THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 406 OF 2013

NOKIA SIEMENS THE TIETOLIIKENNE OY ::::::::::::::::: PLAINTIFF

VERSUS

PNN TECHNOLOGY SOLUTIONS LIMITED::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT:

The Plaintiff Nokia Siemens Tietoliikenne OY sued the Defendants PNN Technology Solutions Limited, for recovery of UGX 442,552,142.52 being service assurance penalties and fuel loss arising from breach of a Sub Contracting Agreement between them.

The facts as discerned from the pleadings are that the Plaintiff sought various services from the Defendant namely radio network availability, field maintenance, network planning and telecom implementation and optimization.

According to the Plaintiff the Defendant failed to fulfill its obligations despite several warnings which led the Plaintiff to terminate the contract and demand for losses incurred in the following.

1. Service Assurance penalties 120,398,818.52/=
2. Fuel loss in form of Grid and IPMU faults 224,203.174/=
3. Costs of litters of fuel 97,950,150/=

Total **442,552,142.52/=**

The Defendant denied liability claiming that it was the Plaintiff which breached the Sub-Contract. Furthermore that the contract only required the Defendant to provide specific power equipment maintenance services.

The Plaintiff having failed to recover brought this suit.

The Defendants written statement of defence was filed by Impala Legal Advocates on 02.10.13 but on 21.07.15 when the Plaintiff's Advocates attempted to serve them with a hearing notice, Impala Advocates declined stating that they no longer had instructions and wrote on the Hearing Notice the words "We no longer have instructions please serve the client directly."

Not knowing the Defendants' current address the Plaintiff sought and obtained an order permitting her to effect service through Newspapers.

The Defendants did not respond to the notice and the suit proceeded exparte.

The issues for resolution were;

1) Whether the Defendant breached the Agreement entered into with the Plaintiff.
2) Remedies.

That the two parties entered into a Sub-Contract Agreement, is not in dispute. Exhibit P.1 is clear on that point and the Defendant also concedes in her written statement of defence.

To determine whether the Defendant breached the Agreement, it is necessary to analyze the obligations in the Agreement.

The reason, the Plaintiff sought the services of the Defendant was because she had entered into a main contract with AIRTEL Uganda under which the Plaintiff was to render O & M Services for a mobile digital telecommunications network in the Territory.

The Defendant in the Sub-Contract was therefore expected to support the Plaintiff fulfill her obligations and liabilities to AIRTEL UGANDA in the main Contract.

The Defendants' obligations were described under the heading of works. These Works and Services included without Limitation Network Planning, Telecom Implementation and Optimization.

Article 2 also defines the Scope of the Agreement. Time was of essence in this relationship.

There were several attachments which were integral parts of the Agreement.
The obligations as PW.1 stated included corrective maintenance, passive maintenance, generator maintenance and fuel logistics which all fell into what was referred to as Radio Network Availability and Field Maintenance.

According to PW.1 Fuel Logistics (Radio Network availability) involved delivering fuel to Mobile network sites belonging to AIRTEL UGANDA, where there was no National Grid, the Generators were to run for 24 hours per day.

PW.1 told Court that to avoid mishaps, the Plaintiff undertook to and did provide fuel to the Defendant on monthly basis. That this was done through fuel cards. Having got the fuel cards, the Defendant was expected to collect the fuel from fuel stations and transport it to the AIRTEL sites. The Defendant would at the end of the month account for the fuel and a reconciliation would be done. Where the Defendant failed to account for the fuel, she would be liable for the fuel.

PW.1 stated that on several occasions the Defendant could not account for the fuel which resulted into loss and that is why there was a claim of fuel loss.

It was also PW.1's evidence that the Defendant failed to do the agreed Field Maintenance at the sites. That the Defendant also failed to take corrective measures by following up whenever the Umeme lines were on the blink. That such negligence of duty led to increased use of fuel thus escalating costs.

PW.1 further stated that the failure by the Defendant to account for fuel led to loss. That the Defendant's conduct also attracted penalties which were provided for in cases where the Defendant's performance fell below the agreed standard.

PW.1 also stated that warning letters were written to the Defendant and due to his bad performance 84 sites were removed from him. That thereafter the Defendant became uncooperative and refused to sign off the monthly performance forms.

In the absence of these forms, reconciliation was made impossible which led the Plaintiff to terminate the contract.

From the evidence of the Plaintiff the obligations of the Defendant were clear. That the Defendant breached the Agreement is discerned from its non-reaction to the warnings given to it by the Plaintiffs.

The first warning letter Exhibit P.2 written on 31.07.12 in part read;

> "*As you are failing your contractual obligations of "Radio Network Availability and Field Maintenance" we see no alternative but to transfer immediately 84 sites to an alternate supplier with immediate effect. Please find in attachment a list of minutes which are held with your team on several occasions without proper engagement from your side. Also a summary of your performance has been added to this letter. The duration of this transfer will be until clear statement of your engagement and NSN Management will be sure you can take over again. However if continued bad performance will be noticed, we see no other solution but to completely remove and get damages for incurred costs from PNN.*"

On 29.08.12, another letter Exhibit P.3 referred to as the 'Last and final warning letter' was issued in almost similar terms, it in part reads;

> "*Please discuss with Local NSN OPS team how you will improve your performance.*

> *If continued bad performance will be noticed, we see no other solution but to completely remove scope and get damages for incurred costs from PNN*."

On 01.10.12 the Plaintiff through PW.1 wrote Exhibit P.4 terminating the contract in these words;

> "*As you are failing your contractual obligations of "Radio Network Availability and Field Maintenance" we see no alternative but to transfer your scope to an alternative supplier and terminate the contract for breach with 30 days notice*."

A clear reading of Exhibits 2, 3 and 4 indicate two things. First that the Defendant's obligations included "Radio Network Availability" and Field Maintenance. Secondly that the Defendant was not fulfilling these obligations. The silence and non denial of the allegations when letter after letter of warning was written and even when the scope was reduced, clearly indicates that the Defendant was in the wrong and therefore breach of the Agreement which laid down those obligations.

Furthermore the Plaintiff's evidence was not rebutted by any contrary evidence from the Defendant, it remained undisturbed and I believe it.

For the reasons above, it is my finding that the Defendant breached the agreement.

Turning to the remedies, these were loss categorized as Service Assurance Penalties, Fuel loss in the form of Grid and IPMU faults and actual litters of fuel lost.

On penalties due to poor performance, Muhammad Shoaib Sakrani stated that at the end of every month the parties would by use of an inbuilt mechanism calculate rewards and penalties. Where the Defendant was found to have done well, she would be rewarded but where she would have done badly, she was to be subjected to penalties.

This exercise was conducted jointly and worked well until end of July when the Defendant became uncooperative and stopped signing off the findings, because of the pressure mounted upon her by the Plaintiff.

PW.3 stated the amount in penalties as follows.

a. May USD 3,700
b. June USD 1,100
c. July 2012 USD 4,600
d. August 2012 USD 10,600
e. September 2012 USD 16,900
f. October 2012 USD 1,700 which all totaled USD 38,600 subjected to an exchange rate of Ug shs. 3,130 amounted to UGX 120,818,000/=.

This evidence is believable because Arnold Ruyonge and Hillary Kafunka all of the Defendants counter signed the passive sign off forms upto July. I find no reason to disbelieve the other claims testified to by PW.3. His evidence remained unchallenged.

I therefore find the Defendant liable to the Plaintiff in the sum of UGX 120,818,000/=.

Turning to loss of fuel, Issa Matovu PW.2 for the Plaintiff stated that fuel for the sites would on monthly basis be estimated and provided to the Defendant by way of fuel cards. The Defendant would then collect the fuel from fuel stations and deliver it to the various sites nationwide.

A reconciliation of fuel taken and used would be conducted at the end of every month wherein the Defendant would account for the fuel. Where he failed to do so, it would be considered fuel lost and the Defendant was expected to make good.

It was PW.2's evidence that when reconciliation took place fuel loss was detected as follows.

April 2012 10 Litters @ Shs. 3,300 per liter 33,100
May 2012 3,195 litters @shs.3,500 Per liter 182,500
June 2012 10,778 @ 3,300 per liter 35,567,400

July 2012 1,719 @ 3,230 per liter 5,552,370

August 2012 1,569 @ 3,120 per liter 4,895,280

September 2012 10,643 @ 3,130 per liter 33,312,590

Again

September 2012 1,774 @ 3130 per liter 5,552,620

Again

April 2012 – September 2012 loss arising from grid faults and IPMU faults 68,995 litters at 3,250 totaling 224,203,174.

Added together give a total of 322,143,324/=.

To support her claim the Plaintiff relied on several Fuel Reconciliation sign off forms endorsed by the Defendant's officials in Exhibit P.7, P.8, P.9, P.10, P.11, P.12. Others were P.13 and 15.

The Plaintiff's evidence was not challenged by way of cross- examination.

PW.2's evidence supported by documentary evidence was clear, remained unrebutted and I believed it. I therefore find that the Defendant is liable to the Plaintiff in the sum of 322,153,324 resulting from loss of fuel and fuel loss due to grid faults and IPMU faults.

The foregoing added to the penalties of 120,398,818 gives a total of 442,552,142 which I hereby award to the Plaintiff against the Defendant.

The Plaintiff also prayed for interest of 20% p.a. from date of termination of the contract till payment in full.

The basis for award of interest is that the Defendant has kept the Plaintiff out of his money and has had use of it himself, so he ought to compensate the Plaintiff, ***Harbutt's Plasticine Ltd versus Wyne Tank & Co. Ltd [1970] 1 Ch.447***.

The interest is awarded at the discretion of the Court but this discretion must be exercised judiciously ***Uganda Revenue Authority versus Stephen Mabosi SCCA 16 OF 2005***.

While awarding interest, Court must consider the ever rising inflation and depreciation of the currency.

It is also this interest that insulates the Plaintiff where the Defendant does not pay immediately, ***Mohaulal Kakubhai Radia versus Warid Telecom Ltd HCCS 234/2011***.

Lord Wright could not have said it better than he did in ***Riches vs. Westminister Bank Ltd [1947] 1 ALL ER 469*** when he wrote that interest.

> "*May be regarded either as representing the profit he might have made if he had the use of the money or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation*."

In the instant case the Defendant who was a Sub-Contractor must have put the Plaintiff in a difficult financial position when he retained fuel costing so much. She deprived the Plaintiff, a business body from utilizing her money and making profit from it while the Defendant enjoyed its use. This deprivation of money from the Plaintiff must be compensated and put right by interest. This being wholly a business venture, I find an award of 20% pa from date of termination appropriate.

Since costs follow the event, the Defendant is also held liable in costs of the suit.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in these terms;

a) The Defendant to pay the Plaintiff UGX 442,552,142/=.
b) Interest on (a) at 20% from 01.10.2012 till payment in full.
c) Costs.

Dated at Kampala this 11th day of October 2018

HON. JUSTICE DAVID WANGUTUSI
JUDGE