THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
HCT – 00 – CC – CS – 0818 – 2003

HYDRO ENGINEERING SERVICES
CO. UGANDA LIMITED (HESCO) :::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

THORNE INTERNATIONAL BOILER
SERVICES LTD (TIBS) :: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T

The plaintiff brought this suit to recover a sum of US $64,606.67 or its equivalent in Uganda currency from the defendant together with interest, general damages and costs of the suit.

The defendant in its written statement of defence denies the plaintiff's claim and contends that the contract price, including VAT, were agreed and fixed at US $139,105 and that the plaintiff was duly paid in accordance with that fixed price but plaintiff failed and /or neglected to complete the contract works with the result that the same had to be completed at the defendant's expense. The defence counter-claims from the plaintiff a sum of US $24,245.55.

At the conferencing the parties agreed that:

1. ***There was a contract***
2. ***There were two Bills of Quantities made at different intervals.***

3. ***The plaintiff performed the bulk of the contract.***

Issues:

1. ***Whether or not this was a fixed price contract.***
2. ***Whether the plaintiff is entitled to the sum claimed in the plaint.***
3. ***Whether the plaintiff caused loss to the defendant by failing to complete the contract.***
4. ***Reliefs, if any.***

Representations:
M/s Ntende & Co. Advocates for the plaintiff
M/s J.B.Byamugisha Advocates for the Defendant.

Issue No. 1: Whether or not this was a fixed price contract.

From the pleadings and evidence, the plaintiff was approached by the 0defendant to design and build extensions at Kinyara Sugar Works, Masindi. In Exhibit P.6, an email from the Plaintiff Company to the defendant dated 17-06-2003, the plaintiff wrote:

> ***"……***
> ***Find attached our quotations as per our site visit an offer for the work at the sum of shs 362,352,730= (three hundred sixty two million, three hundred fifty two thousand, seven hundred thirty) or at the current rate US $181,176.36.***
>
> ***VAT is inclusive in this amount".***

In response to the offer the defendant wrote:

> ***"Dear Sir,***
>
> ***Thank you very much for your highly detailed quotation for the civil work at Kinyara Sugar Works.***

Unfortunately your price is greatly in excess of our budget and also considerably in excess of another potential contractor. We were most impressed by the detail and thoroughness of your offer but as things are at the moment we will have to decline. However, if you look again at your price and if you can offer some inducement by way of reduction, we may yet do business.

This matter …….”

It is trite that a contract is a legally binding agreement. An agreement arises as a result of offer and acceptance, although a number of other requirements must be satisfied for an agreement to be legally binding. It is not necessary to go into details of those other requirements herein. It suffices to mention, however, that in general no particular formality is required for the creation of a valid contract. It may be oral, written, partly oral and partly written, or even implied from conduct. In the instant case, the offer and acceptance were in writing. The plaintiff's initial quotation was in the sum of shs 362,352,730= or its equivalent in Dollars US $181,176.36. The defendant rejected the offer (Exhibit P.7) with reasons: it was greatly in excess of their budget and also considerably in excess of another potential contractor.

Perhaps not to be out-done by the potential competitor the plaintiff responded (Exhibit D.3) saying:

“Having looked into the above subject again, we have found out that some areas needed attention as indicated in your email dated 10/07/2003.

Please find attached, is our schedule of payments and we confirm to you that our prices are fixed and final for the described scope of work”.

From the plaintiff's own correspondence on the matter, Exhibit D.3, the prices for the works described in the Bill of Quantities were fixed and final.

Then in Exhibit P.9, a letter from the defendants to the plaintiff dated 22nd July 2003 sealing the deal the defendants wrote:

> ***"…….***
> ***Payment Terms per our email dated 14th July 2003 as follows:-***
> ***20% with order***
> ***70% monthly against signed percentage completion Forms signed by both yours and our site Engineers.***
> ***10% one month after completion.***
> ***Lumpsum Price USD 139,015.140*** *(sic)* ***(one hundred and thirty nine thousand and fifteen USD and forty cents).***
> ***Payment ……"***

In relation to this issue, I cite from the standard text book on contracts, **CHITTY ON CONTRACTS, 25th Edition, vol. 1, para. 1399:**

> ***"Entire and divisible contract. In an entire contract, complete performance by one party is a condition precedent to the liability of the other; in such a contract the consideration is usually a lumpsum which is payable only upon complete performance by the other party. The opposite of an entire contract is a divisible contract, which is separable into parts, so that different parts of the consideration may be assigned to severable parts of the performance, e.g an agreement for payment pro rata. It is a question of construction of the contract whether it is entire of divisible, but in the reported cases (only one of which is of recent date) the courts have tended to the view that in every lumpsum contract there is an implied term that no part of the price is to be recovered without complete performance. In most modern contracts of any size, however, payments by instalments are specified, so that the law on entire contracts is usually not relevant to them".***

One may find the terminology used here a little confusing. **Hudson's Building and Engineering Contract, 11th Edition, by I.N Duncan Wallace (at p. 420)** makes an attempt to clear the confusion. He writes:

> ***"Fixed Price" and "lumpsum" used in the present fixed price or measured price context, are synonymous. In other contracts, however, "fixed price" is often used to indicate contracts (whether measured or not) where the price is not adjustable for some other reason, as for example, under a 'rise and fall', 'Variation of price' or fluctuations' clause (as inflation adjustment clauses are variously called). Equally, 'lumpsum' has been used by lawyers in the strictly legal and narrower context of the contractor's completion obligation and the rules of entire and substantial performance. Both measured and fixed price or lumpsum contracts will usually all be 'lumpsum' in this special legal sense."***

In the instant case, the plaintiffs visited the construction site. Thereafter, they made an offer for the entire work at the sum of shs 362,352,730= (USD 181,176.36), VAT inclusive. The defendants declined the offer for reasons stated. The plaintiff reconsidered its offer and came up with a revised Bill of Quantities. In a letter to the defendant again, the plaintiff confirmed to them that its (the plaintiff's) prices are fixed and final for the described scope of work. On the basis of that communication the parties struck a deal in which the understanding was that the consideration was a lumpsum price of USD 139,015. From the evidence, it is clear to me that this was a lumpsum contract in as far as the prices stated in the Bill of Quantities were concerned. It was a contract for a fixed price which ought not to be confused with doing of additional works which were separately quoted for during the performance of the contract and the prices for them were separately agreed upon by the parties. Although payments were to be effected in phases, the parties clearly agreed that the price of USD 139,015 was not adjustable on account say of the rise and/ or fall of the prices for the materials. I would in the circumstances of

this case make a finding that this was a fixed price contract in the legal context already explained above. I so find.

Issue No. 2: Whether the plaintiff is entitled to the sum claimed in the plaint

Whether the plaintiff is entitled to the sum claimed in the plaint is dependent on a number of factors, including a determination as to whether or not the defendant was entitled to treat the plaintiff's request for the revision of the terms of contract as terminating its obligations under the contract; and, whether the plaintiffs had substantially performed their obligations under the contract. The main issue as I see it, is the question of substantial performance. For this reason it is right that I should again refer to the relevant passages in Chitty (ibid) which set out the law on this.

First, from paragraph 1400:

> ***"Where a party has performed only part of his obligations under an entire contract he can normally recover nothing, neither the agreed price, since it is not due under the terms of the contract, nor any smaller sum for the value of his partial performance, since the Court has no power to apportion the consideration."***

Then from paragraph 1401:

> ***"Although nowadays building contracts of any size normally provide for payments by instalments, the common law rule on entire contracts was developed in cases concerning building contracts or contracts for work and materials. Where the builder under a lumpsum contract fails to perform some of the agreed work, then, subject to the doctrine of substantial performance, he can recover nothing for the work which was actually completed, despite the fact that the other party may have received substantial benefit therefrom. The building cases take the distinction between substantial no-feasance where***

recovery is denied, and misfeasance, where recovery is permitted subject to a cross-action for damages. If, however, under such a lumpsum contract the builder is guilty of a serious misfeasance, so that the work is substantially deficient, he can recover nothing".

And then paragraph 1402:

"The main exception to the principle that the partial performer of an entire contract cannot recover the agreed price is the doctrine of substantial performance, by this doctrine a failure to complete only an unimportant part of the plaintiff's obligation does not prevent his claim for the agreed price, subject to a counter-claim for damages which will go in diminution of the price."

I must stress the words 'unimportant part of the plaintiff's obligation' and the case cited by the learned author, **Bolton Vs Mahadeva [1972] 1 WLR 1009** in which Court observed (at p. 1013):

"In considering whether there was substantial performance ……. It is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract".

Those being the principles of law applicable, what then are the facts herein?

The plaintiff has averred in paragraph 4 (g) of the plaint that for executing the works under the contract they received from the defendant USD 125,003. Further, that VAT payments, which are in principle a component of the contract of shs 49,916,608= and is ordinarily payable by a contractor's employer as part of the contract value, have been retained by the defendant.

From the evidence, that some money was retained by the defendants is not disputed. According to DW1 Howmans the amount paid to the plaintiff was USD 127,180.37 and

not USD 125,003 as the plaintiff claims. By implication the defendant retained USD 16,213.03 on account of the uncompleted works.

I would think that a lumpsum contract is one where the client essentially assigns all the work to the contractor, who in turn can be expected to ask for a higher mark up in order to take care of any unforeseen contingencies. Doing additional work in construction contracts is in my view not uncommon. Generally speaking, if the actual cost of the project is underestimated, the underestimated cost will in my judgment ordinarily reduce the contractor's profit by that margin. An over-estimate would be to the contractor's benefit in that it would increase his profit margin. A fixed contract can otherwise can be varied with the express or tacit approval of the client.

In the instant case, there is evidence that the price quoted by the plaintiff included a component of VAT. I therefore don't understand their claim for VAT in this case given the presumption that it was part and parcel of the USD 139,015.

As regards the other claims, it is the evidence of the PW1 Oduor that in the course of performing the contract some unexpected difficulties arose at the site. The difficulties related to the designs. The plaintiff's officials then sought audience with the officials of the defendant in Masindi to determine the way forward.

The meeting was slated for 11-11-2003. Come that day, according to the evidence of Mr. Oduor, the defendant's representative, one Jeavons, refused to discuss any business with the plaintiff's officials because according to him (Mr. Jeavons), the parties had agreed on the fixed price of USD 139,015. He told the plaintiff to pack up and leave the site. From the evidence, this marked the end of their relationship. PW1 Oduor's evidence has not been contradicted by any defence evidence. He impressed me as being truthful with regard to the manner of the termination and the reasons therefor.

In law breach of contract refers to breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitles him to

treat the contract as discharged if the other party renounces it, or makes its performance impossible, or totally or substantially fails to perform its promises. In the instant case, according to the uncontradicted evidence of PW1 Oduor, upon the plaintiff's seeking a higher pay in order to compete the contract, the defendant renounced the contract and proceeded to get another contractor to complete the remaining work. This in my view was an over reaction on the part of the defendants.They could have rejected the idea of more funds being asked for and held the plaintiff strictly accountable under the contract. They did not have to chase them away to leave the works uncompleted, more so when this was just a request.

In all these circumstances, taking performance of a contract to be the doing of that which is required by a contract or obligation, Court is satisfied on a balance of probabilities that the plaintiff did not fully perform the contract as agreed. However, full performance was made impossible on the part of the plaintiff by the defendant's uncompromising and unreasonable inflexibility towards the contractor. Court takes the view that the parties could have discussed the matter and agreed or disagreed on the way forward in view of the opinion already expressed above that a fixed price contract is not necessarily immutable. It all depends on the facts and circumstances of each case.

Having said so, it is necessary that I now consider the rights of the parties in light of their failure to resolve the misunderstanding amicably.

The evidence on record makes no case of any extra works. All we have on record is evidence of unexpected difficulties on site encountered by the plaintiff in the performance of the contract. It would appear to me that if unexpected difficulties on site or inadequacies of design are encountered during construction in a fixed price contract, the contractor's price is presumed to include any additional work or expenditure, including varied work, which may be needed to achieve completion, and which must be carried out by the contractor without additional payment in the absence of express provision or successful negotiation of variation of terms.

Court takes the view that no obligation exists on the client's part to vary the work in order to assist him. For this reason the plaintiff was in my view not entitled to any additional payment beyond the contract price of USD 139,015. I have already indicated that this amount included a VAT component.

As regards the amount which the defendant withheld from the plaintiff on account of its failure to fully perform the contract, that is, USD 16,213 according to DW1 Howmans, PW1 Oduor's evidence is that by the time the defendant hounded them off the site, they had covered 95% of the work. And that with the said 95% they had not called for the revision of the contract, implying that the call for revision was in the last stages of completing the contract.

According to DW1 Howmans, the plaintiffs had covered about 55% hence the retention of USD 16,213 to take care of the 45% undone work. Despite the indication in the records available that some site engineers would be assessing the performance, there is no independent assessment of this percentage. Neither party earns credit for this omission.

There is also no independent evidence or at all that the end product was shoddy. The defendant has stated in the counter-claim that they spent USD 24,245.55 for the work which the plaintiff left undone but once again there is no independent valuation. As between the evidence of PW1 Oduor and Dw1 Howmans on the value of the unfinished work, Court is inclined to believe the evidence of the former because he was at the site and therefore directly involved in the performance of the contract. DW1 Howmans evidence is hearsay since he was not in the country to see what was going on at the time. Mr. Jeavons who made further performance of the contract impossible did not appear as a witness. In all these circumstances, the plaintiff is in my view entitled to an order for recovery of the contract price of USD 139,015 under the doctrine of substantial performance. On the balance of probabilities the plaintiff had done over 90% of the work under the contract before they were unreasonably ordered off the site. They were not entitled in all fairness to treat the plaintiff's request for the revision of the terms of the contract, without more, as terminating its obligations under the contract.

Issue No. 3: Whether the plaintiff caused loss to the defendant by failing to complete the contract.

The answer to this issue depends in my view on whether or not the plaintiff failed, refused or neglected to complete the performance of the contract.

I have already out-lined the circumstances under which the contract was terminated. From the evidence, the plaintiffs were just hounded off the site for requesting that the terms of the contract be revised in their favour. The defendant earns no credit for that unwarranted over-reaction. While the plaintiff also earns no credit for its apparent lack of appreciation of principles that govern fixed or lumpsum contracts, the additional cost of completing the contract suffered by the defendant can only be blamed on the defendants themselves because they made further performance of the contract impossible when they ordered the contractor off the site. In the absence of any evidence that the plaintiffs failed, refused or neglected to complete the performance of the contract or merely abandoned the site, the cost was in my view self-induced and therefore unrecoverable from the plaintiffs. I would answer the third issue in the negative and I do so.

Issue No. 4: Reliefs, if any.

From the defendant's own admission, the amount withheld from the defendant was USD 16,213. In view of the Court's finding that the plaintiff is entitled to recover the full contract price of USD 139,015 under the doctrine of substantial performance, the amount shall be decreed to the plaintiff.

As regards the prayer for general damages, these are in law intended as compensation for loss occasioned to the plaintiff by the defendant and not as a punishment to the defendant. Court is inclined to the view that a person who sues for breach of contract is entitled to recover the amount of loss which he sustained due to the breach and that the defendant is liable to make good such loss. In view of the order for payment to the plaintiff of the

contractual sum of USD 16,213 and in view of the plaintiff's role in the termination saga, I would not consider it just and equitable to make an award of general damages, be it nominal or substantial.

As regards the prayer for interest on decretal amount at 30% from the date of filing the suit till payment in full, it is submitted that this will compensate the plaintiff for non-use of its money since contract performance time.

An award of interest in a case of this nature is an equitable remedy. The principle that emerges from decided cases, notably **Sietco Vs Noble Builders (U) Ltd SCCA No. 31 of 1995**, is that where a person is entitled to a liquidated amount on specific goods which a wrong doer has deprived him of, he should be awarded interest from the date of filing the suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and, therefore, interest is given from the date of judgment.

The plaintiff herein sought special and general damages. Court has had to assess them. In keeping with the above principle, interest shall be given at the dollar rate of 8% per annum from the date of judgment till payment in full.

As regards costs, given the defendant's partial success, which I assess at 50%, I would award half the costs of the suit to the plaintiff.

In the result, judgment is entered for the plaintiff against the defendant on the following terms:

i) Special damages: USD 16,213 (United States Dollars sixteen thousand two hundred thirteen only).
ii) Interest on (i) at the rate of 8% per annum from the date of judgment till payment in full.
iii) Half the costs of the suit

Orders accordingly.

Yorokamu Bamwine

J U D G E

30-09-2008

Order:

This judgment shall be delivered on my behalf on the due date by the Registrar of the Court.

Yorokamu Bamwine

J U D G E

30-09-2008