ku byerekeye iburabubasha ry'inkiko zo mu Rwanda, urukiko rwemeje ko nta shingiro bifite kuko mu baburanyi ntawugaragaza ko afite ubwenegihugu bw'ubwongereza cyangwa se ngo bagaragaze ko ibicuruzwa bikomoka muri icyo gihugu. Urukiko rwemeje ko nta ndishyi z'akababaro n'iz'igihombo GREAT LAKES CEMENT Ltd yahabwa kuko ariyo igomba kwishyura DAMCO TANZANIA Ltd.

GREAT LAKES CEMENT Ltd yajuririye mu Rukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rudafite ububasha bwo kuburanisha uru rubanza kuko urubifitiye ububasha ari urwa London kuko rudashobora kubogama nk'uko byumvikanywe mu masezerano. DAMCO TANZANIA Ltd yo ivuga ko impamvu y'ubujurire yatanzwe na GREAT LAKES CEMENT Ltd nta shingiro ifite kubera ko ikirego cyayo kitari gishingiye ku mpamvu yo kutubahiriza amasezerano ahubwo ko cyari gishingiye ku nyandiko zandikiwe mu Rwanda aho umuyobozi mukuru wa GREAT LAKES CEMENT Ltd yiyandikiye inyandiko zigaragaza umwenda asigayemo DAMCO TANZANIA Ltd. Ikomeza ivuga ko ntaho inkiko zo mu bwongereza

zahurira n'uru rubanza kuko ikibazo cyavukiye mu Rwanda kandi n'urega nawe akaba ariho atuye.

Incamake y'icyemezo: 1. Kuba mu masezerano y'ubwikorezi impande zombi zakoze harateganyijwe ko urukiko rwa London arirwo ruzababuranisha mu gihe hazavuka impaka hagati yabo nta gaciro byahabwa kubera ko ababisaba bataragaza ko urwo rukiko rufite ububasha bwo kuruburanisha bushingiye ku kiburanwa cyangwa se ngo bagaragaze ko ari byo biboroheye kurusha kuburanira mu nkiko z'u Rwanda harebwe ibigenda ku rubanza n'agaciro k'ikiburanwa.

2. Umwe mu bakoze amasezerano ntiyavuga ko nta nyungu z'ubukererwe zayavuzwemo kandi ko izisabwa n'urundi ruhande ari ikirenga mu gihe impande zombi zumvikanye uburyo amafaranga y'inyungu z'ubukererwe azishyurwa mu gihe hatabayeho kubahiriza amasezerano. Bityo uwajuriye agomba kwishyura inyungu za 12% zikabarwa guhera mu kwezi kwa Nyakanga 2010 kugeza umunsi urubanza rusomeweho.

Ubujurire nta shingiro bufite.
Ubujurire bwuririye ku bundi bufite ishingiro kuri bimwe.
Amagarama y'urubanza aherereye ku wareze.

Amategeko yashingiweho.
Itegeko Nº21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 168.
Itegeko Ngenga Nº51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, ingingo ya 121.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] DAMCO TANZANIA Ltd yareze GREAT LAKES CEMENT Ltd mu Rukiko Rukuru rw'Ubucuruzi isaba kwishyurwa 85.805USD yasigaye ku giciro cy'ubwikorezi bw'ibicuruzwa byayo yakoze ibivana mu Bushinwa ibigeza i Musanze mu Rwanda, inyungu y'ubucuruzi za 25% ku mwaka, inyungu y'ubukererwe ya 19% ku mwaka zayo, amafaranga y'ikurikiranarubanza n'igihembo cya Avoka, igihano gihatira kwishyura (astreinte) n'irangizarubanza ry'agateganyo.

[2] Muri urwo rubanza GREAT LAKES CEMENT Ltd yatanze inzitizi zigamije kutakira ikirego cya DAMCO TANZANIA Ltd zirimo iy'ingwate igomba gutangwa n'abanyamahanga baburanira mu nkiko z'u Rwanda n'iy'iburabubasha bw'urukiko, inasaba amafaranga y'igihembo cya Avoka n'indishyi z'akababaro kubera ko DAMCO TANZANIA Ltd yayiteje igihombo kuko itayikorereye ibicuruzwa byayo byose, ndetse umuyobozi wayo ahamagarwa muri "Police".

[3] Urukiko Rukuru rw'Ubucuruzi rwemeje ko DAMCO TANZANIA Ltd itagomba gutanga ingwate itangwa n'abanyamahanga kuko ari iyo mu gihugu cyo mu Muryango wa Africa y'Iburasirazuba.

[4] Ku byerekeye ububasha bw'urukiko, urukiko rwasanze ibyo GREAT LAKES CEMENT Ltd iburanisha ko inkiko zo mu Rwanda nta bubasha zifite bwo kuburanisha uru rubanza kubera ko mu masezerano y'ubwikorezi impande zombi zemeranyijwe ko zizaburanishwa n'Urukiko Rukuru rwa London nta shingiro bifite, kuko mu baburanyi ntawe ugaragaza ko afite ubwenegihugu bw'Ubwongereza, ko ibicuruzwa bikomoka muri icyo gihugu, cyangwa se ko byahanyuze, ndetse nta n'uwashoboye kurusobanurira impamvu bahisemo urwo rukiko rudafite aho ruhuriye n'ikiburanwa ndetse n'ababuranyi, n'itegeko bashingiraho baha urwo rukiko ububasha bwo kubaburanisha, maze rushingiye ku ngingo ya 121 y'Itegeko Ngenga Nº51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, rwemeza ko rufite ububasha bwo kuburanisha urubanza kuko uregwa atuye mu Rwanda.

[5] Ku byerekeye umwenda waregewe, Urukiko rwategetse GREAT LAKES CEMENT Ltd kwishyura DAMCO TANZANIA Ltd 85.805USD yasigaye ku bwikorezi bw'ibicuruzwa, inyungu zayo zingana na 31.604USD, inyungu z'ubukererwe zingana na 3.718USD, no kwishyura 6.500Frw y'amagarama y'urubanza. Urukiko rwasanze kandi nta gihano gihatira kwishyura (astreinte) GREAT LAKES CEMENT Ltd ikwiye gucibwa, ko ndetse nta rangizarubanza ry'agateganyo rigomba kubaho, runavuga ko idakwiye guhabwa indishyi z'akababaro isaba ku mpamvu y'uko ariyo igomba kwishyura DAMCO TANZANIA Ltd, kandi nta terabwoba umuyobozi wayo yashyizweho ubwo yahamagarwaga muri "Police".

[6] Ku birebana n'ikirego kigamije kwiregura cyatanzwe na GREAT LAKES CEMENT Ltd gisaba indishyi z'igihombo yatejwe no kuba ibicuruzwa byayo byose itarabishyikirijwe, indishyi z'akababaro zo kuba umuyobozi wayo yarajyanywe muri "Police" agasinyira umwenda kubera iterabwoba, n'amafaranga y'igihembo cya Avoka, Urukiko rwasanze rutabimugenera kuko ari we ugomba kwishyura.

[7] GREAT LAKES CEMENT Ltd yajuririye Urukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rwaburanishije urubanza rudafitiye ububasha kubera ko urukiko rufite ububasha bwo gukemura impaka zose zakomoka ku iyubahirizwa ry'amasezerano yagiranye na DAMCO TANZANIA Ltd ari Urukiko Rukuru rwa London mu Bwongereza.

[8] Mu bujurire bwuririye ku bundi, DAMCO TANZANIA Ltd nayo isaba ko indishyi yagenewe zahuzwa n'igihe, ko kandi igihembo cya Avoka yagenewe ari gito.

[9] Urubanza rwaburanishijwe mu ruhame tariki ya 06/01/2015 no kuwa 28/04/2015, GREAT LAKES CEMENT Ltd ihagarariwe na Me Bimenyimana Eric, naho DAMCO TANZANIA Ltd ihagarariwe na Me Nzamwita Toy.

II. BIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

a. Kumenya niba Urukiko Rukuru rw'Ubucuruzi rwari rufite ububasha bwo kuburanisha ikirego cyatanzwe na DAMCO TANZANIA Ltd.

[10] Me Bimenyimana uburanira GREAT LAKES CEMENT Ltd avuga ko mu ngingo ya 3 y'amasezerano y'ubwikorezi yagiranye na DAMCO TANZANIA Ltd tariki ya 10/11/2010, impande zombi zumvikanye ko ikibazo kizavuka mu iyubahirizwa ryayo kizakemurwa gusa n'Urukiko Rukuru rwa London mu Bwongereza, kubera ko zabonaga rushobora kutabogama (juridiction neutre) aho kwiyambaza inkiko zo mu Rwanda cyangwa se zo muri Tanzania. Asanga rero ikibazo cy'ububasha bw'urukiko bushingiye ku ifasi atari indemyagihugu ku buryo umucamanza yari kubahitiramo urukiko rufite ububasha.

[11] Me Nzamwita uburanira DAMCO TANZANIA Ltd avuga ko impamvu y'ubujurire yatanzwe na GREAT LAKES CEMENT Ltd nta shingiro ifite, kuko ikirego cya DAMCO TANZANIA Ltd kitari gishingiye ku mpamvu yo kutubahiriza amasezerano y'ubwikorezi kubera ko ayo masezerano yasohojwe n'impande zombi, ahubwo cyari gishingiye ku nyandiko zandikiwe mu Rwanda (ordre de paiement et reconnaissance de dette) na bwana Nemeyebahizi Jean Baptiste wari umuyobozi Mukuru wayo, aho kuwa 21/3/2011 no kuwa 28/04/2011 yiyandikiye ubwe inyandiko igaragaza umwenda asigayemo.

[12] Avuga kandi ko ntaho inkiko zo mu Bwongereza zahurira n'uru rubanza kuko ikibazo cyavukiye mu Rwanda ari naho uregwa atuye.

UKO URUKIKO RUBIBONA

[13] Ingingo ya 89, igika cya 1 y'Itegeko N°21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko "umuburanyi ubyukije inzitizi y'iburabubasha agomba kuyisobanura no kugaragaza urukiko avuga ko rufite ububasha bwo kumuburanisha".

[14] Mu ngingo ya 3 y'amasezerano y'ubwikorezi GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd bagiranye tariki ya 10/11/2010 bumvikanye ko ayo masezerano azakurikiza amategeko y'Ubwongereza, ko ari mu bubasha bw'Urukiko Rukuru rwa London gusa, ko kandi mu gihe atazubahirizwa n'umwe muri bo bazakemura ikibazo mu bwumvikane, byananirana bakitabaza urukiko[1].

[15] Urukiko rurasanga ibyo uburanira DAMCO TANZANIA Ltd avuga ko ikirego yatanze kidashingiye kuri ayo masezerano nta gaciro byahabwa kuko inyandiko itanga ikirego n'imyanzuro igiherekeje yakoze, igaragaza ko 85.805USD akomoka ku masezerano y'ubwikorezi (contrat de transport).

[16] Urukiko rurasanga na none kuba GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd barumvikanye ku mategeko agenga amasezerano yabo ndetse n'Urukiko ruzakemura ibibazo byavuka mu iyubahirizwa ryayo rudafite aho ruhuriye n'amasezerano ubwayo cyangwa ababuranyi, ari ihame ryemewe mu ikorwa ry'amasezerano mpuzamahanga, ariko amategeko y'u Rwanda ntacyo abivugaho ku buryo byafasha mu kumvikanisha iki kibazo cy'ububasha bw'urukiko.

[17] Inkiko zo muri Amerika, mu manza zinyuranye, nazo zasanze zikwiye kubahiriza uburenganzira bw'abagiranye amasezerano mpuzamahanga bwo guhitamo urukiko ruzabakemurira ibibazo, uretse iyo bigaragaye ko gushyira mu bikorwa ingingo ibiteganya idashyize mu gaciro (unreasonable), cyangwa ibogamye (injust), cyangwa se bigaragara ko ingingo y'amasezerano ihitamo urukiko nta gaciro ifite (invalid) kubera uburiganya (fraud) cyangwa hari aho irengera (overreaching).

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[1] Iyo ngingo ivuga ngo: *"This Agreement shall be governed by English law, and is subject to the exclusive jurisdiction of High Court of Justice, London.*
In case there is any breach of contract, any amount outstanding shall be settled by Client. Any dispute shall be resolved in an amicable manner, and in the event of inability to solve things amicably, such matter shall be taken to court".

[18] Mu rubanza C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc., rwaciwe n'Urukiko rw'Ubujurire rwa Minnesota, mu mwaka wa 2009, hemejwe ko ingingo y'amasezerano iba ibogamye cyangwa idashyira mu gaciro iyo aho urukiko rwahiswemo n'abagiranye amasezerano ruri (election de for) hababangamiye mu buryo bugaragara, iyo ingingo y'amasezerano yateguwe n'uruhande rumwe (contrat d'adhésion), cyangwa amasezerano adashyira mu gaciro[2].

[19] Ku birebana n'ingingo ya 3 y'amasezerano y'ubwikorezi yabaye hagati ya GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd tariki ya 10/11/2010, bahisemo Urukiko Rukuru rwa London bifuza kubona urukiko rutabogamye rwabakemurira ibibazo. Urukiko rurasanga ariko iyo ngingo idashyize mu gaciro kubera ko bidahagije gushyiraho urukiko ruzakemura ibibazo, udatekereje ku bubasha bwarwo bushingiye ku kiburanwa (compétence matérielle) ndetse no ku bigenda ku rubanza bigereranyijwe n'agaciro k'ikiburanwa mu gihe havuka urubanza. GREAT LAKES CEMENT Ltd rero yifuza kuburanishwa n'urwo rukiko ntigaragaza ko rufite ububasha bushingiye ku kiburanwa bwo kuburanisha uru rubanza, cyangwa se ko ari byo biyoroheye kurusha kuburanira mu nkiko z'u Rwanda harebwe ibigenda ku rubanza n'agaciro k'ikiburanwa, bikaba rero bigaragara ko iyo ngingo idashyize mu gaciro ku baburanyi bombi.

[20] Urukiko rusanga ahubwo Urukiko Rukuru rw'Ubucuruzi, nk'uko rwabyemeje mu rubanza rwajuririwe, rwari rufite ububasha bwo kuburanisha urubanza buteganywa n'ingingo ya 121 y'Itegeko Ngenga N°51/2008 ryo kuwa 09/09/2008 rigena imiterere, imikorere n'ububasha by'inkiko, kubera ko GREAT LAKES CEMENT Ltd ifite icyicaro mu Rwanda kandi ariho amasezerano yarangirijwe.

b. Ubujurire bwuririye ku bundi bwa DAMCO Tanzania

[21] Me Nzamwita uburanira DAMCO TANZANIA Ltd avuga ko yatanze ubujurire bwuririye ku bundi isaba urukiko gusubira mu mibare (actualisation) y'inyungu z'ubucuruzi (17% ku mwaka) hamwe n'inyungu z'ubukererwe (2% ku mwaka) guhera mu kwezi kwa Nyakanga 2010 nk'uko zemejwe n'urukiko ku rwego rwa mbere kugeza umunsi urubanza ruzacibwaho (imyaka ine n'amezi 6), kuko GREAT LAKES CEMENT Ltd yajuriye nta mpamvu aho kwishyura umwenda, maze ikishyura inyungu zose zingana na 85.805USD x imyaka 4 n'amezi 6 x 17% = 65.641.000USD, hiyongereyeho inyungu z'ubukererwe zihwanye na + 7.000USD n'igihembo cya Avoka kingana na 18.169USD kubera ko umucamanza ntacyo yakivuzeho, nyamara hari amasezerano yagiranye na DAMCO TANZANIA Ltd n'inyandiko z'ayo yamaze kwishyurwa, nayo agahuzwa n'igihe akaba 23.650USD.

[22] Me Bimenyimana uburanira GREAT LAKES CEMENT Ltd avuga ko uru rubanza rushingiye ku kirego kitari mu bubasha bw'inkiko z'u Rwanda. Yongereho ko inyungu DAMCO TANZANIA Ltd isaba ari ikirenga kuko mu masezerano hateganyijwe ko inyungu zizacibwa ari 1%, ku kwezi ni ukuvuga 12% ku mwaka, hakaba nta nyungu z'ubukererwe zavuzwemo.

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[2] In the case C.H. Robinson Worldwide, Inc. v. FLS Transp., Inc., it was stated that a "clause is unfair or unreasonable if chosen forum is seriously inconvenient, the clause is [a] contract of adhesion, or agreement is otherwise unreasonable". 772 N.W.2d 528 (Minn. Ct. App. 2009).

[23] Ku byerekeye igihembo cya Avoka, avuga ko kidakwiye gushingira ku kiburanwa kuko amategeko atabyemera, kubera ko n'iyo DAMCO TANZANIA Ltd yatsindwa igomba kwishyura igihembo cya Avoka wayiburaniye.

UKO URUKIKO RUBIBONA

[24] Ingingo ya 168, igika cya 2 y'Itegeko Nº21/2012 ryo kuwa 14/06/2012 ryavuzwe haruguru ivuga ko "ababuranyi bashobora kwaka inyungu, ibyishyuwe ku bukodeshe n'ibindi bintu by'inyongera byabonetse kuva aho urubanza rwaciriwe, n'indishyi z'akababaro umuburanyi yagize kuva urubanza ruciwe".

[25] Mu ngingo ya 5 y'amasezerano yavuzwe haruguru, GREAT LAKES CEMENT Ltd na DAMCO TANZANIA Ltd bumvikanye ko nitishyura amafaranga cy'ubwikorezi uko babyumvikanyeho izacibwa 1% ku kwezi, ni ukuvuga 12% ku mwaka.

[26] Urukiko rurasanga iyo nyungu ya 12% ariyo GREAT LAKES CEMENT Ltd igomba gutanga ku mafaranga atarishyuwe, inyungu zikabarwa guhera mu kwezi kwa Nyakanga 2010 kugeza umunsi urubanza rusomeweho mu buryo bukurikira:
$\frac{85.805\text{USD x } 12 \text{ x iminsi } 1739}{100x\ iminsi\ 360} = 49.738\text{USD}$

[27] Ku byerekeye igihembo cya Avoka, urukiko rurasanga ingingo ya 62 igika cya kabiri y'Itegeko Nº83/2013 ryo kuwa 11/09/2013 rishyiraho Urugaga rw'Abavoka mu Rwanda rikanagena imitunganyirize n'imikorere byarwo, ivuga ko bibujijwe ko Avoka ashyiraho igihembo ashingiye ku buryo urubanza ruzakizwa kuko ashinzwe gukoresha ubushobozi bwe, bityo DAMCO TANZANIA Ltd ikaba igenewe mu bushishozi bw'urukiko igihembo cya Avoka kingana na 1.000.000Frw ku nzego zombi yaburaniyeho.

[28] Urukiko rurasanga amafaranga yose GREAT LAKES CEMENT Ltd igomba kwishyura DAMCO TANZANIA Ltd ari 85.805USD y'umwenda yemejwe n'Urukiko Rukuru rw'Ubucuruzi + 49.738USD y'inyungu = 135.543USD na 1.000.000Frw y'igihembo cya Avoka.

III. ICYEMEZO CY'URUKIKO

[29] Rwemeje ko ubujurire bwatanzwe na GREAT LAKES CEMENT Ltd nta shingiro bufite;

[30] Rwemeje ko ubujurire bwuririye ku bundi bwatanzwe na DAMCO TANZANIA Ltd bufite ishingiro kuri bimwe;

[31] Rutegetse GREAT LAKES CEMENT Ltd kwishyura DAMCO TANZANIA Ltd 135.543USD y'umwenda n'inyungu, na 1.000.000Frw y'igihembo cya Avoka.

[32] Rutegetse GREAT LAKES CEMENT Ltd kwishyura 100.000Frw y'amagarama y'urubanza.