IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 197 OF 2018

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

VULCAN LAB EQUIPMENT LTD.....1ST RESPONDENT

SCHOOL EQUIPMENT PRODUCTION UNIT.....ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 354 OF 2018

BETWEEN

SCHOOL EQUIPMENT PRODUCTION UNIT.....APPELLANT

AND

VULCAN LAB EQUIPMENT LTD.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION....2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ong'udi, J.) dated 7 December, 2017

in

ACEC No. 27 of 2017

Formerly

HCCC NO.110 OF 2010)

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JUDGMENT OF KIAGE, J.A

Reading the record of appeal and wrapping the mind around the events that spawned this whole litigation with an acknowledgement that such events are no black swan leads to a joyless recollection of the 18th century words of Edmund Burke;

> ***"Corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder; which loads us, more than millions of debt; which takes away vigo[u]r from our arms, wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our constitution."*** (In his 1870 *Speech on the Economical Reform.)*

The 1st respondent Vulcan Lab Equipment Limited (Vulcan) filed suit against the 2nd respondent, School Equipment Production Unit (SEPU) and the Kenya Anti-Corruption Unit which is the predecessor to the appellant, Ethics and Anti-Corruption Commission (the Commission), which were the 1st and 2nd Defendant respectively. In the claim, as captured in the plaint filed on 25th February 2010 as further amended, Vulcan sought judgment in several prayers, namely;

(a) A permanent injunction restraining the 1st defendant whether by itself, its directors, officers, servants or agents from rescinding, terminating, cancelling, re-tendering to a third party or any other person and/or breaching in any manner whatsoever the supply contract dated 16th July 2009.

(b) A mandatory order compelling the 1st defendant to affirm and abide by the terms and conditions of the supply contact dated 16th July 2009 and in particular to accept delivery of all the Chemicals and Equipment ready for delivery by the plaintiff worth Kshs. 94,279,2002 and to forthwith pay the plaintiff the said sum of Kshs. 94,279,202.

(c) A mandatory Order compelling the 1st defendant to pay the accrued storage and handling charges payable to Express Kenya Ltd for the month of December 2009, January 2010 and February 2010 at the rate of 275,073.12 per month and the insurance premium of Kshs. 43,848 per month and/or such further storage and handling charges or insurance as may accrue until the 1st defendant takes delivery of the goods.

(d)|A declaration that the 2nd defendant's action in freezing the plaintiff's bank accounts No. 4010000004 and 3010000608 at Southern Credit Commercial Bank, Westlands Branch on 21st July 2009 is illegal, un-warranted and without any valid or legal justification whatsoever.

(e) As against the 1st defendant, interest at court rates on the sum of Kshs. 1,888,486 until payment in full.

(f) As against the 2nd defendant, interest at 9% per annum on the sum of Kshs. 75,086,880 from 21st July 2009 until the time the 2nd defendant will unfreeze the plaintiff's accounts.

(g) As against the 2nd defendant, exemplary damages for abuse of office.

(h) Kshs. 1,542,079 being storage charges.

(i) Such other or further relief as this honourable court may deem fit and just to grant.

(j) Kshs. 1,542,079 being insurance premiums

(k) Kshs. 52,114.94 being loss of profits.

The bases for those prayers were complaints that in July 2009 SEPU approached Vulcan for a quotation or pro forma invoice for the supply of various science equipment and laboratory chemicals, which the former was to supply to various secondary schools in the country. Vulcan complied and forwarded the requested pro-forma invoice which amounted to **Kshs. 226,772,450** inclusive of VAT. The duo then signed a supply contract on 16th July 2009 which provided that SEPU was to pay 33% of that sum as down payment and a similar percentage upon delivery of half of the goods, and the balance at full delivery. The contract was valid for 21/2 months renewable by consent of both parties. On the same day indicated in the contract, SEPU issued a cheque for **Kshs. 75,086,880** to Vulcan.

A few days the Commission rushed to the Chief Magistrate's Court at Kibera vide **Misc. Criminal Application No. 233 of 2009** and obtained orders that froze two of Vulcan's accounts held at the Westlands branch of the Southern Credit Commercial Bank. The Commission took that action to preserve the down payment which it considered to have been a misappropriation of public funds. Vulcan contended that the said action was *"illegal, high handed, unwarranted and amounted to harassment and, a blatant abuse of power by the Commission"* which caused Vulcan to *"loose (sic!) the interest and the opportunity to utilize and/or invest the funds by way of bonds, shares or other business"* of its choice. And it claimed damages.

It further averred that it imported chemicals and laboratory equipment worth Kshs. 94,279,202 but SEPU unreasonably declined to accept delivery, for the reason that the supply contract was under investigation by the Commission and would not go on with the transaction unless it was cleared by it. Vulcan complained that this was illegal, malicious and unwarranted, and was in breach of the contract which caused it to suffer substantial damages (sic). It listed particulars of the illegality, breach and malice by SEPU, and claimed damages.

SEPU's refusal to take delivery caused Vulcan to consume the goods and to store them at Express Kenya Limited, thereby incurring insurance and storage charges of **Kshs. 43,848** and **Kshs. 275,073.12** per month respectively. It would be caused irreparable damage and prejudice for various reasons including that the goods were marked, at SEPU's request, with the words *"Ministry of Education, Not for Sale,"* and so could not be sold to third parties.

Vulcan went on to state that the Commission's freezing of its accounts was illegal, malicious and meant to embarrass and intimidate it as it particularized, and claimed damages from the Commission. The Commission had also through the Attorney General commenced criminal proceedings against Vulcan and its directors charging it with conspiracy to commit an offence of corruption, and fraudulent acquisition of public property under the **Anti-Corruption and Economic Crimes Act** (ACECA), which proceedings Vulcan complains were illegal, unconstitutional, unfounded and in bad faith.

In separate defences, SEPU and the Commission, while admitting the description of the parties contained in the plaint, added that SEPU

was a semi-autonomous Government Agency, which was therefore a public body funded by public funds, and whose functions and operations were subject to the **State Corporations Act Cap, 446** of the Laws of Kenya. They stated that SEPU's decision not to receive the goods subject of the contract, which it communicated to Vulcan, was on account of investigations into the validity and legality of the contract based on complaints that there was misappropriation of public funds through breach of public procurement requirements as contained in the **Public Procurement and Disposal Act, 2006** (PPDA). Those investigations were within, and in fulfilment of the Commission's statutory mandate, and led to the arrest and prosecution of officers of SEPU and directors of Vulcan, with various corruption offences under ACECA. The contract was characterized as part of a scheme to defraud public funds.

In addition, the Commission mounted a counterclaim stating that certain officers of SEPU had conspired with Vulcan to defraud the former of funds through a purported direct procurement, and purported constitution of a tender committee to award the contract in violation of the law and without authority. All those actions were irregular, illegal fraudulent, and against public policy, particulars whereof were pleaded.

They included constituting a tender committee including unqualified members; deliberating on the procurement of the said goods and awarding the tender without a valid resolution and authority contrary to the provision of the PPDA; payment of **Kshs. 75,086,450** based on an invalid contract, which constituted use of public revenue for goods not supplied; fraudulent acquisition of public property; unjust enrichment; and wilful failure to comply with the law relating to public procurement, contrary to provisions of ACECA. The Commission accordingly prayed for judgment against Vulcan, for a declaration that the contract was a nullity *ab initio* and for restitution of the sum of **Kshs. 75,086,880** already received, plus interest thereon which it was prayed its bankers be compelled to release to the Commission.

By the time the matter went for trial before Ong'udi, J. a Judicial Review Application filed by Vulcan being **H.C Misc. Application No. 87 of 2010** seeking to stop the criminal proceedings, had been heard and dismissed. The criminal trial had been concluded with the Anti-corruption court finding the accused persons guilty and convicting them of the offences of corruption. They all appealed to the High Court (Kimaru, J.) but the appeals were also dismissed, save for those of Vulcan and its director, whom the judge absolved of criminal liability and acquitted. See ***BENSON ANYONA OMBAKI & 5 OTHERS vs. REPUBLIC [2015] eKLR.***

The suit proceeded to hearing before the learned Judge who took oral evidence from the parties before rendering her impugned judgment. The Commission and SEPU were dissatisfied with the said judgment.

They filed notices of appeal and records of appeal. The grounds of appeal, though separate, are not dissimilar and can be summarized that the learned Judge erred by;

- ***Finding that a valid contract existed between SEPU and Vulcan when the same was null and void for want of specificity and tainted by fraud and/or illegality.***

- ***Failing to find that there was collusion and conspiracy between officers of SEPU and directors of Vulcan to defraud the public.***

- ***Holding that the aggrieved parties did not plead fraud or undue influence against Vulcan and SEPU's officers.***

- ***Failing to appreciate Vulcan's responsibility to comply with the provisions of PPDA which were binding and not merely SEPU's internal procedures.***

- ***Misapplying TURQUAND'S Rule.***

- ***Failing to find that the monies paid to Vulcan were illegally paid.***

- ***Failing to find that Vulcan failed to mitigate its losses.***

- ***Awarding damages to Vulcan without proof.***

It was thus prayed that the judgment be set aside, the suit by Vulcan be dismissed, and the Commission's counterclaim be allowed.

Before the hearing of the appeal the parties filed written submissions and bundles of authorities which their respective counsel relied on at the hearing of the two appeals which we ordered to be consolidated hence this single judgment.

Going first, **Mr. Murei**, counsel for the Commission stated that a corrupt scheme was hatched and executed on two days in mid-July 2009. On 15th of that month, a Finance and Special Purpose Committee of SEPU met and agreed to proceed with procurement of the goods subject of this litigation using either its normal procurement procedures or contact the Ministry of Education for further guidance. The Ministry had, in June of that year, accepted a proposal by SEPU through its managing director one Benson Anyona, to manufacture, produce and supply science equipment, chemicals and teaching aids to selected secondary schools. Indeed, a cheque for **Kshs. 261,326,352** was issued to SEPU on 30th June 2009.

Immediately after that committee meeting ended, a purported Special Tender Committee meeting was held with four people in attendance inclusive its chairman, which purported to approve direct procurement and to choose Vulcan as the supplier. It was contended that the Tender Committee, with one of its members being the gateman, was improperly constituted contrary to **Regulation 12(2)** of the Public Procurement and Disposal Regulation (PPDR) and the purported choice of Vulcan as supplier was improper, and contrary to **section 26(3)(c)** of the

PPDA, which requires that procurement initiation, proceeding, receipt of goods, works and services be handled by different offices. It is the Procurement Committee that should have identified the supplier.

Described as *an incredible frenzy of activities* in those two days, a payment voucher was prepared for a total of items costing **Kshs. 75,086,88,** a cheque for which amount was delivered to the officers of Vulcan by SEPU's Managing Director himself. At about this point, the Commission commenced investigations and obtained orders freezing Vulcan's accounts. Mr. Murei submitted that on hearing of the Commission's investigations, Vulcan and SEPU entered into a sham agreement for the supply of unspecified goods, for which SEPU was required to pay 33% of the contract sum immediately upon signing of the agreement. That percentage would have translated to **Kshs. 74,834,908,** but what was in fact paid was **Kshs. 75,086,908.** Counsel contended that the purported contract was an afterthought and also illegal as the conditions for direct procurement were not met. It contravened **sections 45A(1)** and **(2)** of ACECA for requiring advance payment for goods not delivered and **Regulation 39** which required that there be negotiations in writing. The contract was vague and all the illegal acts by officers of SEPU and Vulcan pointed to collusion.

Mr. Murei faulted the learned Judge for stating that fraud and illegality were not pleaded when they clearly were, and for describing the legal provisions regarding procurement as *internal regulations of SEPU*, which they were not. They were laws of Kenya governing SEPU as a wholly government-owned company bound by PPDA, about which Vulcan could not plead ignorance. He urged that the acquittal of Vulcan or appeal is not binding.

Counsel further criticized the learned Judge for ordering some **Kshs. 94 million** to be paid to Vulcan without any basis, and for awarding it **Kshs. 50 million** damages which was wholly unwarranted as there can be no general damages for breach of contract. Moreover, Vulcan ought to have, but failed to mitigate its loses. He concluded by urging that having found that the **Kshs. 75,086,880** was criminally paid, the learned Judge ought to have, but improperly failed to allow the Commission's counterclaim. He rested by referring us to his bundle of authorities.

Sepu's learned counsel **Mr. Karongo** fully associated himself with Mr. Murei's submissions and added that the learned Judge was in error not to find that as at the time Vulcan purported to be ready to deliver the goods in December of 2019, there was no valid or enforceable contract as the contract signed between SEPU and Vulcan was of 21/2 months and had expired. He also questioned the award of **Kshs. 50 million** in damages which are not only without basis in law, but were not even pleaded; and of **Kshs. 5 million** for insurance when what Vulcan sought was **Kshs. 1.5 million**. He cast blame on Vulcan for not selling what goods they may have had, upon learning that the Commission was investigating the transaction so as to mitigate its loses.

He cast doubt on the very existence of the goods, any way as it was on record that when Pascal Mwea, an investigator with the Commission visited the warehouse where they were allegedly stored, he did not see or find any such goods. Counsel concluded by positing that Vulcan did not deserve the judgment it obtained.

Answering those submissions, learned counsel for Vulcan, **Mr. Mogere** started by stating that no finding was made against the Commission, and it was not privy to the contract. He therefore urged us to view its appeal with suspicion. Extolling the rule in TURQUAND's case ***ROYAL BRITISH BANK vs. TURQUAND [1843-60] ALL E.R.)*** as one that had stood for 160 years, he posed the question *whether Vulcan should suffer for SEPU's failure to abide by its internal management proceedings*. He defended the speed with which the award and payment were made as not a cause for any suspicion since the Committee and the Board Meetings alluded to the urgency that justified speed. He reiterated that if there was any illegality it was committed by SEPU not by Vulcan, as there was absolutely nothing it could have done to influence the composition of SEPU's committee. He urged that there was an absurdity in SEPU's failure to respect its own internal procedures yet expect third parties to enforce them. To him, the present case was classic TURQUAND.

Counsel contended that neither ACECA nor PPDA impose any responsibility or burden on a supplier of goods. SEPU might have a valid claim against its officers, but it is not released from its contractual obligations to third parties. He also defended the contract from attacks that it was vague and brief, as that did not amount to illegality of the contract. Nor was a request and receipt of down payment, which was the proper thing to do commercially.

In answer to our question on whether general damages should have been awarded, Mr. Mogere conceded, as he had to, that they were not recoverable. He also ventured that Vulcan attempted to sell the goods when SEPU declined delivery so as to mitigate loses, but was unable to do so.

Making a brief rejoinder, Mr. Murei stated that the illegality, of the contract was not confined to the composition of the Tender Committee. He also cast doubt on Vulcan's plea that it had nothing to do with SEPU's internal mechanisms by pointing out that on its application for mandatory injunction, it had annexed minutes of the General Purposes Committee, yet these had not been supplied to them by the Commission, indicative that it was closely connected with the internal goings on at SEPU.

I have gone to great lengths to set out the case as was before the learned Judge, as well as the submissions of counsel on contested points which are also discernible from the record. This is in appreciation that on a first appeal, we proceed on the basis of a re-hearing and are charged to subject the entire evidence to a fresh and exhaustive reappraisal and re-evaluation and to draw our own inferences of fact and come to independent conclusions. We do so cognizant that we are confined to the cold letter of the record and have not had the advantage the trial Judge had, of hearing and observing the witnesses as they testified, for which we make due allowance. See **Rule 29(1)** of the Court of Appeal Rules;

SELLE vs. ASSOCIATED MOTOR BOAT CO/ LTD; [1968] EA *and* ***PETERS vs. SUNDAY POST LTD [1958] EA 424.***

Having carefully considered the record, the rival submissions made and the authorities cited before us, it seems to me that the following issues are determinative of this appeal;

(a) Whether there was a valid, enforceable supply contract between SEPU and Vulcan.

(b) Whether the procurement statute and regulations were binding upon Vulcan.

(c) Whether Vulcan was entitled to Kshs. 94,279, 202 as awarded

(d) Whether Vulcan was entitled to Kshs. 50,000,000 general damages.

(e) Whether Vulcan was entitled to Kshs. 5,000,000 as accrued insurance premiums.

The fulcrum of the appeals by the Commission and SEPU is the contention that there was no valid and/or enforceable contract between SEPU and Vulcan as what passed for a contact was a sham and an afterthought contrived to mask the unlawful payment of **Kshs. 75,086,880** to Vulcan. I have studied the said contact which is remarkable for its brevity and absolute lack of details, terms and conditions that would reasonably be expected of a contract valued at nearly a quarter of a billion shillings, a colossal sum by any standards. Even though the said document, strangely titled *"Contract agreement"* is three pages in length, the first page is merely the cover page bearing the names of the parties and the last page is for their signatures, leaving the second page with a total of three unnumbered clauses only as follows;

"WHEREAS

Vulcan Lab Equipment Ltd is able to supply the consignment in full as per terms and conditions defined in this contract. The supplier having presented to school Equipment Production Unit that has the capacity and professional skills to supply proper material as agreed and stated later in this document.

IT IS HEREBY AGREED AS FOLLOWS:

The terms of agreement and assignment of this contract is valid from 16th July, 2009 for a period of 2 ½ months as it deems fit and can be renewed at the dissemination of the client subject to agreement of both parties.

The agreement expires once upon both parties discharge their obligation.

CONDITIONS AND TERMS OF PAYMENT

School Equipment Production Unit shall pay 33% down payment of the total sum of contract of Kshs. 226,772,450 (VAT inclusive) 33% on delivery of 50% of the total goods and the remaining upon delivery in full of the items and documentation entered properly subjected to quality agreed. It is agreed that if the supplier is guilty of any misconduct or any serious breach of agreement or neglect, or fail or refuses to carry out his supplies, SEPU may summarily disengage without notice."

I think, with respect, that the complaint that the contract was vague is unanswerable. It does not contain in its short body, particulars, specifications or quality of goods to be provided. Nor is there a schedule or annexture to it providing that crucial information or any reference to the pro forma invoice that Vulcan had presented to SEPU. The contract having been in writing, there was not room for further or extrinsic material to beef it up or lend it the specificity was so patently devoid of.

The clause on conditions and terms of payment makes reference to the 33% down payment of the contract sum of **Kshs. 226,772,450** which is the first and only time the contract sum is mentioned. There is no telling how the same is arrived at. The term on down payment was on the face of it illegal, in that **section 45(2)(a)(ii)** of ACECA criminalizes fraudulent payment for goods not supplied. The contract requiring the down payment, signed by both parties, facially revealed a conspiracy to commit an offence. Indeed, it is a case of blatant distortion and violation on the law on procurement, for SEPU to have entered into a contract under which it was gifting Vulcan money with which to procure and sell goods to SEPU. This goes against the expectation, expressed in the contract itself, that Vulcan had *"the capacity and professional skills"* to supply the goods. In verity, Vulcan did not have the financial capacity, a fact made poignantly clear by the fact that the cheque for **Kshs. 75,086,880** was paid into an account held by Vulcan that was in fact overdrawn.

The contract was also illegal for being entered into in breach of various provisions of the PPDA and the PPDR. I think that the whole rushed process reeked of corruption and blatant illegality. I need not go into a detailed narration of the litany of misdeeds that SEPU officers committed for the benefit of Vulcan. The General Tender Committee that approved the use of direct procurement was not quorate in that it had only 4 members when **Regulation 12(2)** of the PPDR sets the quorum at 5 members, including the chairman. The numbers aside, it is ready a distortion of the process in a tragic-comic way, for SEPU officers to have literally assembled a team in a hurry that included its gateman, who was obviously unqualified to sit on the Committee. For semi-autonomous Government agencies such as SEPU, the PPDR required that members of the Tender Committee be heads of departments or persons in equivalent positions.

Moreover, there not having been actual or imminent threat to public health, welfare, safety or damage to property, there was no basis for the extreme urgency to warrant the route of direct procurement. A procuring entity is under **Regulation 62** required to notify the Public Procurement Oversight Authority of the decision and justification for using direct procurement under **Regulation 62** of the PPDR, and in the present case the oversight authority very categorically opined that there was breach of procurement procedure in the transaction.

As if those infirmities were not enough, it is not dispute that whereas the contract provided that its duration was for 2 1/2 months, which expired at the end of September 2009, the goods subject thereof had not been supplied. Indeed, Vulcan admitted that the goods were ready for collection in December, which was long after the contract had expired by effluxion of time without any extension having been agreed upon or effected. That means that by the time Vulcan was suing, there was no enforceable contract and it had failed to deliver within time.

I could add a lot to that catalogue of corruption-fuelled errors, but I am content to mention only that the payment of **Kshs. 75,086,880** by a cheque hurriedly prepared and then delivered by SEPU's Managing Director personally in fact had nothing to do with the 33% stipulation for down payment. Simple arithmetic shows that 33%, even had it been lawful, which it was not, would have been **Kshs. 74,834,908.** This is further token of the collusion and cover-up that attended the preparation and execution of the contract. It was all in furtherance of a corrupt scheme, which was obviously against public policy.

Indeed in ***BENSON ANYONA OMBAKI & 5 OTHERS*** (supra) Kimaru, J. was very categorical that the procurement process, at the centre of an attempted sanitization of which was the contract, was both illegal and criminal:

> ***"This Court therefore holds that the entire procurement process was tainted with illegality. In fact it was criminal. Therefore when the 1st to 4th appellants made a prepayment to the 6th appellant, they were compounding an illegal and criminal act that commenced when the direct procurement process was put in place by the 1st appellant. The law did not allow the appellants to make a prepayment of such a colossal sum of money when in fact no goods had been supplied. It was clear to the court that the 1st to 4th appellants were financing the 6th appellant to supply the science equipment. The 5th and 6th appellants explained that they gave condition to SEPU to be paid the advance sum of 33% of the total cost before they could supply the equipment. The 1st to 4th appellants ought to have known or indeed were presumed by the law to know that they were not supposed to pay an advocate payment before the goods were supplied. The court therefore holds that the prosecution did prove to the required standard of proof beyond reasonable doubt that the 1st to 4th appellants fraudulently paid to the 6th appellant the said sum of Kshs. 75,086,880."***

It has not been suggested that there was an appeal from that judgment, and I take it that the finding of illegality and criminality of the procurement process, and by necessary extension the contract in purported signification of it, is a settled judicial finding.

This Court has been consistently categorical that it will not aid those who would seek to use the judicial process to enforce contracts that bear the blight and blemish of corruption or illegality, and are against the public interest. I need do no more than reiterate what this Court, comprising a bench on which I sat, stated in ***KENYA PIPELINE CO. LTD vs. GLENCORE ENERGY (UK) LTD [2015] eKRL:***

> ***"In STANDARD CHARTERED BANK vs. INTERCOM SERVICES LTD & 4 OTHERS (supra), this Court, differently constituted, accepted the submissions made that once an issue of a breach of a statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the Court must investigate it because the court's fundamental role is to uphold the law. The court upheld and endorsed the old English case of HOLMAN vs. JOHNSON (1775-1802) ALL ER 98 where Chief Justice Mansfield stated;***
>
> ***'The principle of public policy is this:***
>
> ***Ex dolo malo no ovitur action. No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.***
>
> ***We respectfully agree with that pronouncement of the law that still speaks unmistakably more than two centuries later. What the English courts could not do to assist a lawbreaker, Kenyan courts and court anywhere should not do.***
>
> ***There is a consistent line of decisions of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succour and has refused to be an instrument of validation for such persons. We still refuse. See MISTRY AMAR SINGH vs. KULYBYA [1963] EA 408, HEPTULA vs. NOOR MOHAMMED [1984] KLR and FESTUS OGADA vs. HANS MOLLIN (supra). In the last case the Court stated, and we are content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality."***

In ***BLUE SEA SHOPPING MALL LTD vs. CITY COUNCIL OF NAIROBI & 3 OTHERS [2015] eKLR*** this Court, differently constituted, authoritatively held that a contract entered into in a procurement process that is flawed for violating the PPDA is striken by invalidity and illegality and cannot be given effect by the courts. See also **PIUS KIMAIYO LANGAT vs. CO-OPERATIVE BANK OF KENYA LTD [2017] eKLR.**

It seems to me quite elementary that where a supplier enters into a contract that is in clear and egregious violation of the provision of the PPDA, such as in the instant case, it cannot lie in his mouth to say that he was unaware of such violations, or that the consequences of infirmity and unenforceability should not be visited upon him. I am not persuaded that Vulcan was a virtuous virgin corrupted by a crafty and vicious suitor. Indeed, the reverse may in all probability be true, as it was the direct beneficiary of all the nefarious machinations that subverted and made nonsense of procurement law. The question of whether Vulcan was bound by the statute law and regulations appears to me to be easily answered in the affirmative, on statutory authority. **Section 27(4)** of the PPDA provides in express terms that contractors, suppliers or consultants shall comply with all of its provisions. It follows therefore that in accepting direct procurement in the absence of the conditions spelt out in the PPDA, instead of the normal competitive process; in accepting the sum of **Kshs. 75,086,880** which was a forbidden advance payment for goods not delivered; in proceeding with the contract without written negotiations; Vulcan went beyond being an innocent party to being an active participant in the violation of the mandatory provision of the PPDA, the PPDR and ACECA. It was not ignorant of the law that it deliberately breached. Moreover, such ignorance, had it been the case, could never have been a defence available to it.

Given those clear statutory commands, I find it to be wholly unsatisfactory, and quite puzzling, that the learned Judge minimized the

breaches by both SEPU and Vulcan and christened the provisions as SEPU's internal procedures, compliance with which Vulcan did not have to enquire into. With great respect, I find this to have been a patent misdirection which must be reversed. In arriving at that curious conclusion, the learned Judge placed much reliance on the old English case of TURQUAND (supra) and the rule enunciated therein, otherwise referred to as the "indoor management rule." She cited a passage from **CHINA WU YI CO. LTD Vs. EDERMANN PROPERTY LTD & 2 OTHERS [2013] eKLR** where the rule was applied to the effect that a third party dealing in good faith with a company, need not enquire into the regularity of such company's internal proceedings and to assume, essentially, that the company has complied with all internal regulations.

Whereas I see the practical necessity and the patent utility of the rule, for to hold otherwise would be to unduly clog the commercial interaction between companies and third parties, and unduly burden the latter with the duty to make inconvenient, lengthy and probably unsuccessful inquiries or investigations into internal procedures of companies, I cannot accept that such third parties are in any way absolved from the duty to be satisfied that the rather obvious relevant statutory requirements have been met. I would therefore hold that the authorities cited by Vulcan including ***KREDIT BANK CASSEL GMBH – Vs. SCHENKERS [1927] ALL ER 421*** and ***EAST AFRICAN SAFARI AIR LIMITED Vs. ANTHONY KEGODE & ANOTHER [2011] eKLR,*** are distinguishable.

My thinking on this matter aligns with that of the South African Supreme Court of Appeal's decision in ***TEB PROPERTIES CC Vs. THE SCIENCE DEVELOPMENT, NORTH WEST (792/10) [2011] ZACA 243***.

The leading judgment Petse AJA (with Lewis and Bosielo JJ.A concurring) set out the frontiers of the Turquand Rule to the effect that it cannot apply to statutory edicts:

> ***"To my mind the concession made by the appellant that the Turquand rule only operates in favour of third parties who act in good faith and does not avail a third party who knew that the internal formalities had not been complied with, or was put on inquiry which he failed to make, is fatal to the appellant's argument on this score. I say this because in Eastern Cape Provincial Government and Others vs. Contract props 25 (Pty) Ltd [2001] 4SA 142] which concerned the validity of two lease agreements of immovable property concluded without any reference to the provincial tender board – and thus peremptory statutory prescripts – this court said the following" This is not a case in which "innocent" third parties are involved. It is a case between the immediate parties to leases which one of them had no power in law to conclude and had been deprived of that power (if it ever had it) in the public interest. The fact that respondent was misled into believing that the department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were ultra vires the powers of the department and they cannot be allowed to stand as if they were intra vires."***

It is my unhesitating conclusion that the learned Judge misapplied the Turquand Rule and that Vulcan's attempts to rely on the same before us must necessarily fail.

Having come to those conclusions regarding the existence of a valid contract and the binding, peremptory character of procurement laws upon Vulcan, the conclusion is inevitable that the learned Judge fell into error in awarding it the sum of **Kshs. 94,279,202,** which Vulcan said was the value of the goods it procured but SEPU declined to take delivery. The learned Judge granted that prayer on the basis that SEPU's refusal to accept the goods amounted to breach of contract. As there was no valid contract, that basis for payment would not lie, and I would set it aside. I do not think it is necessary for my decision on this point to engage in a laboured interrogation of whether Vulcan should have taken steps to mitigate its loses, save to say that it ought, as a matter of practical business sense, to have done so. See ***CAPITAL FISH KENYA LTD Vs. THE KENYA POWER & LIGHTING CO. LTD [2016] eKLR***.

I am of the view that Vulcan's arguments that it could not otherwise dispose of the goods because they were marked *"Ministry of Educatation, Not for Sale"* ring hollow in the absence of any evidence that they were required to, and did in fact so mark the goods. At any rate, the argument is dealt a fatal blow by Vulcan's own contention that the self-same goods were later sold by Express Kenya Limited, to recover storage charges. For the same reason, the **Kshs. 5,000,000** allegedly for insurance premiums was not recoverable and should be set aside.

Regarding the **Kshs. 50 million** awarded to Vulcan, as general damages for breach of contract, it was so plainly wrong and inexplicable that Mr. Mogere made no effort to defend it, and promptly conceded the point. Beyond the fact that the learned Judge literally plucked the altogether fantastic sum from the air, with no effort to justify it, the error lay more fundamentally on the award of any sum as general damages for breach of contract. I think I can do no better than quote *in extenso* what my learned colleagues and I stated in **KENYA *TOURIST DEVELOPMENT CORPORATION Vs. SUNDOWNER LODGE LIMITED* [2018] eKLR** on our way for setting aside another award of general damages for breach of contract.

> **"With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case; as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In NDARAMSHI (K) Vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) Vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination."**

The upshot of my consideration of this appeal is that the contract between Vulcan and SEPU having been vitiated by the obvious fraud which the Commission pleaded and particularized, but the learned Judge wrongly held otherwise, and on the strength of the binding provisions of the relevant statutes which were breached by the parties thereto, Vulcan did not deserve any of the monies it was awarded by the court below. The claim proceeded from corrupt adventurism, and that court ought to have firmly rejected it.

I would allow the appeals by the Commission and SEPU, and set aside the judgment of the High Court in so far as it granted any money decree to Vulcan. I would substitute therefor an order dismissing its suit in entirety. I would grant the costs of the suit and of these appeals, to the Commission only as SEPU was not blameless, to be borne by Vulcan.

As Ouko (P) and Murgor JA agree, it is so ordered.

Dated and Delivered at Nairobi this 19th day of June, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 197 OF 2018

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION ……..… APPELLANT

AND

VULCAN LAB EQUIPMENT LTD ……...……..…. 1ST RESPONDENT

SCHOOL EQUIPMENT PRODUCTION UNIT ……..... 2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 354 OF 2018

BETWEEN

SCHOOL EQUIPMENT PRODUCTION UNIT …….…..….. APPELLANT

AND

VULCAN LAB EQUIPMENT LTD ……...……..…. 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION... 2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ong'udi, J.) dated 7 December, 2017

in

ACEC No. 27 of 2017

Formerly

HCCC NO.110 OF 2010)

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CONCURRING JUDGMENT OF OUKO, J.A

I have had the benefit of reading the judgment of the Hon. Mr. Justice Patrick Kiage, J.A. in draft. I entirely concur with his findings and I have nothing useful to add.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. OUKO, P

……..……..

JUDGE OF APPEAL

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****

CONCURRING JUDGMENT OF MURGOR, J.A

I have had the advantage of reading in draft the judgment of my learned brother Kiage, J.A. I entirely concur with his findings and I have nothing useful to add.

Dated and delivered at Nairobi this 19th day of June, 2020.

A. K. MURGOR

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JUDGE OF APPEAL