

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA  
AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 338 OF 2009**

**MESSRS BISONS CONSULT INTERNATIONAL LTD}..... PLAINTIFF**

**VERSUS**

- 1. KAMPALA CITY COUNCIL}**
- 2. KAMPALA CENTRAL DIVISION}..... DEFENDANTS**

**BEFORE HON. Mr JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

On 7 November 2012 the Plaintiffs suit was substantially settled when the parties filed a partial settlement of the suit by consent and the same was entered as a partial judgment of the court on 7 November 2012. In the consent it was agreed as follows:

1. That the Defendants have agreed to pay the Plaintiff a sum of Uganda shillings 41,687,929/= as the amount due to the Plaintiff after deducting the statutory withholding tax.
2. The following disagreed matters shall be determined by the court:
  - a. Three invoices each in the amount of Uganda shillings 8, 784,250/= totalling to Uganda shillings 26,352,750/= which were issued by the Plaintiff but are disputed by the Defendants.
  - b. Adjustments made on the Plaintiffs invoices by the Defendant's contract supervisor totalling Uganda shillings 13,705,220/=.
  - c. The prayer for general damages by the Plaintiff.
  - d. The prayer for interest on the decretal amount at the rate of 25% per annum from November 2006 until the date of judgment.
  - e. Costs of the suit.

Subsequently it is only the Plaintiff who adduced evidence for purposes of determination of the disagreed matters and after failure of the Defendant to produce its witness, both Counsels finally addressed the court in written submissions. The Plaintiff was represented by Counsel John Kaddu while the Defendant was represented by Counsel Bernard Mutyaba Sempa.

The submissions of the Plaintiff's Counsel is that on 1 November 2003 the Plaintiff and the first Defendant executed a three-year contract for road sweeping, grass cutting and gardening in Kololo area at a monthly fee of Uganda shillings 8,784,250/=. The total contract sum for the three-year period was Uganda shillings 316,233,000/=. The Plaintiff performed the contract and issued monthly invoices to the first Defendant for the works done. The Plaintiff filed this action seeking to recover Uganda shillings 82,732,685/= as the unpaid balance of the contract sum, general damages for breach of contract, interest and costs of the suit. Following a series of reconciliations of accounts by the parties, the Defendants agreed to pay a sum of Uganda shillings 41,687,929/= to the Plaintiff but disputed three invoices amounting to Uganda shillings 26,352,750/= in addition to a sum of Uganda shillings 13,705,250/= in respect of deductions made against some monthly payments which were contested.

The issues for trial firstly are whether the Plaintiff is entitled to payment for the three disputed invoices each in the amount of Uganda shillings 8,784,250/= totalling Uganda shillings 26,352,750/=:, secondly whether the Plaintiff is entitled to payment of Uganda shillings 13,705,220/= being the total sum of the adjustments made on its invoices by the Defendant's contract supervisor and thirdly the remedies available to the parties.

According to PW1 the disputed invoices appear at pages 49, 55 and 58 of the Plaintiff's trial bundle. The invoices were disputed by the Defendants on the ground that the Plaintiff failed to produce their original copies. Under the contract signed by the parties the preparation and submission of monthly invoices was not a prerequisite for receiving monthly payment and it was the Plaintiff who adopted the issuance of invoices as a method of tracking payments received from the Defendants. The Plaintiff could only be denied payment for breach of its obligations under the contract under the provisions of clause 18.1 thereof. There was no requirement for the Plaintiff to prepare monthly invoices before it would receive payment. The invoices prepared were received by the contract manager of the Defendants. Counsel submitted that the contract signed by the parties did not require the Plaintiff to issue monthly invoices to the Defendant as a prerequisite to payment. The agreed monthly pay was a fixed sum of Uganda shillings 8,784,250/= under clause 4.1 of the contract which made it mandatory for payments to be effected on a monthly basis and in any case not later than the 7<sup>th</sup> day of the following month. The Defendant did not deny having received the Plaintiff's invoices and no explanation has been given for failure to settle the sums indicated in them. In the absence of any evidence to suggest that the work was not done by the Plaintiff for the three months in issue, Counsel prayed that the court finds that the Plaintiff is entitled to payment for the three disputed invoices totalling Uganda shillings 26,352,750/=.

In reply the Defendants Counsel submitted that the Plaintiff is not entitled to the payment for the three invoices. Though the Plaintiff claims to have invoiced the Defendant for the stated amount, it could not produce the original copies and could not explain the failure to do so. According to the contract, work was supposed to be done to the satisfaction of the Defendant and the said

satisfaction was to be expressed by issuing certificates. PW1 in his evidence did not testify that it demanded for certificates so as to be entitled to payment.

In rejoinder the Plaintiff's Counsel reiterated submissions that the Plaintiff was not required by the contract to prepare monthly invoices before receiving payment from the Defendants. The contract did not require the Defendants to issue certificates as proof of the work done satisfactorily and the Plaintiff was not obliged to ask for a certificate. Counsel further submitted that the Plaintiff did not receive any certificates in respect of the payments admitted by the Defendants.

On the first issue of **whether the Plaintiff is entitled to the prayers in respect of the three disputed invoices**, the question of whether the Plaintiff is entitled depends on whether the Plaintiff did carry out the work. PW1 Bisangwa Kasimba Josephat, the Managing Director of the Plaintiff testified that the work was done. He testified that the invoices were disputed by the Defendants on the ground that the Plaintiff failed to produce the original copies thereof. This evidence has not been contradicted by a counter evidence of the Defendants. In those circumstances, the grounds for refusal of payment for failure to produce the original invoices, is not a valid basis for denying payment to the Plaintiffs who carried out the contracted works. Clause 2.1 of the contract provides that any variation to the contract shall be in writing. There is no evidence of any variation to the contract and the Plaintiff without much ado is entitled to payment of the sum of **Uganda shillings 26,352,750/=** based on the three invoices admitted in evidence because it proved that the work contracted was done.

The second issue is **whether the Plaintiff is entitled to payment of Uganda shillings 13,705,224/=** based on adjustments made on its invoices by the Defendant's contract supervisor.

The Plaintiff's Counsel relied on the evidence of PW1 that the Plaintiff' disputed the adjustments made to some of the monthly payments by the Defendant's contract supervisor on the ground that the contract signed by the parties did not give him the mandate to do so. If the Defendant's contract supervisor was dissatisfied, he was required to give 14 days' written notice to rectify the breach under clause 18.1 of the contract but never issued such a notice. The Defendant's contract supervisor did not testify.

In reply the Defendants Counsel submitted that the Plaintiff did not in his testimony show how the figure arose.

In rejoinder the Plaintiff's Counsel submitted that PW1 proved that the deductions were made by the Defendant's contract supervisor without justification.

I have carefully considered the testimony of PW1 which is the only testimony on the matter. The testimony is that the Plaintiff disputes the adjustments made to some of its monthly payments by the Defendant's contract supervisor all totalling to Uganda shillings 13,705,220/=. The ground for disputing the adjustments was that the contract did not give the supervisor any mandate to

make any adjustments against the monthly payments due to the Plaintiff. The letter awarding the tender for grass cutting, gardening and road sweeping dated 17th of September 2003 provides that the contract was to be under the direct supervision of the Central Division.

The Plaintiff relied on clause 18 of the contract for the submission that the Plaintiff was entitled to 14 days notice for breach of its primary obligations under the contract. However clause 18 deals with the grounds for termination of the contract. Because termination did not arise, the question of giving 14 days notice for breach of primary obligations does not arise.

The contract was executed on 1 November 2003 and clause 5 thereof provides that the Council shall pay to the contractor a monthly fee of Uganda shillings 8,784,250/=. It does not give any other conditions for the payment. The contract is subject to the general conditions annexed to the written contract. The general conditions defines the work, makes provision for employees of the Plaintiff and the authorised officer. Clause 4 of the general conditions provides that payment shall be effected on a monthly basis and in any case not later than the seventh day of the month following. The works or the obligations of the Plaintiff are catered for under clause 5.1 of the general terms of the contract. The Plaintiff was required to weed flowerbeds/pots, plant and maintain new flowers and trees as directed by the contracts supervisors; protect flowerbeds/pots, weed the flower plots and replace them with new flowers when necessary. The Plaintiff was to ensure that all the refuse/garbage generated while carrying out its obligations were properly disposed off. The Plaintiff was required to provide the services in a proper skilful and workmanlike manner. The supervisor was entitled to view and monitor the provision of the services.

There is clearly no express provision for deduction of the monthly pay. Though the Plaintiff did not give the particulars of the deductions, the Plaintiff has proved that the deductions if made would not be in accordance with the contract. In the original plaint the Plaintiff claimed Uganda shillings 82,732,685/= and did not raise the question of deductions. Apparently the deductions came about in the reconciliation exercise of the parties. The basis of the deductions has not been explained in the testimony of PW1. The court cannot assume that the deductions are not lawful. The only testimony is that the Defendant's authorised officer never gave any notice to the Plaintiff about dissatisfaction. However there is no evidence that the deduction was made on the basis of dissatisfaction with the Plaintiffs work. All the invoices contained in the trial bundle indicate that the amount payable before charging VAT was Uganda shillings 7,554,445/=. VAT chargeable was 17% and amounting to Uganda shillings 1,229,795/=. The total amount after charging VAT for each monthly pay was Uganda shillings 8,784,250/=. Schedule of payments submitted by the Plaintiff which has 32 items shows that in some months the Plaintiff was paid between 7,284,250/= and the full amount of Uganda shillings 8,784,250/=. Commencing 27th of June 2006, no payments had been made. The schedule also shows that the amounts deducted represent approximately the amount that would be due for VAT. Towards the end of the year 2005 the VAT chargeable was 18%. Beginning September 2005, the invoices of the Plaintiff show that VAT chargeable was 18% and therefore the amount payable before charging VAT was

Uganda shillings 7,444,273/=. VAT chargeable was Uganda shillings 1,339,967/= per month. Finally clause 2.1 of the standard terms and conditions of the contract provides as follows:

"Following the formation of a binding agreement no deviation from, addition to, or variation of the conditions shall be valid or of any effect unless agreed in writing and signed by the parties."

There is no provision in the contract on how VAT was to be treated. Last but not least, it would be a valid inference of fact to conclude that the amounts withheld was VAT. Payments are to be made without deduction. In those circumstances, the Plaintiff has proved on the balance of probabilities and on the basis of the agreed documents that it was not paid a sum of Uganda shillings 13,705,220/=. To be more precise it is the agreement of the parties in the partial judgment of the court issued by consent of the parties on 7 November 2012 that adjustments were made on the Plaintiffs invoices by the Defendant's contract supervisor totalling to Uganda shillings 13,705,220/=. The basis for such a deduction has not been proved. Before I windup the issue, it is the obligation of the supplier of services under the Value Added Act cap 349 particularly section 4 thereof that VAT is chargeable on every taxable supply in Uganda made by a taxable person. A taxable supply under section 18 (1) of the VAT Act is a supply of goods or services other than an exempt supply for consideration as part of his or her business activities. The tax is imposed on the supplier of the services and not on the consumer. In this case the supplier of the services is the Plaintiff. In those circumstances, the Plaintiff is entitled to the full amount payable on a monthly basis from which it is obliged to pay VAT. Consequently the Plaintiff is awarded the sum of Uganda shillings 13,705,224/=. For the avoidance of doubt, the Plaintiff is obliged to remit any VAT that is owed to Uganda Revenue Authority under the payments made pursuant to the contract by the Defendant.

Additional remedies:

The Plaintiff's Counsel submitted that under clause 4.1 payments were to be effected on a monthly basis and in any case not later than the 7th day of the following month. He submitted that the Plaintiff pursued payment in vain until it sought redress in court in the year 2009. The Defendant made partial admission in November 2012 and made payments in January 2013. In those circumstances the Plaintiff had been kept out of its money and is entitled to general damages. Counsel relied on **Halsbury's laws of England fourth edition volume 12 (1)** paragraph 812 for the submission that general damages are losses, usually not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are the presumed and natural or probable consequence of the wrong complained off and all the Plaintiff needs to do is to assert that such damages have been suffered.

In reply the Defendants Counsel submitted that the Plaintiff in the testimony did not indicate that they had suffered loss or inconvenience. Consequently the Plaintiff is not entitled to general damages.

I agree with the Plaintiffs submissions that it has been kept out of its money contrary to clause 4.1 of the contract. Failure to pay the Plaintiff on a monthly basis and in any case not later than the 7th day of the following month amounts to breach of contract. Secondly the Plaintiff had been kept out of its money for several years until it sought redress in a court of law. In those circumstances, the Plaintiff is entitled to general damages for breach of contract. Accordingly, the Plaintiff is awarded general damages of 21% of the decreed amount namely the amount in the partial judgment amounting to Uganda shillings 41,687,929/=, amount on the basis of three unpaid invoices of 26,352,750/-.

#### Interest

As far as the question of interest is concerned Counsel submitted that the Defendant kept the Plaintiff out of his money since 2006. He therefore prayed for interest on the sum of Uganda shillings 41,687,929/= awarded in the partial judgment by consent of the parties. And interest on additional sums awarded by the court. In the plaint the Plaintiff prays for interest at the rate of 25% per annum from November 2006 until the date of judgment.

Section 26 (2) of the Civil Procedure Act permits the court to award a reasonable interest on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on the principal sum for any period prior to the institution of the suit and with such further interest at such rate as the court deems reasonable on the aggregate sum adjudged from the date of the decree to the date of payment or any earlier date.

In the circumstances it is reasonable to award interest at the rate of Uganda shillings 21% per annum from January 2007 till the date of judgment on the aggregate sum adjudged on the partial judgment amount of Uganda Shillings 41,687,929/= plus 26,352,750/= based on the three invoices and totally **Uganda shillings 68,040,679/=**. Secondly the Plaintiff is awarded interest at 14% per annum on the aggregate sum of **Uganda shillings 68,040,679/=** from the date of judgment till payment in full.

Lastly the general rule is that costs follow the event and the Plaintiff is entitled to costs of the suit and the costs of the suit are awarded to the Plaintiff.

Judgment delivered in open court this 7<sup>th</sup> day of June 2013

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

John Kaddu for the Plaintiff

Plaintiff's representative Paul Walugembe (Manager) in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

7<sup>th</sup> June 2013