RADIANT INSURANCE COMPANY LTD v. UNIVERSITY OF RWANDA

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00042/2019/CA (Kanyange, P.J.) 25 Gicurasi 2019]

Amategeko agenga itangwa ry'amasoko – Avansi yo gutangira imirimo – Inshingano z'umwishingizi mu gihe yishyujwe n'uwatanze isoko – Umwishingizi ntiyakwitwaza ko atakwishyura uwatanze isoko avansi yo gutangira imirimo ngo kuko imirimo yakozwe irenze agaciro ka avansi yatanzwe kuko avansi yo gutangira imirimo ari amafaranga ahabwa uwatsindiye isoko kugira ngo abashe gushyira mu bikorwa isoko yatsindiye, ko nta gice cy'umurimo runaka ayo mafaranga aba yishyuriwe ku buryo yafatwa nk'ubwishyu.

Amategeko agenga itangwa ry'amasoko – Inyandiko y'ingwate – Umwishingizi ntashobora kuvuga ko garantie yatanze idashamikiye ku masezerano y'ibanze ngo yange kwishyura uwatanze isoko kandi garantie itangwa mu masoko ya Leta cyangwa y'abantu ku giti cyabo itandukana n'ubwishingizi (cautionnement), kuko inshingano zishingiye kuri garantie ziba zihagije, zidasaba kuba zishingiye ku yandi masezerano yafatwa nk'ay'ibanze.

Amategeko agenga amasezerano – Amasezerano y'ingwate – Impamvu zishobora gutuma amasezerano y'ingwate atubahirizwa – Mu gihe uwatanze isoko yemeranyijwe na rwiyemezamirimo igihe avansi y'imirimo izatangira gukatwa kandi n'umwishingizi nk'umunyamwuga akaba abizi, ntibyafatwa nk'uburiganya (fraude) cyangwa abus manifeste mu gihe bitagaragarira buri wese bidasabye ko n'umucamanza ko asesengura amasezerano y'ibanze.

Amategeko agenga amasezerano – Indishyi zijyanye no kutubahiriza amasezerano – Indishyi zo kutubahiriza amasezerano ntizitangwa mu gihe hatagaragazwa ishingiro ryazo cyangwa uzisaba agaragaze igihombo gifatika byamuteye cyangwa ngo agaragaze uko yabaze ibyo yatakaje.

Incamake y'ikibazo: JV EXERT ENGINNEERING GROUP Ltd & CHEON KWANG ENGINNEERING AND CONSTRUCTION Co Ltd (JV) yagiranye na Kaminuza y'u Rwanda amasezerano ya ''design and Build of a five level veterinary laboratory complex'', Radiant Insurance Company Ltd yishingira iyo avansi y'imirimo.

Kaminuza y'u Rwanda yaje gusesa amasezerano y'isoko ivuga ko rwiyemezamirimo atayubahirije, ihita inandikira Radiant Insurance Company Ltd iyisaba kwishyurwa ingwate ya avansi yo gutangira imirimo kuko amasezerano yari yagiranye rwiyemezamirimo yasheshwe, inayishyikiriza raporo y'agaciro k'imirimo yakozwe.

Radiant Insurance Company Ltd yasubije Kaminuza y'u Rwanda ko ntacyo iyigomba ishingiye kuko imirimo yakozwe ifite agaciro karenze ingwate yayihaye nk'uko yabigaragaraje muri raporo yayishyikirije.

Kaminuza y'u Rwanda yaregeye Urukiko rw'Ubucuruzi rwa Nyarugenge irusaba kuyitegeka kwishyura ingwate ya avansi yo gutangira imirimo yishingiye; maze urukiko rwemeza ko ikirego cyayo nta shingiro gifite kuko avansi yarakoreshejwe mu mirimo y'isoko; bityo ko nta mpamvu ihari yatuma ingwate ifatirwa.

Kaminuza y'u Rwanda yajuriye mu Rukiko Rukuru rw'Ubucuruzi, ivuga ko Umucamanza wa mbere yakoze amakosa yo kwemeza ko avansi itagomba gusubizwa agendeye ku kuba yarakoreshejwe ibyo yagombaga gukora, maze rwemeza ko ikirego cyayo gifite ishingiro; ko imikirize y'urubanza rwajuririwe ihindutse, rutegeka Radiant Insurance Company Ltd kwishyura Kamunuza y'u Rwanda 527.117.404 Frw yishingiye kuri avansi yo gutangira imirimo, n'indishyi zingana na 5.271.174 Frw.

Radiant Insurance Company Ltd yajuririye urwo rubanza mu Rukiko rw'Ubujurire,ivuga ko hasuzumwa niba amafaranga y'ingwate ya avansi yo gutangira imirimo kimwe n'indishyi bigomba kwishyurwa, kuko isanga Urukiko Rukuru rw'Ubucuruzi rwarasesenguye nabi amategeko. Kaminuza y'u Rwanda yo ivuga ko ayo mafaranga y'ingwate agomba kwishyurwa nk'uko Urukiko Rukuru rw'Ubucuruzi rwabyemeje, kuko nta makosa rwakoze mu gusesengura amategeko.

Incamake y'icyemezo: 1. Umwishingizi agomba kwishyura uwatanze isoko akibimusaba avansi yo gutangira imirimo ntakwitwaza ko imirimo yakozwe irenze agaciro ka avansi yatanzwe kuko avansi yo gutangira imirimo ari amafaranga ahabwa uwatsindiye isoko kugira ngo abashe gushyira mu bikorwa isoko yatsindiye.

2. Indishyi zo kutubahiriza amasezerano ntizitangwa mu gihe hatagaragazwa ishingiro ryazo cyangwa uzisaba agaragaze igihombo gifatika byamuteye cyangwa ngo agaragaze uko yabaze ibyo yatakaje.

Ubujurire bufite ishingiro kuri bimwe.
Amagarama aherereye ku uwajuriye.

Amategeko yashingiweho:
Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi.
Itegeko no 45/2011 ryo kuwa 25/11/2011 rigenga amasezerano.
Itegeko no 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta.

Imanza zifashishijwe:
Urubanza no RCOMAA 0055/2016/CS rwo ku wa 29/09/2017.
Urubanza no RCOMAA 0026/2018/CA rwo ku wa 08/02/2019.

Inyandiko z'abahanga zifashishijwe:
Christian Gavalda, Jean Stouffllet, Droit Bancaire, Lexis Nexis, Litec, 7e édition, p. 418.
Thierry Bonneau, Droit bancaire, 11e édition, LGDJ, p. 606.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rushingiye ku mafaranga ya avansi yo gutangira imirimo ingana na 527.177.044 Frw, JV EXERT ENGINNEERING GROUP Ltd & CHEON KWANG ENGINNEERING AND CONSTRUCTION Co Ltd (JV) yahawe na Kaminuza y'u Rwanda, ishingiye ku masezerano ya ''design and Build of a five level veterinary laboratory complex'', Radiant Insurance Company Ltd yishingira iyo avansi nk'uko bigaragazwa n'inyandio y'ingwate no RD001RCOA1404569/03032 yo ku wa 11/06/2014.

[2] Kuwa 07/07/2016, Kaminuza y'u Rwanda yasheshe amasezerano y'isoko ivugako rwiyemezamirimo atayubahirije, ku wa 28/07/2016, yandikira Radiant Insurance Company Ltd iyisaba kwishyurwa ingwate ya avansi yo gutangira imirimo kuko amasezerano yari yagiranye rwiyemezamirimo yasheshwe, inayishyikiriza raporo y'agaciro k'imirimo yakozwe kangana na 544.166.689,50 Frw. Ku wa 10/03/2017, Radiant Insurance Company Ltd ishingiye kuri iyo raporo, yandikiye Kaminuza y'u Rwanda iyimenyesha ko ntacyo iyigomba kuko imirimo yakozwe ifite agaciro karenze ingwate yayihaye, ko kubera iyo mpamvu avansi yatanzwe yakoreshejwe nk'uko amategeko abiteganya.

[3] Nyuma y'uko Kaminuza y'u Rwanda yongeye kwishyuza Radiant, nayo ikayandikira iyihakanira ko itazayishyura, yatanze ikirego mu Rukiko rw'Ubucuruzi rwa Nyarugenge irusaba kuyitegeka kwishyura ingwate ya avansi yo gutangira imirimo yishingiye, JV EXERT ENGINNEERING GROUP Ltd & CHEON KWANG ENGINNEERING AND CONSTRUCTION Co Ltd (JV) igobokeshwa muri urwo rubanza.

[4] Mu rubanza no RCOM 02087/2017/TC/NYGE rwaciwe ku wa 17/05/2018, Urukiko rw'Ubucuruzi rwa Nyarugenge rwasanze kuba avansi yarakoreshejwe mu mirimo y'isoko nk'uko bigaragazwa n'inyandiko Kaminuza y'u Rwanda yikoreye ubwayo, yerekana ko agaciro k'imirimo yose kangana na 544.166.689, 50 Frw, bigaragaza ko nta mpamvu ihari yatuma ingwate ifatirwa, rwanzura ko ikirego cyatanzwe na Kaminuza y'u Rwanda nta shingiro gifite, ruyitegeka kwishyura Radiant Insurance Company Ltd 600.000 Frw y'ikurikiranarubanza n'igihembo cya Avoka.

[5] Kaminuza y'u Rwanda yajuriye mu Rukiko Rukuru rw'Ubucuruzi, ku wa 07/12/2018 ruca urubanza no RCOMA 00442/2018/CHC/HCC, rusobanura ko Umucamanza wa mbere yakoze amakosa yo kwemeza ko avansi itagomba gusubizwa agendeye ku kuba yarakoreshejwe ibyo yagombaga gukora, rwanzura ko ubujurire bwa Kaminuza y'u Rwanda bufite ishingiro, ko imikirize y'urubanza rwajuririwe ihindutse, rutegeka Radiant Insurance Company Ltd kwishyura Kamunuza y'u Rwanda 527.117.404 Frw yishingiye kuri avansi yo gutangira imirimo, n'indishyi zingana na 5.271.174 Frw.

[6] RadiantInsuranceCompanyLtdyajuririyeurworubanzamuRukikorw'Ubujurire,ivuga ko hasuzumwa niba amafaranga y'ingwate ya avansi yo gutangira imirimo kimwe n'indishyi bigomba kwishyurwa, kuko isanga Urukiko Rukuru rw'Ubucuruzi rwarasesenguye nabi amategeko. Kaminuza y'u Rwanda yo ivuga ko ayo mafaranga y'ingwate agomba kwishyurwa nk'uko Urukiko Rukuru rw'Ubucuruzi rwabyemeje, kuko nta makosa rwakoze mu gusesengura amategeko.

[7] Iburanisha ryabereye mu ruhame ku wa 12/02/2020, ripfundurwa ku wa 14/05/2020 nk'uko byari byemejwe mu cyemezo cy'Urukiko cyo ku wa 05/05/2020, muri ayo maburanisha yombi Radiant Insurance Company Ltd ikaba yaraburanirwaga na Me KAZUNGU Jean Bosco,

Kaminuza y'u Rwanda iburanirwa na Me HABUMUREMYI Prosper mu iburanisha rya mbere, na Me CYUBAHIRO Fiat mu iburanisha rya kabiri.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO

1.KumenyanibaRadiantInsuranceCompanyLtdikwiyegutegekwakwishyura ingwate ya avansi yo gutangira imirimo.

[8] Uburanira Radiant Insurance Company Ltd, avuga ko impamvu ya mbere y'ubujurire irebana no kuba mu gika cya 22 cy'urubanza rujuririrwa, Urukiko Rukuru rw'Ubucuruzi rwaravuze ko sosiyete aburanira igomba kwishyura ingwate ya avansi yo gutangira imirimo ngo kuko ''avansi yo gutangira imirimo ari umwenda utanga isoko aba ahaye uwaritsindiye kugira ngo atangire akazi noneho akazagenda amukata uko amwishyuye cyangwa se mu buryo bumvikanyeho mu masezerano (...), byumvikana rero ko isoko ryarangizwa neza cyangwa ritarangizwa rigaseswa, avansi yo gutangira imirimo igomba gusubizwa, na cyane ko iramutse idasubijwe kandi rwiyemezamirimo yarahawe n'ikiguzi cy'isoko yatsindiye haba hiyongereyeho n'aya avansi atarashubijwe", ariko akaba atemeranya n'iryo sesengura, kuko hashingiwe ku biteganywa n'ingingo ya 88 y'Itegeko no 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta, iteganya ko ingwate ishobora gufatirwa yose cyangwa igice cyayo, bivuze ko avansi idasubizwa yose, ahubwo hakwiye gusuzumwa no guha agaciro ibyo yakoreshejwe hanyuma hakishyurwa ikinyuranyo, cyangwa kigafatirwa ku ngwate yatanzwe; ko Radiant Insurance Company Ltd yagaragaje ko avansi yatanzwe yakoreshejwe neza ku buryo imirimo yakozwe ifite agaciro kayiruta nk'uko bigaragazwa na raporo Kaminuza y'u Rwanda yatanze, bivuze ko ntacyo rwiyemezamirimo ndetse n'umwishingizi bakwiye kubazwa, ko ahubwo Kaminuza y'u Rwanda ishaka indonke (enrichissement sans cause) kuko ishaka kugumana iyo mirimo ikanasaba guhabwa avansi yatanze.

[9] Avuga kandi ko hashingiwe ku ngingo ya 89 y'Itegeko no12/2007 ryo kuwa 27/03/2007 ryavuzwe haruguru, Kaminuza y'u Rwanda yagombaga kugira amafaranga ikata kuri factures rwiyemezamirimo yayihaga, ko kuba mu masezerano yagiranye na rwiyemezamirimo, barumvikanye ko ayo mafaranga azakatwa kuva kuri facture ya gatatu, ibyo bitareba Radiant Insurance Company Ltd kuko itayasinyeho, ko ahubwo niba uwari ufite ubwishyu atariyishyuye kandi biteganywa n'Itegeko, bitagira ingaruka kuri Radiant Insurance Company Ltd hashingiwe ku ngingo ya 113 y'Itegeko rigenga amasezerano. Asanga kandi ibyo gukata amafaranga ku nyemezabuguzi za rwiyemezamirimo biteganywa n'ingingo ya 89, nta masezerano yabivuguruza (disposition imperative), kuko iteganya uburyo bwo kugaruza amafaranga ya Leta yatanzwe igihe kitaragera, ko rero amasezerano cyangwa igice cyayo bikozwe mu buryo bunyuranyije n'iyo ngingo, nta gaciro byahabwa mu mategeko.

[10] 10.Asobanura ko kuba mu masezerano y'ingwate, Radiant Insurance Company Ltd yarashingiye ku ngingo ya 51, agace ka gatatu, y'amasezerano y'isoko, bitavuze ko yari izi ko avansi izatangira gukatwa kuri facture ya gatatu, ahubwo yashingiye kuri iyo ngingo kuko ariyo iteganya ibya avansi yo gutangira imirimo, naho iby'uko avansi izatangira kwishyurwa kuri facture ya gatatu bikaba bivugwa mu ngingo z'ihariye z'amasezerano (conditions spéciales), Radiant Insurance Company Ltd itamenyeshejwe, bivuze ko yatanze ''garantie'' hari ibyo yahishwe, ko kandi ingingo ya 2 y'amasezerano y'ibanze ari yo igaragaza ibiyagize.

[11] Asanga kandi uwatanze isoko atakwitwaza ko afite ingwate ngo areke gukata amafaranga ya avansi yatanze, nta n'uburenganzira afite bwo gukata iyo avansi ahereye kuri facture ashatse kuko byaba binyuranyije n'ingingo ya 86 y'Itegeko no 12/2007 ryo ku wa 27/03/2007 rigenga amasezerano, bikananyuranya n'inyungu z'abagiranye amasezerano; ko asanga hashingiwe ku biteganywa n'ingingo za 64, 65 na 70 z'Itegeko rigenga amasezerano, Radiant Insurance Company Ltd atariyo ikwiye gusabwa kwishyura kuko habaye uburiganya.

[12] Asobanura kandi ko igihe uru rubanza rwaburanwaga, habayeho n'urubanza nshinjabyaha (RPA00696/2018/HC rwaciwe ku wa 15/11/2019) haregwa MUNYANEZA Félicien, Représentant légal akaba na Managing Director wa JV EXERT ENGINEERING GROUP LTD & CHEON KWANG ENGINEERING AND CONSTRUCTION Co LTD (JV) hamwe n'undi munya Kenya, baregwa gukoresha amafaranga y'isoko icyo atateganyirijwe; ko nubwo urwo rubanza rwaciwe nyuma y'urubanza rujuririrwa, hari ibidashobora guhinduka bitakwirengagizwa (faits constants) by'uko amafaranga yakoreshejwe neza, ko MUNYANEZA Félicien, Radiant Insurance Company Ltd yishingiye, atagomba kuyasubiza, akaba yibaza impamvu Radiant Insurance Company Ltd yamwishyurira. Asanga ahubwo Kaminuza y'u Rwanda yaratangiye urubanza nshinjabyaha yizeye ko MUNYANEZA Félicien azategekwa kwishyura amafaranga iregera ubu, ibonye bidakunze irega mu Rukiko rw'Ubucuruzi, ko icyo nacyo ari ikimenyetso cy'uko Radiant Insurance Company Ltd idakwiye kwishyura amafaranga Kaminuza y'u Rwanda iregera.

[13] Uburanira Kaminuza y'u Rwanda, avuga ko ibyo Urukiko Rukuru rw'Ubucuruzi rwashingiyeho mu gika cya 22 cy'urubanza rujuririrwa nta nenge bifite, kuko rwiyemezamirimo ahabwa avansi ntacyo arakora, akagenda ayishyura mu gihe yishyuza imirimo amaze gukora, agakatwa amafaranga kuri factures atanze kugeza arangije kwishyura amafaranga yose ya avansi.

[14] Avuga kandi ko ikigomba kurebwa muri uru rubanza, atari amasezerano yabaye hagati ya Kaminuza y'u Rwanda na rwiyemezamirimo kuko atariyo ikirego gishingiyeho, ko ahubwo harebwa amasezerano y'imberame (contrat unilatéral) Radiant Insurance Company Ltd yasinye, aho yashingiye ku ngingo ya 51 y'amasezerano y'isoko irebana na avansi, yiyemeza kwishyura nta mananiza 527.117.404 Frw Kaminuza y'u Rwanda ikimara kuyasaba nk'uko bigaragazwa n'inyandiko y'ingwate ubwayo (We, Radiant Insurance Company Ltd, as instructed by the contractor, agree inconditionally and irrevocably to guarantee as primary obligation and not as surety merely, the payment to University of Rwanda on his first demand without whatsover right of objection and without his first claim to the contractor, the amount not exceedind 527.117.404 Frw). Asanga kandi ingingo ya 89 y'Itegeko no 12/2007 ryo ku wa 27/03/2007 ryavuzwe haruguru yashingiweho mu guca urubanza rujuririrwa, yarakoreshejwe uko bikwiye.

[15] Akomeza avuga ko ibivugwa n'uburanira Radiant Insurance Company Ltd ko habayeho uburiganya (dol), ngo kuko itamenye ko avansi izatangira gukatwa rwiyemezamirimo kuva kuri facture ya gatatu, ko kandi binanyuranyije n'ingingo ya 89 y'Itegeko rigenga amasoko ya Leta, nta shingiro bifite, kuko amasezerano y'ingwate Radiant Insurance Company Ltd yasinye agaragaza ko yashingiye ku ngingo ya 51 y'amasezerano y'isoko (in accordance with the provision of the conditions of contract, clause 51 (advance payment) of the above mentioned contract), kandi iyo ngingo ivuga igihe avansi izatangirira kwishyurwa, bivuze rero ko Radiant Insurance Company Ltd itavuga ko itari ibizi, ko kandi itakwitwaza ko biri mu ngingo zihariye (conditions spéciales) kuko nazo ziba zigize amasezerano, ikaba yaragombaga kubirebera hamwe, ikaba rero itavuga ko yashingiye ku ngingo y'amasezerano itazi, mu gihe nyamara byari biteganyijwe mu ngingo ya

51,3 y'ingingo zihariye; ko usibye no kuba yari ibizi, kuba impande zakoranye amasezerano zaremeranyijwe ko avansi izatangira gukatwa kuri facture ya gatatu, ntaho binyuranyije n'Itegeko, kuko icyo ingingo ya 89 y'Itegeko rigenga amasoko ya Leta itegeka, ari uko habaho gukata amafaranga ya avansi kuri factures za rwiyemezamirimo, ikaba ariko itavuga ko bigomba gukorwa kuva kuri facture ya mbere, keretse ahubwo Radiant Insurance Company Ltd igaragaje ko abakoranye amasezerano bemeranyijwe ko nta gukata avansi bizabaho, kandi Kaminuza y'u Rwanda ikaba yari yakoze imibare y'uburyo avansi yose yishyuye izagaruzwa.

[16] Avuga kandi ko ntacyo Radiant Insurance Company Ltd yagombye kwitwaza yanga kwishyura ibyo yiyemeje, kuko amasezerano yasinye agaragaza ibintu bitatu by'ingenzi : kwishyura nta yandi mananiza, kwishingira avansi kugeza yose yishyuwe, kuba nta nzitizi n'imwe (pas d'objection) yashyira kuri Kaminuza y'u Rwanda, ibyo kandi bikaba bishingiye ku miterere y'ubwishingizi (garantie) yasinye. Asanga ahubwo Urukiko rw'Ubucuruzi rwa Nyarugenge rwaribeshye rujya gushakisha icyo avansi yakoreshejwe nk'uko na Radiant Insurance Company Ltd ibivuga, nyamara icyishingiwe atari icyo rwiyemezamirimo azakoresha avansi ahubwo hishingiwe ko azayishyura yose.

[17] Akomeza avuga ko ibivugwa n'uburanira Radiant Insurance Company Ltd, ko Kaminuza y'u Rwanda ishaka kwikungahaza nta mpamvu (enrichisseement sans cause), nta shingiro bifite, kuko nk'uko bisobanuwe mu gika cya 8 cy'urubanza rujuririrwa, hari 896.068.611 Frw yagaragaye nk'ikinyuranyo hagati y'amafaranga JV EXERT ENGINEERING GROUP LTD yari imaze kubona n'agaciro k'imirimo yari imaze gukora, bivuze ko hari amafaranga Kaminuza y'u Rwanda yishyuye ariko ntiyabona imirimo (contre partie), binavuze ko hari amafaranga yiyongereye kuri avansi yatanze.

[18] Asanga rero ibivugwa n'uburanira Radiant Insurance Company Ltd ashingiye ku ngingo za 64, 65 na 70 z'Itegeko rigenga amasezerano nta shingiro bifite, kuko nta buriganya (dol) cyangwa uburyarya Kaminuza y'u Rwanda yakoresheje, kandi amasezerano yasinye arasobanutse, ikaba yagombye kuyubahiriza.

[19] Ku birebana n'urubanza nshinjabyaha uburanira Radiant Insurance Company Ltd aburanisha, avuga ko rutavanaho ibyo Radiant Insurance Company Ltd yishingiye, kuko rwabaye hagati y'Ubushinjacyaha n'abarezwe, Kaminuza y'u Rwanda na Radiant Insurance Company Ltd bakaba batararubayemo ababuranyi, ngo habe hari icyemezo cyafashwe cyagira ingaruka ku byo Radiant Insurance Company Ltd yishingiye, ko ahubwo kuba Urukiko rwarasanze nta mafaranga MUNYANEZA Felicien agomba gusubiza, bishimangira inshingano ya Radiant Insurance Company Ltd yo gusubiza avansi atishyuye; ko no kuvuga ko Kaminuza y'u Rwanda yabanje kunyura mu nzira y'ikirego cy'inshinjabyaha ataribyo kuko atariyo yatanze icyo kirego, ikaba kandi itari iyobewe ko ko ari ikibazo cy'ubucuruzi kigomba gukemurwa n'inkiko z'ubucuruzi.

UKO URUKIKO RUBIBONA

[20] Ku birebana na avansi yo gutangira imiromo, ingingo ya 88 y'Itegeko no 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta ryakurikizwaga amasezerano hagati ya Kaninuza y'u Rwanda na rwiyemezamirimo asinywa, iteganya ko ‘ ‘ Uwegukanye isoko agomba gukoresha gusa avansi yahawe mu bikorwa bijyanye n'isoko. Iyo uwegukanye isoko akoresheje avansi yose

cyangwa igice cyayo mu bikorwa bindi bidafite aho bihuriye n'isoko, iyo avansi ihita ifatwa nk'umwenda ugomba kwishyurwa hafatiriwe ingwate yose cyangwa igice cyayo''.

[21] Ingingo ya 89 y'Itegeko rimaze kuvugwa iteganya ko ''Avansi yahawe uwegukanye isoko isubizwa hakoreshejwe ikatwa ry'umubare runaka w'amafaranga ku nyemezabuguzi zatanzwe kandi zemejwe. Igitabo cy'amabwiriza agenga ipiganwa giteganya ijanisha ry'amafaranga azagenda akatwa kugeza igihe avansi yose yishyuwe. Ingwate ya avansi isubizwa uwegukanye isoko mu minsi mirongo itatu (30) uhereye igihe avansi yose yatanzwe yishyuriwe''.

[22] Ku kibazo cyo kumenya niba ntacyo Radiant Insurance Company Ltd ikwiye kubazwa kuko agaciro k'imirimo rwiyemezamirimo yakoze karenze aka avansi yahawe, bikaba bivuze ko yakoreshejwe neza, Urukiko rurasanga nta shingiro bifite, kuko nk'uko byasobanuwe n'Urukiko rw'Ikirenga[1] bikanashingirwaho n'uru Rukiko mu rundi rubanza Radiant Insurance Company Ltd yaburanye na RAB[2,] avansi yo gutangira imirimo ni amafaranga ahabwa uwatsindiye isoko kugira ngo abashe gushyira mu bikorwa isoko yatsindiye, ko nta gice cy'umurimo runaka ayo mafaranga aba yishyuriwe ku buryo yafatwa nk'ubwishyu, ahubwo uko uwatsindiye isoko agenda yishyuza imirimo yakoze, agenda avanamo ingano runaka ya avansi nk'uko impande zakoranye amasezerano zabyumvikanye, akazarangiza kwishyuza imirimo yakoze yose, avansi yose isubijwe uwamuhaye isoko, ko rero kuba avansi isubizwa uwatanze isoko, itafatwa nk'ubwishyu kuri iryo soko.

[23] Nk'uko inyandiko y'ingwate ya avansi yo gutangira imirimo[3] ibigaragaza, Radiant Insurance Company Ltd yishingiye 527.117.404 Frw, inemera ko izayishyura ikibisabwa bwa mbere kandi nta kindi ishobora kwitwaza[4], mu gika cya nyuma cy'iyo nyandiko hakaba havugwamo ko iyo ngwate izagumana agaciro kugeza Kaminuza y'u Rwanda yishyuwe avansi yose[5].

[24] Urukiko rurasanga rero, kuba agaciro k'imirimo yari imaze gukorwa na rwiyemezamirimo kari karenze avansi yahawe nk'uko Radiant Insurance Company Ltd ibivuga, bitayivanaho inshingano yiyemeje mu nyandiko yasinye, kuko nk'uko byasobanuwe haruguru, avansi si ubwishyu ku buryo kuyisubiza byashingira ku gaciro k'imiromo yari imaze gukorwa, ahubwo nk'uko ingingo ya 89 yavuzwe haruguru ibiteganya, iyo avansi igomba gusubizwa uwatanze isoko nk'uko byanateganyijwe mu nyandiko y'ingwate (..untill UR receive full repayment of the same amont from the contractor). Urukiko rurasanga kandi ibivugwa na Radiant Insurance Company Ltd ko Kaminuza y'u Rwanda ishaka indonke kuko imirimo yakozwe iruta avansi yatanzwe, nta shingiro bifite, kuko rwiyemezamirimo atahawe avansi gusa, ahubwo yanahawe amafaranga y'imirimo yari amaze gukora.

[25] Ku kibazo cy'uko Radiant Insurance Company Ltd itakwishyura amafaranga iregwa kuko Kaminuza y'u Rwanda itakase avansi kuva kuri facture ya mbere rwiyemezamirimo yatanze,

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[1] Urubanza no RCOMAA 0055/2016/CS rwo ku wa 29/09/2017.
[2] Urubanza no RCOMAA 0026/2018/CA rwo ku wa 08/02/2019.
[3] *Advance Payment Guarantee no RD 001RCOA1404569/03032.*
[4] *We, Radiant.....agree inconditionally and irrevocably to guarantee as primary obligation and not as surety merely, the payment to University of Rwanda on his first demand without whatsoever right of objection on our part...*
[5] *The guarantee shall remain valid and in full effect from the date of the advance payment under the contract until University of Rwanda receive full repayment of the same amont from the contractor.*

Urukiko rurasanga mu kugisubiza, ari ngombwa kubanza gusobanura ubwoko bw'amasezerano Radiant Insurance Company Ltd yasinye, kugira ngo harebwe niba hari icyo ishobora gushingiraho isaba kutayubahiriza.

[26] Nk'uko byasobanuwe haruguru, Radiant Insurance Company Ltd yemeye ko izishyura 527.117.404 Frw ikibisabwa bwa mbere, aribyo byitwa garantie à première demande ou garantie sur demande. Abahanga mu mategeko bavuga ko iyo garantie itandukanye n'ubwishingizi (cautionnement), ko inshingano zishingiye kuri iyo garantie ziba zihagije, ko zidashingiye ku yandi masezerano. Ko ubwo bwoko bw'amasezerano bukoreshwa cyane mu masoko ya Leta cyangwa ay'abantu ku giti cyabo6. Basobanura ko icy'ingenzi muri izo garantie ari uko inshingano z'uwishingiye ziba zihagije, ko zidashingira ku masezerano y'ibanze[7].

[27] Abahanga mu mategeko basobanura kandi ko n'ubwo iyo garantie yavuga ku masezerano y'ibanze (faire référence), ubwabyo bitayibuza kuba yihagije[8].

[28] Urukiko rurasanga hashingiwe ku bisobanuro by'abo bahanga, nta kindi Radiant Insurance Company Ltd yagombye kwitwaza yanga kwishyura Kaminuza y'u Rwanda, kuko inyandiko y'ingwate yasinye yihagije ubwayo, ikaba itatuma ishakira indi mpamvu yo kutishyura mu masezerano Kaminuza y'u Rwanda yagiranye na rwiyemezamirimo, cyane cyane ko nayo ubwayo yiyemeje ko izishyura, ko nta kindi izitwaza.

[29] Ku birebana no kuba Kaminuza y'u Rwanda na rwiyemezamirimo baremeranyije ko avansi izatangira gukatwa kuri *facture* ya gatatu, Urukiko rurasanga usibye kuba Radiant Insurance Company Ltd itabyitwaza ngo yange kubahiriza inshingano zayo kuko byagaragajwe ko izo nshingano zidashingira ku masezerano y'ibanze, nta n'ubwo byakwitwa ko binyuranye n'ingingo ya 89 yavuzwe haruguru, kuko icya ngombwa ari uko avansi yari gukatwa, kabone n'ubwo iryo katwa ryari gutangirira kuri f*acture* ya gatatu.

[30] Byongeye kandi, bigaragara ko mu nyandiko y'ingwate yo ku wa 11/06/2014, Radiant Insurance Company yarashingiye ku ngigo ya 51 y'amasezerano hagati ya Kaminuza y'u Rwanda na JV EXERT ENGINNEERING GROUP Ltd & CHEON KWANG ENGINNEERING AND CONSTRUCTION Co Ltd, bikagaragara ko iyo ngingo igizwe n'uduce dutatu, iri mu ngingo rusange z'amasezerano (conditions générales), umutwe wayo ukaba ari ''Advance Payment'', mu

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[6] *Depuis quelques dizaines d'années s'est dévelopée sous la dénomination de ''garantie indépendante'', ou ''garantie sur demande'' ou ''garantie à première demande'', une forme d'engagement bancaire destiné comme le cautionnement à garantir une ou plusieurs obligations d'un client de la banque dit ''donneur d'ordre'' envers un tiers dit ''bénéficiaire''. Mais à la différence du cautionnement, l'obligation née de la garantie est principale et non pas accessoire.*
(...) La majorité des garanties sont émises pour les besoins d'un marché public ou privé, le client exigeant que certaines obligations essentielles du fournisseur soient couvertes par une garantie bancaire: Christian Gavalda, Jean Stoufflet, Droit Bancaire, Lexis Nexis, Litec, 7e édition, p. 418

[7] *Tout le mécanisme de la garantie est dominé par l'autonomie de l'engagement contracté par le garant envers le bénéficiaire. Cet engagement est indépendant du rapport juridique liant le donneur d'ordre au bénéficiaire (contrat de base), p. 421*

[8] *On doit toutefois remarquer que la lettre de garantie fait généralement référence au contrat de base, ce qui n'altère pas le caractère autonome de l'engagement bancaire, Thierry Bonneau, Droit bancaire, 11e édition, LGDJ, p.606*

gace kayo ka gatatu (51.3) hakaba havugwamo uburyo iyo avansi izajya ikurwa mu mafaranga yishyuwe rwiyemezamirimo nk'uko biteganyijwe mu ngingo zihariye z'amasezerano (special conditions of contract)[9], naho mu ngingo ya GCC 51.3 y'amasezerano y'ihariye (SCC) hakaba hateganyijwe ko avansi yo gutangira imirimo izishyurwa havanwa 20% mu mafaranga y'imirimo yakozwe guhera kuri *facture* ya gatatu[10].

[31] Hashingiwe ku bimaze kugaragazwa, Urukiko rurasanga ibivugwa na Radiant Insurance Company Ltd ko itamenye ko avansi izatangira gukatwa kuva kuri *facture* ya gatatu, nta shingiro bifite, kuko niba yarashingiye ku ngingo ya 51 yavuzwe haruguru, yanamenye ibikubiye mu ngingo zihariye kuko zivugwa mu gace ka gatatu k'ingingo yashingiyeho (51.3), kandi izo ngingo rusange kimwe n'ingingo zihariye zikaba ziri mu bigize amasezerano nk'uko bivugwa mu ngingo ya 2 y'amasezerano ubwayo (no 1/2014), bityo Radiant Insurance Rwanda Ltd nk'umunyamwuga mu byerekeye ubwishingizi (professionnel) ikaba itavuga ko yashingiye ku ngingo ya 51 ngo kuko ariyo ivuga ibya avansi yo gutangira imirimo, itarebye ibiyikubiyemo ngo imenye ibyo yishingiye.

[32] Urukiko rurasanga rero, kuba Kaminuza y'u Rwanda yaremeranyije na rwiyemezamirimo ko avansi izatangira gukatwa kuri facture ya gatatu, ubwabyo bitakwitwa ko habaye uburiganya kuko nk'uko bimaze kugaragazwa, Radiant Insurance Company Ltd yatanze ubwinshingizi ibizi.

[33] Ku kibazo cyo kumenya niba amasezerano y'ingwate ashobora kutubahirizwa, abahanga mu mategeko bavuga ko n'ubwo ayo masezerano aba yihagije, ashobora kutubahirizwa iyo habaye fraude cyangwa abus manifestes, ko ariko ibyo bigomba kuba bigaragarira buri wese, bitagibwaho impaka[11]. Batanga urugero rw'igihe hari inyandiko zigaragaza ko amasezerano y'ibanze yubahirijwe neza, ko muri icyo gihe kwishyuza ingwate ijyanye nayo byaba ari uburiganya (aha byumvikana ko ari ingwate yo kurangiza imirimo). Urundi rugero batanga ni igihe hasabwa kwishyura ingwate idafite aho ihuriye n'amasezerano y'ibanze yatumye iyo ngwate itangwa, cyangwa igihe utumiza ibintu yahaye isoko umuntu utandukanye n'uwishingiwe. Basobanura ko izo ngero zigaragaza ko uburiganya bureberwa kenshi mu masezerano y'ibanze, ko ariko mu kumenya niba ubwo buriganya buhari, Umucamanza adashobora gusesengura ayo masezerano y'ibanze cyangwa gushakisha niba yarubahirijwe cyangwa atarubahirijwe neza, kuko kubikora byaba bivuze ko uburiganya butagaragarira buri wese[12].

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[9] *The advance payment shall be repaid by deducting proportionate amounts from payments otherwise due to the contactor, as specified in the SCC, following the schedule of completed percentage of the works on a payment basis.(...)*

[10] *The advance payment wil be repaid by deducting amounts equal to 20% of the certified value of work done starting from the 3 rd interim certificate after the start date (...)*

[11] *L'autonomie de la garantie a en effet pour limite la fraude ou l'abus manifestes. Ces deux notions peuvent être distingués: la fraude suppose une manoeuvre du bénéficiaire en vue d'obtenir une somme à laquelle il n'a pas droit; l'abus vise l'hypothèse où, en l'absence de manoeuvre caractérisée, le bénéficiaire, profitant de l'automatisme et de l'absence de contrôle de la mise en oeuvre de la garantie, en réclame l'exécution bien qu'il soit dépourvu de toute créance au titre du contrat de base. (....) La paralysie de la garantie ne peut cependant être obtenue que si la fraude ou l'abus sont manifestes: selon l'expression couramment employée, ''ils crèvent les yeux'': autrement dit, ils ne suscitent aucun doute; ils sont évidents, Thierry Bonneau, op.cit., p.611*

[12] *Ainsi par exemple, lorsque l'achèvement de l'exécution du contrat de base est établi par des documents que le bénéficiaire ou des personnes habilitées à l'engager ont souscrit, l'appel en garantie est frauduleux, ou si l'on préfère abusive. De même, il ya fraude ou abus lorsque l'appel est étranger au contrat de base dans le cadre duquel la*

[34] Urukiko rurasanga rero izo ngero zatanzwe ntaho zihuriye n'ibivugwa na Radiant Insurance Company Ltd, byo kuba avansi yaratangiye gukatwa kuri *facture* ya gatatu, cyane cyane ko byagaragajwe ko yatanze ingwate ibizi (cyangwa yaragombaga kubimenya), bityo ikaba ikwiye kwishyura Kaminuza y'u Rwanda amafaranga avugwa mu nyandiko y'ingwate.

[35] Ku birebana n'urubanza nshinjabyaha uburanira Radiant Insurance Company Ltd aburanisha, Urukiko rurasanga usibye kuba ntacyo rwemeje ku birebana n'ibyo Kaminuza y'u Rwanda yaregeye muri uru rubanza, nta n'ubwo rwavanaho inshingano za Radiant Insurance Company Ltd zishingiye ku nyandiko y'ingwate nk'uko byasobanuwe haruguru.

[36] Hashingiwe ku byasobanuwe byose, Urukiko rurasanga nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze mu kwemeza ko Radiant Insurance Company Ltd igomba kwishyura 527.117.404 Frw yishingiye.

2. Kumenya niba inyungu zategetswe zikwiye gutangwa.

[37] Uburanira Radiant Insurance Company Ltd avuga ko idakwiye gutanga inyungu zategetswe mu rubanza rwajuririwe kuko itagomba kwishyura amafaranga yishyuzwa ajyanye na avansi yo gutangira imirimo. Byongeye kandi, kuba Kaminuza y'u Rwanda itarakase avansi kuri *factures* ebyiri za mbere, byateje igihombo Radiant Insurance Company.

[38] Uburanira Kaminuza y'u Rwanda avuga ko Radiant Insurance Company Ltd igomba gutegekwa kwishyura amafaranga y'indishyi kuko yanze kwishyura ku neza no kubahiriza *advance payment guarantee* yatanze ku wa 11/6/2014, bityo ikaba igomba kwishyura indishyi zingana na 10% z'amafaranga y'ingwate yanze kwishyura ku neza, zingana na 52.711.740 Frw kubera igihombo yayiteje, kuko Urukiko Rukuru rw'Ubucuruzi rwasanze indishyi zasabwe na Kaminuza y'u Rwanda zifite ishingiro, ariko mu kuzandika habamo kwibeshya rwandika 5.271.174 Frw aho kwandika 52.711.740 Frw, ariyo mpamvu asaba ko byakosorwa hashingiwe ku ngingo ya 141 y'Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi. Kuri iki kibazo cyo gukosora, uburanira Radiant Insurance Company Ltd nawe avuga ko byakosorwa, kuko 10% ya 527.177.404 Frw atari 5.271.174 Frw nk'uko yanditswe mu rubanza rujuririrwa.

UKO URUKIKO RUBIBONA

[39] Ingingo ya 137 y'Itegeko no 45/2011 rigenga amasezerano iteganya ko ‘‘Uruhande rwarenganyijwe rufite uburenganzira bwo kubona indishyi zitanzwe n'urundi ruhande rutubahirije ibisabwa mu masezerano, keretse iyo ikirego kigamije kubona indishyi cyahagaritswe cyangwa

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garantie a été émise ou lorsque, dans le cadre d'une garantie de soumission, l'importateur a attribué le contrat à un soumissionnaire autre que le donneur d'ordre. Ces exemples montrent que la fraude ou l'abus sont souvent appréciés par rapport au contrat de base. Mais le juge ne peut, pour les caractériser, se livrer à une analyse du contrat de base ou rechercher si le contrat a été ou non correctement exécuté: une telle démarche prouve en effet que la fraude ou l'abus ne sont pas manifestes, Thierry Bonneau, op.cit., p.611-612

cyaravanyweho‘‘. Ingingo ya 138 y’Itegeko rimaze kuvugwa iteganya ibigenderwaho muri rusange mu kubara indishyi.

[40] Nk’uko ababuranyi babyemeranyaho, bigaragara ko habaye ikosa mu myandikire y’urubanza rujuririrwa kuko mu gika cya 27, Urukiko rwavuze ko 10% ya 52.711.740 Frw Kaminuza y’u Rwanda isaba afite ishingiro, aho kwandika ko ari 10% ya 527.117.404 Frw kuko ariyo yasabye, ibyo bikaba byaratumye Urukiko ruvuga ko izo ndishyi zingana na 5.271.174 Frw aho kuba 52.711.740 Frw.

[41] Ku birebana n’ishingiro ry’izo ndishyi, imikirize y’urubanza rwajuririwe igaragaza ko Kaminuza y’u Rwanda yagenewe 10% y’amafaranga yishyuza hashingiwe ku ngingo za 80 na 137 z’Itegeko no 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano hamwe no ku ngingo ya 258 CCLIII, kubera ko Radiant Insurance company Ltd yishe amasezerano yayitegekaga kwishyura igisabwa garantie ya avansi ku wa 28/07/2016, bigatuma Kaminuza y’u Rwanda igira ibyo itakaza ikanajya mu manza bidakwiye.

[42] Urukiko rurasanga ariko, kuba indishyi zatanzwe zishingiye ku ngingo ya 137 y’Itegeko no 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano nk’uko Urukiko Rukuru rw’Ubucuruzi rwabisobanuye, byumvikana ko hagomba kugaragazwa ishingiro ryazo, nyamara bikaba bigaragara ko urwo Rukiko rwashingiye ku mpamvu y’uko hari ibyo Kaminuza y’u Rwanda yatakaje ariko ntirwagaragaza uburyo ibyo yatakaje byabazwe hashingiwe ku bishobora kugenderwaho bivugwa mu ngingo ya 138 y’Itegeko rimaze kuvugwa, ahubwo rwemeza gusa ko ari 10% y’amafaranga y’ingwate, ndetse bikaba bigaragara ko rwafatiye hamwe ibyo Kaminuza y’u Rwanda yatakaje no kuba yarajyanywe mu manza, mu bujurire naho Kaminuza y’u Rwanda ikaba ivuga yagize igihombo ariko nabwo ntigaragaze uburyo ikibara, bityo uru Rukiko rukaba rusanga izo ndishyi zitagomba gutangwa, akaba atari na ngombwa gukosora amakosa yakozwe mu myandikire nk’uko Kaminuza y’u Rwanda ibisaba.

2. Kumenya niba Radiant Insurance Company Ltd yahabwa amafaranga isaba

[43] Uburanira Radiant Insurance Company Ltd asaba ko Kaminuza y‘u Rwanda yategekwa kuyiha 1.000.000 Frw yiyongera ku yo yasabaga mu nzego ebyiri zibanza (TC na HCC), kuko yashowe mu manza ku maherere nta kosa ifite, bityo ikaba yagenerwa 2.600.000 Frw.

[44] Uburanira Kaminuza y’u Rwanda yiregura avuga ko ibyo Radiant Insurance Company Ltd isaba nta shingiro bifite, kuko uru rubanza rukomoka ku kutubahiriza amasezerano kwayo nk'uko byasobanuwe haruguru, ahubwo ko isaba amafaranga y’ikurikiranarubanza angana na 500.000 Frw yiyongera ku yari yarategetswe mu rubanza rujuririrwa. Uburanira Radiant yiregura kuri aya mafaranga avuga ko nta shingiro ryayo kuko Kaminuza y’u Rwanda ariyo yayishoye mu manza.

UKO URUKIKO RUBIBONA

[45] Ingingo ya 111 y’Itegeko no 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y’imanza z’imbonezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi, iteganya ko ‘’Ikirego cy’amafaranga y’ikurikiranarubanza ni ikirego gishamikiye ku kirego cy’iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza. Ikirego cy’amafaranga y’ikurikiranarubanza

kiburanishirizwa rimwe n'ikirego cy'iremezo. Gishobora kandi kwakirwa kikaburanishwa n'iyo ikirego cy'iremezo cyaba kitakiriwe''.

[46] Urukiko rurasanga mu gihe byagaragajwe ko Radiant Insurance Company Ltd igomba kubahiriza inshingano zayo yishyura amafaranga yishingiye, itahindukira ngo ivuge ko yashowe mu manza ku maherere, inabisabire indishyi.

[47] Urukiko rurasanga ahubwo, kuba byagaragajwe ko ubujurire bwayo budafite ishingiro, igomba guha Kaminuza y'u Rwanda amafaranga yakoresheje ikurikirana urubana kuri uru rwego nk'uko yayasabye, kuko ari mu rugero rukwiye.

III. ICYEMEZO CY'URUKIKO

[48] Rwemeje ko ubujurire bwa Radiant Insurance Company Ltd bufite ishingiro kuri bimwe;

[49] Rutegetse Radiant Insurance Company Ltd guha Kaminuza y'u Rwanda 527.117.404 Frw yishingiye, hamwe na 500.000 Frw y'ikurikiranarubanza kuri uru rwego;

[50] Rutegetse ko ingwate y'amagarama iherera kuri Radiant Insurance Company Ltd.