REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-1740-2000

Partizanski Put
Plaintiffs
Jovan Latincic

Versus

Sobetra (U) Ltd
Defendant

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGEMENT

1. The plaintiff no.1 is the owner of a set of construction equipment, consisting of a grader, wheel loader, and bulldozer, which it hired out to the defendant, a construction firm engaged in road construction in Uganda. The Plaintiff no.2 was an agent of the Plaintiff no.1, in the transactions giving rise to this action. The Plaintiff no.1, as lessor, and Plaintiff no.2 as agent of the Lessor, executed an agreement dated 8th June 1999 with the defendant as lessee, in which the defendant took, on a dry lease, and the terms therein contained, the grader, wheel loader and bull dozer at the rate of US$ 7,000.00, US$6,000.00 and US$7,000.00 per month respectively. In addition the plaintiff no.2 would be paid 7% of every payment to the plaintiff No.1, by the defendant.
2. The lease was to run initially for 3 months but was subsequently extended to the 31st March 2000 by an addendum to the original agreement. It is contended for

the plaintiff, and denied by the defendant, that upon the expiry of the agreement the plaintiff no.1 asked for the return of the machinery, but the defendant refused to return the machinery until 11th September 2001.

3. The plaintiffs contend that by the expiry of the lease agreement on 31st March 2000 a sum of US$50,629.25 was outstanding from the defendants. The plaintiffs further claim from the defendants additional sums of money for the period between 31st March 2000 to 11th September 2001 totalling to US$ 455,727.10, as lost earnings, interest and costs of the suit.
4. The defendant denied that it was indebted to the plaintiffs in the sums claimed or at all as it had paid all the monies due to the plaintiffs under the dry lease agreement. The defendant further contends that the agreement was on 2nd March 2000 extended for an indefinite period, with varied terms with regard to mode of payment, being terminated and or expired only on 28th February 2001. The defendant could not return the machinery to Kampala from Gulu because its wheel loader had broken down, and no other wheel loader was available because of insecurity obtaining in Northern Uganda. The defendant relies on the common law principle of *force majeure*.
5. The defendant further contends that the machinery, throughout the entire period of the lease, continuously broke down as a result of which the defendant incurred repair expenses outside the terms of lease for which it counter claimed the sum of Shs.46,711,703.00 incurred on repairs and spares during and after the dry lease. It had been agreed that the plaintiff would refund those expenses but they failed to pay the defendant.
6. The defendant further contended that the machinery leased from the plaintiff was mechanically unfit for the purpose for which it was contracted.
7. At a scheduling conference the following facts were agreed upon.
   1. Plaintiff no.1 was the lessor under a dry lease agreement in which Plaintiff no.2 was agent of plaintiff no.1, to defendant of road construction equipment at rentals

stated therein.

2. That dry lease agreement was renewed by addendum no.1.

3. Defendant had opportunity to examine the equipment before it took it on hire.

4. Under the lease agreement Plaintiff no.2's commission was 7% of every payment and it would be paid directly to him.

8. The parties agreed to admit 15 documents as plaintiffs' exhibits without proof in the ordinary way, and these were admitted and marked accordingly. The plaintiffs called 2 witnesses and the defendant called 3 witnesses.

9. In resolving the matters in issue in this case I will deal with issue by issue as framed by the parties, discussing the evidence of the parties on each particular issue, the factual/legal findings of the court thereon and the reasons therefor.

10. The first issue in this case was whether, after the expiration of the lease plaintiff no.1 and the defendant mutually agreed upon an extension of the lease agreement for an indefinite period of time so that the defendant was under no obligation to return the leased machinery until the agreement was terminated. Put simply was the lease in question extended to an indefinite term by the parties?

11. The evidence on this issue for the plaintiffs was the testimony of the PW1, plaintiff no.2, Jovan Latincic. PW1 stated that the defendant wanted to retain the machinery given his letter of 2nd March 2000, admitted into evidence as Exhibit P7. The witness stated that the plaintiff no.1 responded with their letter of the same date. [Admitted into evidence as Exhibit P12] This letter was not an extension of the lease agreement. DW3 was the managing director of the defendant, and he testified on the extension of the lease. He testified that the parties had agreed to an indefinite extension of the lease as set out in Exhibit P7, which was a summary of what the parties had verbally agreed upon and accepted by the plaintiffs in Exhibit P12, though with one reservation as regards paragraph 1.

12. Mr. Okua learned counsel for the defendant submitted that on this issue exhibits P7 and P12 clearly demonstrated that there was an extension of the lease by the parties. On the other hand Dr. Byamugisha for the plaintiff submitted that there

was an extension but not for an indefinite period. This extension was terminated on the 20th June 2000 when the plaintiffs wrote to the defendants asking them to return the machinery. This letter was admitted as exhibit P18 [initially marked exhibit P13 in error].

13. Both counsel agreed as to an extension of the lease agreement. In addition Dr. Byamugisha argues that this extension was terminated on 20th June 2000 with the demand by the plaintiff no.1 for the return of the machinery. There was another letter for the return of the machinery following exhibit P18. This was admitted into evidence as exhibit P19[initially marked P14 in error]. There was no response, or at least, written response from the defendants that has been exhibited in this matter.

14. I would find that the lease for the machinery was extended beyond 31st March 2000 but this extension lasted only up to June 20th 2000 when the plaintiff no.1 wrote to the defendant recalling the machinery in question. As it was the duty of the defendant to demobilize the machinery under the written lease, exhibit P1 and thus return it to the plaintiff, what it required from this date was reasonable time, within which to carry out the demobilization. So in answer to issue no.1 I would say that there was an indefinite extension of the lease that was terminated on or about 20th June 2000 by the plaintiff no.1, as it was entitled to do.

15. Issue No.2 is stated to be in the alternative. Alternatively, whether when the lease expired in February 2001, it is a defence to plaintiff's claim that the machinery could not be returned from Gulu to Kampala because of reasons stated in paragraph 11 of the amended written statement of defence filed on 3 October 2002?

16. It is important to bring in view at the outset paragraph 11 referred to above in the amended written statement of the defendant. It states,

> 'The defendant in reply to paragraph 13 the defendant contends that it had lawful possession of the machinery by virtue of the extension of 2 March 2000 and shall prove

> that all payments due were received by the plaintiffs. It is further averred by the defendant that when the lease was terminated in February 2001 the machinery could not be returned to Kampala from Gulu (because the defendants wheel loader had broken down and owners of alternative wheel loaders refused to hire them out) due to the security situation obtaining at the time in Northern Uganda. The defendant shall rely on the common law principal of ***force majeure***.'

17. Given my finding on issue no.1 that the lease was terminated in June 2000, it is somewhat academic to consider this issue. Nevertheless I will proceed to do so. DW3 the managing director of the defendant testified on this point. Asked by Mr. Okua why the defendant did not return the machinery on termination in March 2001, he stated,

> 'There have been two circumstances; one was the request made by Mr. Branco to delay a bit the delivery as he had no place to park the machine. Mr. Branco after requiring the return of the machine told me to wait for a period of time because he had no place to park the machine……
> All the delay was caused by security problem prevailing in the areas where the P. Put machines were parked.'

18. DW1 testified as to general problems of insecurity in Northern Uganda from 1999 to 2003. This testimony was echoed by DW2. Mr. Okua submitted that relying on the above evidence this court should find for the defendant on this issue that the defendant was prevented by *force majeure* to return the machinery.
19. Dr. Byamugisha submitted that DW3 should not be believed given that in his testimony he contradicts the pleadings of the defendant to the extent that he claimed in his testimony that the machinery was not returned due to a request from the plaintiff no.1's managing director. In any case the defendant had been told to return the machinery much earlier than March 2001.
20. In the testimony of DW3 two reasons are cited as the cause of the failure to return the machinery in March 2001. Firstly that this was requested by the plaintiff no.1's managing director, Mr. Branko. It is not clear whether this was a verbal or written request, and when it was exactly made by Mr. Branco and where it was made. Nevertheless at the same time, this reason was never advanced on the

defendants pleadings in paragraph 11. If it was significant, it ought to have been stated in the pleadings. It was not.

21. Paragraph 11 of the amended written statement of defence advances another reason. That the defendant's wheel loader had broken down and he could not hire alternative wheel loaders as other owners were not willing to let wheel loaders travel to Northern Uganda to collect the machinery. I am not sure that this machinery is transported by a wheel loader. A wheel loader is one of the machinery that was leased. Its work is not for transport of machinery, as the wheel loader in this case was needed apparently for earth works, on the contracts the defendant was working on in Northern Uganda.
22. I suppose what was meant must have been a low loader that is able to transport heavy machinery or other equipment. What is important is that DW3 in his testimony never refers to this as having been the problem or cause of the failure to transport the machinery from Northern Uganda in his evidence. He generally mentions security where the machines were parked but goes no further to explain how security or insecurity impaired his ability to deliver the machinery to Kampala.
23. Though there was insurgency in Northern Uganda during this period, it is clear that the defendants were working in the area. In fact the defendants mobilized the equipment in question during the insurgency and transported the machinery to the area where they had work to do. DW3 testified that he visited the area frequently during this period. DW2 testified that they were guarded by soldiers and moved the equipment in question from time to time to the locations they were working at.
24. In Ryde v Bushell and Another, [1967] E.A.817 the court of appeal for East Africa dealt with the issue of force majeure or an act of God that may release a person from liability under contract or further performance of a contract. Newbold, P., stated at page 820,

> 'But before the plea can succeed it must be established that it was an act of God which prevented performance or which destroyed the results of performance. Nothing can be said to be an act of God unless it is an occurrence due

> exclusively to natural causes of so extraordinary a nature that it could not reasonably have been forseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence. It is for the person setting up the plea of act of God to prove the various facts which constitute an act of God.'

25. This passage states the law, in my view, as to what may amount to an act of God, or *mutatis mutandis*, *force majeure*. It discusses what constitutes an act of God, and the party who has the burden to prove its occurrence. I shall apply the same to this present case.
26. The defendant has failed in my view to adduce sufficient evidence to show it was prevented by anything amounting to *force majeure* or act of God to return the machinery in question. In any case the lease was determined on 20th June 2000, and there is no explanation why the machinery was not returned then or reasonably thereafter. From paragraph 11 of the amended written statement of defence the defendant owned a 'wheel loader' for transporting the machinery which had broken down in February 2001. Presumably it was working in June 2000, and the defendant had ample opportunity anyway to return the machinery. Instead the defendant ignored the plaintiff's letters exhibit P18 and P19 calling for the return of the machinery in June 2000. The breakdown of the transportation vehicle for the machinery cannot amount to *force majeure* to release the defendant from its obligations.
27. In answer to issue no.2 I find that there was no sufficient evidence adduced to prove the occurrence of a *force majeure* or act of God to prevent the defendant from returning the machinery whether in February 2001 or June 2000. General assertions of insecurity without particularity or detail, as have been made here are insufficient. In any case if it is true that the delay was partly caused by a request from the plaintiff no.1, not to deliver the machinery when the defendant was ready to deliver the machinery, as testified by DW3, that in itself, cannot amount to *force majeure*!
28. It will also be noted that the state of war or insurgency in Northern Uganda

existed at the time the parties entered into the contract in 1999 and throughout the performance of the contract between the defendant and Government of Uganda. Insurgency in Northern Uganda was not an unforeseen event. The defendant took the machinery to Northern Uganda, well aware of the conditions obtaining there at the time. In my view, insurgency or insecurity in Northern Uganda cannot in the circumstances of this case, without more, be set up, as a plea that excuses liability from the consequences of performance or non-performance of the contract between the parties.

29. I now turn to issues no.3 and no.4 which I think can be addressed together. 3. Whether the agreed hire charges were subject to the machinery being in a workable state for whatever reason? 4. Whether mode of payment was changed after the lease? The evidence on these two issues was given by PW1 and DW3, in addition to the documentary evidence admitted, in particular exhibits P7 and P12. I shall set out the exhibits P7 and P12 first.

> ‘Sobetra Uganda Limited Construction and Engineering Company
> Hannington Road Plot 24
> PO Box 27933 Kampala
> Telephone +256 41 344454
> Fax +256 41 349408

P.Put Co. Kampala (by fax)
Kampala,
02.03.00

Attention Mr. B. Vukicevic Copy Mr. J. Latincic

RE: Leasing of Plant

Dear Sir,
We refer to yesterday meeting on the above captioned subject. After having elaborated the causes which have generated certain conflicts between the parties of the leasing agreement, a general understanding was reached and we wish to summarise the conclusion:

> 1. Sobetra will pay to P.Put the amount of US$5000 (five thousand) as compensation in respect of the availability of the D7 Caterpillar Dozer and of the 950 Caterpillar Loader, up to the end of January 2000. The above amount will be

considered as part repayment of the repairs carried out to the two machine by Sobetra;
2. In view of Sobetra intention to keep on the Project the Plant object of the Lease, waiting for improvement of the security situation and the resumption of the works, Sobetra will pay to P.Put as from the 1st February 2000 the amount of US$7000 (seven thousand) per month. The first payment will be executed before the 11th March;
3. In case of utilization by Sobetra of the Cat D7 and of the 950 Loader (security and mechanical condition permitting) Sobetra will pay P.PUT the amount due as for the Leasing Agreement.

4. P.PUT agrees to pay for the cost of replacement of the turbo-charger of the 950 loader;
5. Sobetra confirm that the Plant object of the lease will be included in the General Claim for the suspension of the works which will be lodged with the Ministry of Works. Please confirm your approval to the above points.
Yours sincerely
(signed)'

30. Exhibit P12 which was the immediate response to that letter from the plaintiff no.1 states,

'2nd March, 2000

Attention Mr. Giorgio Petrangeli

Dear Sir,
Re: Lease Agreement
Reference is made to our lease Agreement and the addendum related to the hire of our plant and Equipment and your letter dated 2/02/2000. We hereby confirm our approval to the points in your letter i.e. from Item 1 through 5, except that point 1 (one) i.e. the amount of 5,000 US dollars should be used as a part payment for the repairs of Bulldozer only.
Yours faithfully,
(signed)
Branko Vukicevic
Managing Director.'

31. From the foregoing exhibits, which both witnesses agreed set out their respective positions, it is clear, especially from paragraph 3 of exhibit P7 that it was agreed that during that extension of the lease the defendant would be paying for actual utilization at the rates set out in the lease agreement. This was a variation from the earlier position where the defendant was obliged to pay, regardless of whether it had utilized the equipment or not. This variation was obviously restricted to the

Cat D7 and the 950 Loader. As regards the grader the terms of payment remained unchanged and did not depend on whether it was utilised or not.

32. In answer to issue no.3 I find that the agreed hire charges were to be paid, in respect of the Cat D7 and the 950 Loader, during the extension of the lease, only when these machines were utilised, security and mechanical condition permitting.
33. Turning to issue no.4 in light of my finding on issue no.3 and to the extent that there was a variation to the method of calculation of the hire charges, it must follow, to give business efficacy to the variation in the agreement, an implied term changing the mode of payment of the hire charges for Cat D7 and the 950 Loader. The defendant, who was in possession of the equipment, and who was to utilise them, had to keep a record of utilisation which he would have to submit with the payments due, to the plaintiff no.1 and plaintiff no.2. If this was not done, there was no way for the plaintiffs to be notified of what was due. This arrangement would only subsist for as long as the lease was running. Once the lease was terminated, this variation, along with the original agreement would no longer apply. And in light of my findings on issue no.1, it would follow that this variation held up to only 20th June 2000 when termination of this lease was effected.
34. I now turn to issue no.5 And this was whether the defendant owes the plaintiffs the sum set out in the plaint as follows: (a) US$50,629.25 as at 31.03.2000; (b) US$33,563.53 as at 07.07.2000; (c) US$195,382.93 as at 11.09.2001 and (d) US$226,780.64 as at 11.09.2001
35. The evidence on this issue is the testimony of PW1 and PW2 for the plaintiff and DW3 for the defendant, in addition to the documentary evidence admitted on record.
36. PW2 was a book keeper with the plaintiff no.1. She stated that invoices to the defendant for the machines were prepared by Mr. Branko and she recorded them. She tendered the said invoices in evidence marked exhibit P20 to P75. She also worked on a statement of account/summary that reconciled the account with the defendant and these were admitted as exhibit P76 and P77. Exhibit P76 provides a statement of the account between the plaintiff no.1 and the defendant while

exhibit P77 provides a statement of account between the plaintiff no.2 and the defendant. Both exhibits indicate the amounts that were invoiced to the defendant as well as the amounts that the defendant paid, and the dates on which each of these transactions occurred.

37. DW3 stated that the defendant did not owe any money to the plaintiffs as it had paid all the money that was due to the plaintiffs. Neither the defendant's pleadings nor DW3's testimony discloses what the defendant paid and when it was paid. No receipts or payment vouchers have been shown. No information, utilisation log or other, has been provided with regard to the period of extension of the lease from the 1st April 2000 to 20th June 2000 when it was terminated, in so far as the charges and payments, if any for the Cat D7 and the 950 Loader, given the variation in charging for those machines.
38. If the defendant failed to keep such records, or at any rate, since no such records were submitted to the plaintiffs, or in evidence to this court, the burden of which was on the defendant, it is not unreasonable, in my view, for the plaintiffs to invoice the defendant for the 2 machines as it was previously doing in accordance with the written terms of the lease. The defendant has only the defendant to blame for this state of affairs.
39. DW2 was the defendant's supervisor at the site for the period of the works. He testified that during this period no attempt was made to repair any of the machines. It is only the grader that worked satisfactorily and the other 2 machines were only parked. This contradicts the testimony of DW3, his boss, who stated that they repaired all the machines time and again, producing invoices and receipts in connection thereto. In fact for that reason the defendant filed a counter claim.
40. This contradiction is significant. One of these two witnesses is definitely not telling the truth on this matter. And for that reason the credibility of both witnesses is in question, not only on this matter, but in relation to their whole testimony. In addition the defendant has failed to offer any proof about any payments to the plaintiffs, let alone indicate any figure to represent what the

defendants may have paid. The only evidence of the defendant's payments is in exhibits P76 and P77 adduced by the plaintiff.

41. I am satisfied on a balance of probability that the defendant did not pay the amounts referred to in issue no.5(a), that is the sum of (a) US$50,629.25 as at 31.03.2000 to the plaintiffs. I order that the same be paid by the defendant.
42. With regard to the claim between 01/04/2000 to 20/06/2000, the defendant would have been entitled to pay according to varied terms of payment that depended on utilisation. Unfortunately for the defendant, the defendant has not shown in accordance with the implied term of maintenance of a log for utilisation of the machines, with respect to the 2 machines which had to be charged on a utilisation basis. In such circumstance the plaintiffs were entitled to continue to invoice the defendant according to the rates in the exhibit P1. Such rates would therefore obtain, in my view for the period of the extension of the lease, in absence of a log for utilisation of the machines, until termination of the lease which occurred on or about the 20th June 2000.
43. The plaintiffs have claimed, in addition to the rates under the agreement, loss of earnings which would have been made had the defendant availed the machines when they were requested for, as the plaintiffs had sourced another company, RPP (Uganda) Ltd, willing to pay US$37,000.00 for the three machines per month. Exhibit P5, a letter from the said company offering to hire those machines for that price for 5 months is on record. This letter is addressed to The Managing Director of NECA Co. Ltd. No other evidence was introduced to suggest that the price offered was indicative of the going rates at the time for the equipment in question. It may well be that no contract may have been concluded with this company anyway.
44. Without more, I am not prepared to find that the plaintiffs lost this probable income. Accordingly I reject the claim for US$226,780.64.
45. I am prepared to order compensation for the plaintiffs in accordance with the rates initially agreed between the parties which is at US$20,000.00 per month for the three machines until the return of the same by the defendant. Accordingly I

find that the plaintiff is entitled to a further sum of US$228,946.46 for the period between 1st April 2000 to 11th September 2001 when the machinery was returned, in addition to US$50,629.25, already ordered.

46. The plaintiffs claimed commercial banking interest rate on US$50,629.25 from 31.03.2000 till payment in full, and with respect to the rest of the claim from date of judgement till payment in full. No evidence was adduced as to what was the commercial banking interest rate then or now. With regard to the claim for US$50,629.25, I am prepared to allow interest at the rate of 11% per annum from the 1st April 2000 to the date of judgement, and thereafter at court rate till payment in full. With regard to the balance of the decretal amount I allow interest at court rate from the date of judgment till payment in full. The plaintiffs shall be entitled to costs of this suit as well.
47. The last issue is whether the plaintiffs owe the defendants the sum of Shs.46,711,703 on the counter claim. This is a claim for repairs to the machines. The agreement provided who was to be responsible for what repairs. Without going to the details of the agreement, and the responsibility of each party, given the grave contradiction in the testimony of DW2 and DW3 on the question as to whether any repairs were carried out or not, on the machinery, I am satisfied that there is no credible evidence in support of the counterclaim. It is accordingly dismissed with costs.
48. Judgment is entered for the plaintiffs in the terms set out above.

Signed, dated, and delivered this 13th September 2007

FMS Egonda-Ntende
Judge