**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HCT - 00 - CC - CS - 289 – 2013**

**STARLITE ENGINEERS LTD :::::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**NATIONAL HOUSING & CONSTRUCTION CO. LTD :::::::::::: DEFENDANT**

**BEFORE: THE HON. JUSTICE DAVID WANGUTUSI**

**J U D G M E N T:**

National Housing Corporation, the Defendant in this case, desirous of building two blocks of flats in Bugolobi sought and invited bidders to execute this project. Starlite Engineers Ltd, the Plaintiff herein responded and emerged as the successful bidder. They were awarded a contract for the supply of labour services on 16th May 2011. The contract price was Ugx. 737,618,750/= and the contract commenced on 27th April 2011 with the intended completion date as 23rd July 2012. Extension of that period however could be done on request of the Plaintiff after the construction manager assessing the reason for extension and forwarding it to the Chief Operations Officer for approval. Payments would be effected from time to time on receipt of invoices by the Defendant supported by payment certificates within 30 days of certification by the Project Supervisor.

In other words, the payments would be works measured of actual work done duly certified by the Project Supervisor where applicable.

The supervisor would deduct 6% withholding tax. It was an agreed term in the contract that VAT would be paid to the Contractor. 10% of the contract sum was to be retained as retention money. The Defendant was to provide all the construction materials, site offices and storage. Furthermore, the Defendant would carry out the overall site supervision of the works.

Subsequently, a dispute arose with regard to who was liable to pay Value Added Tax (VAT) to the Uganda Revenue Authority (URA). The Plaintiff contended that under the contract, the Defendant was obliged to meet the VAT and any other taxes accruing from the transaction. This was disputed by the Defendant which led the Plaintiff to file this suit on 7th June 2013 in which they seek an order for specific performance of the contract by the Defendant with respect to the payment of VAT together with the interest attached it to it by URA or an order of reimbursement of all money paid by the Plaintiff to URA in satisfaction of the same, an order for the payment of money owed by the Defendant to the Plaintiff for work done but unpaid for amounting to Ugx. 78,864,699/=, general damages, exemplary damages, aggravated damages, interest and costs of the suit.

The claim was countered by the Defendant's Written Statement of Defence in which they denied any liability by contending that the Plaintiff's bill of quantities, which took precedence over all other documents in the event of discrepancies, did not indicate VAT and therefore the contract amount was considered to be VAT inclusive and that the Defendant is not liable to reimburse the Plaintiff for paying tax as required by law.

It is also in this Written Statement of Defence that the Defendants formally terminated their contract with the Plaintiff.

The issues for determination by this court as agreed by both parties are:

1. Whether the Defendant unlawfully terminated the contract?
2. Whether the Defendant is liable for VAT as claimed by the Plaintiff?

3. Whether the Plaintiff is entitled to the remedies sought.

With regard to the first issue, the contract for the supply of labour services by the Plaintiff to the Defendant commenced on 27th April 2011 and the services were to be completed by 23rd July 2012 – Exhibit D.2. It is without dispute that by 23rd July 2012, the construction works were not complete. However, the Plaintiff continued to work until their work was suspended by the Defendant on 13th June 2013 - Exhibit P.1. The email from the Defendant's Project Coordinator to the Plaintiff's Manager read as follows:

> *"Dear Richard,*
>
> *As per the conversation you were required stop works until further notice. You will receive an official letter tomorrow."*

The ultimate termination of the contract was formally expressed in paragraph 4 of the Defendant's Written Statement of Defence which provided:

> *"The Defendant in response to paragraph (4)(a) of the plaint shall contend that the Plaintiff's contract is no longer under performance."*

Provisions regarding termination of the contract are set out in Clause 59 of the contract. It provides in Clause 59.1 that the employer or the Contractor may terminate the contract if the other party causes a fundamental breach of the contract. Instances that would constitute a fundamental breach are set out in Clause 59.2. Counsel for the Plaintiff submitted that the contract was terminated pursuant to Clause 59.2(g) and 59.4.

Clause 59.2(g) sets out an instance that constitutes a fundamental breach. It provides:

> *"If the rate of progress of the works at any time during the period of the contract is such that the completion of the works will, as measured against program, be delayed by the number of dates for which the maximum amount of liquidated damages can be imposed."*

DW 1 testified that one of the reasons the contract was terminated was delays by the Plaintiff in completing the works and that since the Defendant's clients wanted to take over their units, the Defendant was under pressure to complete the project.

That there were delays was not disputed by the Plaintiff. PW1 acknowledged receipt of a letter dated 18th October 2012 from the Defendant cautioning about the slow progress of the work; Exhibit D.8. It read in part:

> *"… To this date, the deployment levels have not improved and the situation is getting worse by the day. As a result, your blocks are far behind schedule yet all rendering, plastering, floor screening and painting work should have been complete by 24th July 2012 following an extension of time."*

PW2 testified that the contract date of completion was extended but that there was no formal communication of the same. He further testified that the Plaintiff followed the procedures for requesting for extension of time as set out in the contract but he was unable to show any correspondence of the same. It is important at this point to examine the contract provision on extension of time as set out in Clause 28.

Clause 28.2 provides:

> *"The Project Manager shall decide whether and by how much to extend the intended completion date within 21 days of the Contractor asking the Project Manager for a decision upon the effect of a Compensation Event or Variation and submitting full supporting information. If the Contractor has failed to give an early warning of a delay or has failed to cooperate in dealing with a delay, the delay by this failure shall not be considered in assessing the new intended completion date."*

By this provision, the Plaintiff was required to request for an extension and would have received a response regarding the same within 21 days. There is no proof that the Plaintiff requested for such an extension. Be that as it may, the Plaintiff continued working long after 23rd July 2012 until 13th June 2013 when their work was suspended. PW1 testified that the fact that they

continued working implied that the contract had been extended. This was countered by DW1, who testified that the contract was not extended but that the Plaintiff was given more time to complete the works. She further testified that despite the fact that the Plaintiff was allowed on site to complete the works, they never did and the Defendant had to hire other contractors to finish the project. This fact was not disputed.

The Plaintiff's reliance on the fact that they were not stopped from working when time ran out which meant an extension, cannot stand. The provisions I have earlier mentioned described the manner in which extensions were made and it was the only procedure that could be used to create an extension. This was a written contract which was to be executed within its four corners.

Accordingly, while it is true that the Plaintiff continued working after the 23rd July 2012, there is no proof that the procedure of extension of time was followed and thus the Plaintiff was working outside the agreed period as no extension had been given by the Defendant. See; **Green Boat Entertainment Ltd V City Council of Kampala HCCS 580/2003**

Counsel for the Defendant submitted that the contract was also terminated pursuant to Clause 59.4 which provides:

> *"Notwithstanding the above, the employer may terminate the contract for convenience."*

DW1 testified that besides delay, the two other reasons the contract was terminated were that deployment was decreasing and that the workmanship was becoming worse. This is corroborated by a number of correspondences which include Exhibit D7 which is an email dated 18th June 2012 addressed to the Plaintiff in which they are cautioned about misusing the Defendant's material.
This letter written by Nabantya Angella, the Assistant Project Engineer and who testified as DW1 read in part;

> *"… We have noted with concern that your supervisors are misusing National Housing & Construction Company materials particularly on Block B. I would like to inform you that you will have to incur the expenses of the extra materials starting with extra treated timber required now to complete Block B roofing."*

Further in Exhibit D.8, a letter from the Defendant to the Plaintiff dated 18th October 2012, the Plaintiff is also cautioned about low deployment levels which in effect had led to the Plaintiff's failure to meet set targets for each activity. Other instances of dissatisfaction are expressed in Exhibit D.10 in which the low deployment levels by the Plaintiff were apparent.

These correspondences were not disputed by the Plaintiff. It is upon this background of events that the Defendant terminated its contract with the Plaintiff.

I have found no foundation in the Plaintiff's claims that the contract was extended as there was nothing to show that the Plaintiff had followed the procedures set out in the contract with regard to extension of time.

Further, it is based on the Defendant's dissatisfaction with the Plaintiff's performance of the contract that they exercised their rights under Clause 59 of the contract to terminate it. I have combed through the proceedings and seen nothing to show that in terminating the contract as they did, the Defendant acted unlawfully. It is my finding therefore that the contract was lawfully terminated.

The second issue pertains to whether the Defendant is liable to pay VAT as claimed by the Plaintiff.

The VAT Act Cap 349 is clear as to the person liable to pay tax. Section 5(a) provides that in the case of a taxable supply, the tax payable is to be paid by the taxable person making the supply. In this case the person making the supply is the Plaintiff so they are liable to pay VAT to URA and at no time could they refer URA to the Defendant. It was therefore the duty of the Plaintiff to pay VAT to URA

While they are liable to pay VAT to URA, it was the Plaintiff's contention that they should be reimbursed by the Defendant because they had agreed that the Defendant would pay VAT to the Plaintiff.

The Defendant contended that the VAT was included in the final contract price and was therefore under no obligation to pay. They also argued that since VAT was a legal requirement there was no way the Plaintiff could have quoted a price excluding VAT in it.

To understand the position better, one has took at the agreement that the parties signed which specifically stated the price of construction as Ugx 737,618,750/=. This was the contract price for the works to be performed in the contract. In none of the provisions of the contract did the parties mention VAT except in Clause 20 where in the parties provided that VAT would be paid by the Defendant to the Plaintiff.

Looking at the case as a whole VAT was treated separately. I say this because even in the certificates claimed by the Plaintiff, VAT was not included. The conduct of the Defendant in remaining silent and processing payments to the Plaintiff, which clearly spelt out that VAT had not been included can only be concluded that the Defendant knew that the issue of VAT would be handled in line with Clause 20 in which the Defendant had undertaken to pay it to the Contractor, the Plaintiff herein.
I can see no other construction to Clause 20 of the agreement besides the above. In the premises the Plaintiff is entitled to compensation of VAT from the Defendant.

Turning to the third issue, the Plaintiff sought an order for specific performance of the contract by the Defendant with respect to the payment of VAT together with the interest attached to it by URA or an order of reimbursement of all money paid by the Plaintiff to URA in satisfaction of the relevant VAT obligations if the same would have been paid by the Plaintiff to URA by the date of concluding this suit. Having found that the Plaintiff was liable to pay VAT to URA as is required by the law which the Plaintiff subsequently did, it is also this court's finding that the Defendant was obligated to pay VAT to the Plaintiff as per the terms of their contract, which the Defendant did not do.

Accordingly, the Defendant is hereby ordered to reimburse the Plaintiff all the money they paid to URA in satisfaction of VAT.

The Plaintiff also sought an order for the payment of money owed by the Defendant to the Plaintiff for work done but unpaid for amounting to Ugx. 78,864,699/= as at 7th June 2013 when the suit was filed. The certificates in contention were 23, 24 and 25. The joint scheduling memorandum of 23rd May 2014 shows that at mediation, the Defendant agreed to pay Certificate No. 3, Certificate No. 25 and retention fees on both including interest to be calculated as per the contract.

The Defendant went on to pay Ugx. 18,889,698/= to the Plaintiff and retention fees of Ugx. 52,560,424/= remained outstanding though it was conceded by the Defendant that the same was due.

By the time the trial commenced on 3rd March 2015, the Defendant had paid to the Plaintiff the amounts due on Certificates 3, 23, 24 and 25 including interest of Ugx. 5,645,449/= - Exhibit D6.
The contention that remains is one of calculation interest on delayed payments of the certificates. This is provided for by the contract.

Clause 42.1 provides that the Contractor would submit to the Project Manager statements of estimated value of the work executed less the cumulative amount certified previously.

The mode of payments was set out in Clause 43.1 which provided:

> *"Payments shall be adjusted for deductions for advance payments and retention. The employer shall pay the Contractor the amounts certified by the Project Manager within 30 days of the date of each certificate. If the employer makes a late payment, the contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing*

*rate of interest for commercial borrowing for each of the currencies in which payments are made."*

Turning to the issue of interest, DW2 testified that interest was calculated from the time of receipt of an approved certificate and that the Defendant would have 30 days within which to pay the certificate and after those 30 days, interest would start to accrue. Therefore interest would start to accrue on the 31st day from the date when payment fell due and was not paid.

The counting of days commences from the date the Plaintiff submits an invoice together with a payment certificate. This is clearly illustrated in Clause D.16 of the contract which provides:

*" The amount certified by ther Project Supervisor shall be paid in full within 30 days of receipt of an invoice by the Company supported by the payment certificate."*

The foregoing means that time does not begin running at the time the Project Supervisor certifies the payment certificate but rather from the time the Plaintiff submitted an invoice accompanied with that certified payment. It is therefore the dates on which the invoices were submitted that marked the beginning of the 30 days within which payment would be effected in default of which, interest would begin accruing.

I have had opportunity to look at two invoices for Certificates 23 & 24 and have found that the invoice dates on which the Defendant based the calculation of the interest that they paid to the Plaintiff fell right within the calculations that were exhibited in the table in Exhibit D6.

It is therefore this Court's finding that the Plaintiff was rightly paid the interest due to them and is not entitled to claim any more.

The Plaintiff prayed for general, exemplary and aggravated damages.

General damages are such as the law will presume to be the direct natural or probable consequence of the act complained of **Stroms V Hutchinson [1905] AC 515.**

The underlying principle is to put the injured party financially as near as possible into the position they would have been in had the promise been fulfilled. **Addis V Gramaphone Co. Ltd [1909] AC 488**

PW1 testified that the actions of the Defendant occasioned enormous loss to the Plaintiff which is "an award winning small medium enterprise." Counsel for the Plaintiff submitted that the Plaintiff was entitled to damages for the inconvenience suffered as a result of the delayed payments and for the unlawful termination of the contract.

Having found earlier in this judgment that the contract was rightfully terminated, the Plaintiff cannot recover any damages in this regard.

As to the VAT money, the delay in payment that resulted into their paying money which they would otherwise have received from the Defendants is because they presented claims which excluded VAT due to them yet they knew that under the law, it was their responsibility to ensure that VAT was paid.

Under these circumstances, to which they contributed by neglecting their duty of including VAT in certificates, they cannot claim general damages.

Turning to the claim of exemplary and aggravated damages; aggravated damages reflect exceptional harm done to the Plaintiff by reason of the Defendant's actions while exemplary damages are awardable to punish, deter, express outrage of court at the Defendant's highhanded malicious, vindictive and malicious conduct. **Uganda Revenue Authority V Wanume David CACA 43/2010.**

The award of exemplary damages is limited to three cases of first; oppressive, arbitrary or unconstitutional action by public servants, oppressive action by private corporations and individuals.

Second, where the motive of making a profit is a factor, such as where the Defendant in disregard of the Plaintiff's rights; calculates that the money to be got out of the wrong to be inflicted upon the Plaintiff will exceed the damages at risk. It is then necessary for the law and courts to show that rights of an individual cannot be trampled upon and the law infringed with impunity.

Third, where a statute imposes exemplary damages to be paid. **Rookes V Barnard (1964) A.C 1129 All E.R 367**; **Cassell Co. Ltd V Broome (1972) 1 All E.R 801**.

Considering the circumstances of this case, and having found above that the delayed payments of VAT was a result of the Plaintiff's failure to include it in the claims they presented to the Defendant, I do not find this case to fall within the categories stated above. Exemplary damages are accordingly denied.

Further, having examined the record, I do not find any evidence of exceptional harm occasioned to the Plaintiff as a result of the Defendant's actions as would warrant an award of aggravated damages. This claim is also denied.

The Plaintiff prayed for interest on the outstanding sums owed to them by the Defendant and on costs of the suit at a commercial rate from the date it was due till payment in full. An award of interest is discretionary. **URA V Stephen Mabosi SCCA 16/1995**

Having found that there is no money left outstanding with regard to outstanding sums owed by the Defendant in respect of services rendered, I find no reason to justify interest at a commercial rate.
I would however award an interest at court rate on the VAT money to be reimbursed to the Plaintiff. It is hereby awarded.

In conclusion, judgment is entered in favour of the Plaintiff against the Defendant in the following terms:

1. An order of reimbursement of all monies paid by the Plaintiff to URA in satisfaction of the relevant VAT obligations, that is, Ugx. 113,273,472/-

2. Interest on (1) at court rate from date of judgment till payment in full.

3. Costs of the suit.

**…….**

**David K. Wangutusi**
**JUDGE**

**Date: 25/05/15**