THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-333- 2004

M/S AKKERMANS INDUSTRIAL ENGINEERING :::::::::::::::::: **PLAINTIFFS**

VERSUS

ATTORNEY GENERAL :: **DEFENDANTS**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

JUDGMENT:

The Plaintiffs sued the Attorney General in his representative capacity on behalf of The Ministry of Education and Sports (hereinafter referred to as *"MOES").* The case for the Plaintiffs is that on the 21st June, 2002 they entered Into a contract with MOES to provide Consultancy services for the installation and Commissioning of equipment supplied under the 1 st Procurement cycle for Makerere University (hereinafter referred to as *"MUK")* and Uganda Polytechnic Kyambogo (hereinafter referred to as *"UPK").* The Contract was for a sum of Euro 275,172.32 and for a period of 3 months. The Plaintiffs generally were to inspect the machines, identify the required Missing spares parts, Install and Commission the machines, train staff and provide operating manuals and a performance warranty. MOES on the other hand were generally expected to provide spares and purchase other equipment and accessories for installation on the recommendation of the plaintiffs.

It is the further case for the Plaintiffs that MOES failed to honour their obligations within the specified time frame and extended the contract twice first for 2 months and thereafter for a further 12. 5 months largely as a result of failing to provide the required spares, equipment and materials. The plaintiffs aver that out of a total contract price of Euros 275,172.32 they were only paid Euros 245,010.85 and that a further Euro 1,804,710.03 is also due as special damages for the extended period of 14.5 months under the contract.

On the other hand the Defendants generally deny the claims of the plaintiffs but concede that they only owe the plaintiffs the sum of Euros 17,467. 87 only. The Defendants deny that there

was any modification and or extension of the original contract.

On the 2nd March, 2005 during the per trial scheduling conference Court gave Judgment on admission against the Defendant on the admitted sum of Euros 17,467.87 and set the following issues for trial.

1. Whether the contract between the parties was extended and on what terms?

2. Whether in the event that the contract was not extended the Plaintiff is entitled to payment on the extra 14.5 months spent on the job on the basis of the principle of quantum meruit?

3. Whether the Defendant breached the contract?

4. Whether the Plaintiff is entitled to the remedies claimed?

Mr. B. Tusasirwe and Mr. A. Lumonya appeared for the Plaintiffs while Mrs. R. Rwakojjo and Mr. Mungungu appeared for the Attorney General.

Issue No 1. **Whether the contract between the parties was extended and on what terms?**

The plaintiffs called one witness Mr. Chappa Karuhanga the Chairman of M/S Serefaco Ltd the local agents of the Plaintiff Company and who did the consultancy work with them in Uganda.

The case for the plaintiffs is that the contract was supposed to run from the 21st June 2002 until the 30th September 2002 a period of 3 months. However due to failure of the Defendant to supply spare parts as provided for under the contract not all the work could be completed

on time. Mr. Karuhanga testified that when the contracted period expired it was then extended on the following basis. First the parties held a meeting on the 29th November 2002 which was Minuted (Exh. P.13) where it was agreed that the contract be extended by *"...two months and increase the fees according to the existing man month rates..."* He also testified that out of expediency the outstanding spares be procured by the Plaintiff to Save time for which the consultant would be paid a handling fee. Mr. Karuhanga further testified that he received several letters that show that the contract was extended. The first was from the Project Implementation Director Mr. John Nakabago dated 14th February, 2003 where he wrote; ". . . *As far as we are Concerned, we have already increased your contract by two man months..."* The second was from The Permanent secretary MOES dated 14th April 2003 (Exh. P.3) who wrote *"...This is to inform you that the operation of the agreement has not ceased..."* other letters were dated 5th March, 2003 and 10th November, 2003. It is therefore the case for the Plaintiff that there were effectively on the contract until November, 2003 at the Instance and request of the defendant; a total of 14.5 additional months for which they have to be paid. By reason of their actions Counsel for the Plaintiff submitted that the Defendants are estopped from denying the extension of the contract. In this regard he referred me to the cases of

Balkis Consolidated Co. V Tomkinson (1893) AC 396

For the proposition that estoppel arises if a party makes a false representation to another who acts on that representation and the other party cannot be afterwards be allowed to claim the falsehood of his representation and assert the real truth in place of the falsehood which has so misled the other.

The Defendants called three witnesses Mr. Nakabugo (DW1) who was the project Director, Mr. David Byona (DW2) the project Accountant and Mr. A. Rugumayo (DW3) the project engineer. They all did not did deny the communication that the Plaintiff relied upon above. They however all submitted that the contract provided that any amendment required the prior approval of the project's main financier The African Development Bank (ADB). Counsel for

the Defendants submitted that the contract provided in Article 2.4 that the terms and conditions of the contract could only be modified by the written agreement of the parties but shall not be effective until the consent of the ADB had been obtained. This modification they submitted related to both the scope of services and the contract price. Counsel for the Defendant further submitted that no evidence had been adduced that if there was a contract modification as alleged that the consent of the ADB had been obtained to make it effective. She referred to minutes of the parties dated 29th November, 2002 (Exh. P.13) which she submitted fell short of the contractual requirement for extension. She in particular referred me to paragraphs 5 and 6 thereof which provided

Para 5. .. . *it was **proposed** (emphasis added) to extend duration of the contract by two months and increase the fees according to the existing man-month rates...”*

Para 6. “. . . *PIU will write to the Bank and to the Permanent Secretary **making a proposal and seeking approval** (emphasis added)...”*

She submitted that such a proposal and approval never materialised.

As to estoppel Counsel for the Defendant submitted that the argument for it was misconceived. She submitted that there was no misrepresentation that had been made to the Plaintiffs’ through the minutes and the letters that had been said to relied upon as it was always understood by the parties that the consent of the ADB would required but was not obtained.

She finally submitted that a written contract can only be varied by another written agreement to that effect but in this case there is none. In this regard I was referred to the case of

Mujuni Ruhemba V Skanka Jensen (U) Ltd. (1997-2001) UCLR 92.

I have perused the submissions of both counsel and reviewed the evidence on this issue. The parties in this case entered into a written contract to govern their relationship. Clearly a period of three months was insufficient in many respects to carry out its desired objectives and the parties felt it required modification. However to modify it required the parties to follow the contractual requirements for modification namely to do so in writing and obtain the consent of the ADB. This was not done which from a contractual point of view means that there was no extension as envisaged in the contract. In this regard I must agree with the submissions of counsel for the Defendant that legally there was no modification. I must also agree with Counsel for the Defendant that the argument for estoppel in these circumstances is misconceived in the face of clear provisions of the contract. Estoppel being an equitable remedy is a matter of discretion based on well established principles. One such principle is that estoppel shall only be used as a *"shield and not a sword"* but in this case the Plaintiffs have chosen to use it as a *"sword"* contrary to the established principles for which the argument cannot stand. I therefore answer the first issue in the negative that the contract dated 21st June 2002 was not extended.

Issue No 2. **Whether in the event that the contract was not extended the Plaintiff is entitled to payment on the extra 14.5 months spent on the job on the basis of the principle of quantum meruit?**

This is an alternative issue to the issue number one as framed. The evidence adduced to court regarding this issue is basically the same as that in issue number one. Counsel for the Plaintiff submitted that there is no doubt that when the initial contract period expired another contract came into existence between the parties with a view to complete the installation work. He submitted that the Plaintiffs at the prompting of the Defendants went ahead with the consultancy, identified new suppliers and procured spares for which the defendant had promised to pay. Counsel for the Plaintiff submitted that a party can claim quantum meruit for work done or goods delivered under a contract that does not expressly provide how much he is to be paid. In this regard I was referred to the case of

Paynter V Williams (1833) 1 C&M 810

He submitted that an implied contract had come into place and where such a contract is silent as to remuneration then the court will award a reasonable sum. In this regard he referred me to two cases namely;

Way V Latilla (1937) 2 ALL E.R. 759 and

the judgment of **Greer J** in **William Lacey (Hounslow) Ltd V Davis [1954]** 1 **Q.B. 428.**

Counsel for Defendant referred Court to Black's Law Dictionary 6th Edition p. 1243 which inter alia defines quantum meruit as *"much* as *deserved"*. She disagreed that the Plaintiffs were entitled to an extra 14.5 months of payment on the basis of quantum meruit. She submitted that in the Plaintiff's Final Report (Exh. P.11) at pages 11 and 15 showed the work to be carried out after the contract ended. This included the installation of the x-ray spectrometer machine. The spares for the x-ray machine were procured by the Plaintiff. The x-ray machine was then fixed by another South African firm M/s Panalytical Ltd who had been sourced by the Plaintiff and only arrived in Kampala on the 9th November, 2003 for a week to do the said work. Counsel for the Defendant submitted that the Plaintiff cannot claim payment for an extra 14.5 months for simply purchasing a spare and being with the officials of M/s Panaytical Ltd for one week when they installed the x-ray tube.

I have perused the submissions of both Counsel and the evidence on this issue. It clear that the parties found themselves in some fix when the contract period had ended yet its objectives had not been met. Mr. Rugumayo (PW3) the project Engineer Mr. Rugumayo testified that after the contract expired there was further activity in practical terms though not in legal terms as no approval for the extension had been obtained. He further testified that it was management's decision to work with the consultant (i.e. the plaintiff) to try and finish the contract. This is further corroborated by the letters to the Plaintiff Exhibits P.2 and 3 (supra) from the Project Director and the Permanent Secretary of MOES. It is therefore not in doubt in my mind that more work was done by the Plaintiff with the *"administrative"* consent of the defendant.

In the case of

Agri-Industrial Management agency Ltd. V Kayonza Growers Tea Factory Ltd and another HCCS 819 of 2004

I held with approval on the authorities that if services are supplied at the request of the recipient, or if they are freely accepted by him, he will be bound to pay a reasonable price for them. This is the principle of quantum meruit. The Defendant in this case freely accepted the services of the Plaintiff after the contract period had expired and therefore will have to pay a reasonable price for those services. I however agree with counsel for the Defendant, that the said compensation should not be more than deserved. In this respect I am not been able to agree with the Plaintiffs that it is reasonable to charge for a period when they were simply waiting for spares. Quantum meruit being an equitable remedy targets unjust enrichment and therefore covers actual services rendered or materials supplied. I think it is unreasonable given the history of this contract to keep workers (if that is what the Plaintiff did) on the site for 14.5 months simply just waiting for spares to be delivered and installed.

In answer therefore to the second issue I find that subject to the parameters outlined above that the Plaintiff is entitled to payment beyond the contract period on the basis of the principle of quantum meruit.

Issue No 3. Whether the Defendant breached the contract?

From my findings above I find that to the extent that the Defendants have not paid for the services under the initial contract and that during the extended period under the principle of quantum meruit they are indeed in breach of contract. In this regard Judgment on admission has already been given against the Defendant on the admitted figure of Euros 17,467.87. What remains to identify the breach and quantify.

Issue No 4. **<u>Whether the Plaintiff is entitled to the remedies claimed?</u>**

The plaintiff in para 5 their pleadings claim the following amounts

(i) Amount due on the submission of the final report……...25,517.23

(ii) Balance on 2nd progress report.....…….....2,644.24

(iii) Balance on payment for x-ray tube……..... 222.24

(iv) Balance on Heidenhen software ……...993.24

(v) Consultancy fee for 2 months extension confirmed
in meeting of 29/09/02 (275,175.32 x 32 x 2/2.25) ……244,58762

(vi) Consultancy fee for a further 12.5 months……..... 1,528,735.10
(275,172.32 x 12.50 / 2.25)

Total **1,804,710.00**

On this figure the Plaintiff further claims interest at 20%p.a. from 18th November 2003 until payment in full.

The Plaintiff also claims general damages and interest thereupon at court rate from the date of judgment.

In response to these claims Mr. Byona (DW2) the Project Accountant testified that all the contractual amounts were paid to the plaintiff except in two instances. The first was on the second progress report where the Plaintiff was to have done by that time 80% of the work but only 77% thereof was certified so that claim was accordingly

reduced. The second was on the final report for 10% which according to The Project Director Mr. Nakabugo (DW1) was not paid because the invoice had *"white out"* and so was treated as suspicious.

Judgment on admission has already been given against the Defendant for Euro 17,549.70 which inter alia covers the claim on item (ii) for the x-ray tube and item (iii) for the software and Euros 16,338.86 being the balance on the contract itself as not all the work was completed.

As to the claim for Euros 27,517.23 (under item (i) above) as the amount due on the submission of the Final Report this is provided for the contact under "Part III Special Conditions" (Para 6.4. provided for 10% of the contract lump sum which assuming that the contract had run well, which it did not). Since the contractual period ended before the work was completed the Final report was subject to the work completed at the time of the Second Report (i.e. 77% out of 80%). This would put the total adjusted contractual lump sum payable to the Plaintiffs under the initial contract to be Euro 245,590.85 (see Exh. D2, D3 and D4) added to the admitted amount of Euro 16,338.86 (on the contract) giving a total of Euro 261,929.71 (instead of Euro 275,172.32) which, I find is the amount due under the said contract. There is therefore no further amount therefore to award under item (i) above.

As to the extended period (claims (v) and (vi) above) where the principle of quantum meruit applies it appears that all direct costs have been dealt with leaving a reasonable compensation to the Plaintiff for extra work. The evidence shows that the Plaintiffs in the extended period bought the x-ray tube and identified M/S Panalytical Ltd from South Africa to install and commission the machine even though the Plaintiff signed the job card. During meeting of the 29th November, 2002 the Plaintiffs in part B (4) of the minutes proposed a handling fee of 10%. I find that for what the Plaintiffs did in the extended period a handling fee of 10% is reasonable compensation. Since court did not see all the relevant invoices I order that the Defendant and Plaintiff obtain the invoices paid for services of M / s Panalyitical and the full cost of the X-ray tube and pay 10% of those invoice values to the Plaintiff as its handling charges to complete the work on the X-ray machine.

As to general damages Counsel for the Plaintiff did not address Court on the matter and quanti1y the amount to be awarded. I therefore exercise my discretion to award general damages of Euros 1,600.

As to interest I award the Plaintiff interest at 4% (being an award in euros) from the 18th November, 2003 on the claim for special damages for sum of Euros 17, 467.89 until payment in full. I also award further interest at 2% on the general damages from the date of judgment until payment in full.

I also award the Plaintiff the costs of the suit.

Justice Geoffrey Kiryabwire

JUDGE

Date: 19/01/09