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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

CIVIL SUIT NO. 07 OF 1998

M/S AFRICAN TEXTILE MILL LTD.....PLAINTIFF

VERSUS

TECHNO FIRE APPLIANCES LTD.....DEFENDANT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGEMENT

The plaintiff sued the defendant for recovery of Shs. 12,422,672/=, general damages for breach of contract and costs of the suit. The cause of action arose from a contract which was signed between the plaintiff and the defendant, in which the defendant undertook to supply, install and service certain specified fire fighting equipment at the plaintiff's factory at Mbale.

The defendant denied the plaintiff's claim. The plaintiff called one witness and closed its case. The defendant was represented by Counsel, though none of its representatives appeared in court. They did not call any witness, and did not file any submissions.

The following issues were framed for determination by court.

1. Whether the plaintiff and defendant entered into a contract to supply, install and service fire-fighting equipment worth shs. 050.350/=.
2. Whether the defendant was paid the contract sum.
3. Whether the plaintiff is in breach.
4. If so what are the remedies.

The only witness for the plaintiff, and indeed the only witness in this case was the Chairman of the plaintiff company, Mr. Jantibhai Valabhai Patel. He testified at length and took the court through the history of the contract, its terms, items supplied and not, and the alleged default.

He explained that he was the Chairman of African Textile Mills and the chief executive of the company. He was the one who handled all transactions and the day to day running of the Company. He represented the Company in matters relating to agreements.

On 7/4/93 he signed a contract with Techno Fire Appliances Ltd., the defendant herein. Under the contract, the defendant who was represented by one Jimmy Dean was to supply and install fire fighting equipment, service the existing fire equipment, and train personnel in that regard. The contract sum was shs. 44,050,350/=. He signed the contract on behalf of the plaintiff, and Jimmy Dean signed on behalf of the defendant. The Secretary to the Treasury witnessed the agreement. It was admitted in evidence as exhibit P1.

Under the terms of the contract, 50% of the contract sum, i.e. Shs 22,025,175/= was to be paid immediately on execution. The balance was to be paid after completion of the contract. The contract was to be executed and completed within 5 weeks from the date of the agreement.

The defendant was to supply items of fire fighting equipment which were set out in appendix one to the agreement, exhibit P1. The items, which were to be supplied, were set out in appendix one as follows;

1. 6 sets of fixed hydraulic hose reel complete with wall brackets, shafts and back plates at shs. 5.970.000/=.
2. 10 pieces of water type fire extinguisher with CO2 cartridge valued shs. 1,600,000/=.
3. 18 pieces of CO2 fire extinguishers of capacity 6kg valued shs. 5.040.000/=.
4. 8 pieces of foam chemical extinguishers valued shs. 1.450.000/=.
5. 16 pieces of canvas fire hose with coupling 2 ½ x 75 feet long value 9.760.000/=.
6. 12 pieces of nozzles for hose reel ¾ valued at shs. 5.040.000/=.
7. 6 Diffuse nozzles 4 canvas hoses shs. 390,000/=.
8. 50 fire brackets painted red and marked 'FIRE' valued at shs. 1,000,000/-.
9. 7 Asbestos fire blankets "6 x 6" blankets valued at shs. 1.610,000/=.
10. 2 pieces of Co2 truck unit (30/36kgs) mounted on 2 wheels valued 1.560,000/-.
11. 6 pieces landing valve valued shs. 1.140.000/=.
12. 18 pieces of hosepipes ¾ " x 75 feet shs. 8,100,000/= (includes spares and plumbing materials for installation valued shs. 1,500,000/=.
13. 12 fire cabinets valued at shs. 1.680.000/=.
14. Service, refilling, re spraying existing fire extinguishers value shs. 2.680.350.

The grand total for the equipment and the service was shs. 44,050,350/=. I noted that the numbering in appendix one was not as systematic as I have set it out above. For example numbers 5 and 9 were omitted. Secondly, the items in No. 14 above are set out in detail in appendix two of the agreement.

The witness told court that after signing the contract the defendant delivered only part of the equipment but neither installed, serviced it or trained personnel.

Deliveries were made on three separate delivery notes which were admitted in evidence collectively as exhibit P2. Under those delivery notes, the following were delivered.

On 23/4/93 the defendant delivered under Delivery Note No. 668 the following;

1. 10 water type fire extinguisher.
2. 18 Co2 fire extinguishers.
3. 8 Foam type extinguishers
4. 16 Canvas hoses
5. 6 Diffused nozzles
6. 5 Landing values.

On 26/4/93 the defendant delivered under Delivery Note No 669 the following;

1. 9 Co2 fire extinguishers of 5 kg capacity.
2. 4 water type fire extinguishers.

The defendant delivered the following on 4/6/93 under Delivery Note 690;

1. 14 water fire fighting extinguishers.
2. 10 ACP fire extinguishers 5 kg capacity.
3. 1 ACP fire extinguisher
4. 20 LBS capacity
5. 5 Co2 fire extinguishers of 10 kg.
6. 1 Co2 fire extinguisher of 5 kg.
7. 1 Foam type fire extinguisher
8. 2 Co2 fire extinguishers.
9. 50 Fire buckets
- 10.1 Co2 fire extinguisher 10 kg
- 11.2 Co2 mobile trolley 35 kg.

On 2/9/93, the Mechanical Engineer of the plaintiff J. S. Kasirye received the following items without delivery notes, but only on receipt No. 104.

1. 12 fire hose boxes.
2. 5 hose reels.
3. 12 hose reel nozzles.
4. 7 tin buckets.

The witness told court that the defendant did not supply the following items in appendix one to the agreement exhibit P1.

1. 18 hose pipes $\frac{3}{4}$ x 75 value shs. 8,100,000/=
2. of the filing cabinets of item 15 of the appendix one, (item 13 herein) the defendant delivered goods worth only shs. 180,000. Remaining for delivery are goods worth shs. 1,500,000/=.

3. under item 1 of appendix one, out of six fixed hydraulic hose reels complete with wall brackets shafts and back plates, the defendant delivered only five valued at shs. 995,000/=. One remained undelivered.

The above undelivered items all total up to shs. 9,095,000/=.

Under the contract, the defendant was supposed to service and re spray the existing fire fighting equipment. The details were contained in appendix two of exhibit P1. The witness testified that under this appendix, the contract was not performed to the extent that the total of the undone works were shs. 1.827.672/-. It is to be noted that the total contract sum under appendix two was shs. 2.680.350/-. I do not intend to set the out the particulars of the contract under that appendix in details.

The defendant was informed of the shortfall in the deliveries and service, and its failure to train as stipulated under the contract by a letter dated 1/8/97. A copy of that letter was tendered and admitted as exhibit P.3.

The defendant replied that they completed all the deliveries. On 23/5/97 the defendant wrote to say they were in the process of looking for the delivery notes to prove they had completed delivery. Up to the time of giving testimony in court, the defendants had not supplied those delivery notes. The letter dated 23/5/97 was tendered in evidence as exhibit P.4.

The plaintiff paid the defendant the full contract price. The witness wrote to their bankers, Bank of Baroda a letter dated 25/2/99 exhibit P5, asking them

to confirm that the cheques, which the plaintiff issued to the defendant in payment of the contract sum were honoured.

The bank replied and confirmed that the cheques were paid to the defendants. Photocopies of the cheques were enclosed, with confirmation from the drawer bank which meant that funds were received by the defendants. The letter from bank of Baroda to this effect was admitted in evidence as exhibit P6.

Due to the non delivery the fire fighting equipment, the plaintiff were forced to seek alternative suppliers to service the machines. They engaged the Kenyan firm, Fine Services Kenya to do this. That firm serviced the equipment and replaced those missing in 1998. The witness could not recall the amount they paid for these services.

As stated earlier the defendant did not call any witness, and did not file any submissions. The burden in a civil suit lies on the plaintiff to prove their case on a balance of probabilities. See *J. K. Patel V. Spear Motors Ltd.* SCCA No. 4 of 1991, *Sebuliba V. Co-operative Bank Ltd.* [1982] HCB 129 and *Miller V. Minister of Pensions* [1947] 2 All ER 373.

The 1st issue was whether the parties entered into an agreement to supply and service fire fighting equipment for Shs. 44,050,350/=.

The plaintiff's witness Jantibhai Valbhai Patel testified that he was the Chairman of the plaintiff company and that he was in charge of for the day-to-day affairs of the company. On the 7th April, 1993 he signed a contract on

behalf of the plaintiff with the defendant represented by Jimmy Dean for the supply and installation of specified fire fighting equipment, which were specified in appendix one of the agreement. Under the contract the defendant was to service, refill and re spray existing fire extinguishers, which were specified in appendix two of the agreement. The defendant was also supposed to train the plaintiff's staff in the use of that equipment.

The contract sum was agreed at Shs. 44,050,350/=. Exhibit PI, was a copy of the contract agreement. Exhibit PI states that the agreed price was Shs. 44,050,350/=. It shows the specified fire fighting equipment that were to be supplied, installed and serviced, and training of the plaintiff's staff in the use of that equipment. The agreement is dated 7th April 1993.

The witness was intensely cross-examined by the defence, but he was very consistent and appeared honest. He obviously knew very well what he was testifying to. He gave details of the execution of the contract, even those aspects which were not favourable to his side yet there was no one from the defendants side to controvert or rebut his evidence. That was a mark of honesty. Indeed there was no evidence to rebut this evidence. It was not challenged.

Court finds and holds that the plaintiff proved on balance of probabilities that the defendant and plaintiff entered into a contract on 7th April, 1993 in the sum of shs.44,050,350/=.

The 2nd issue was whether the defendant was paid the contract sum in full. PWI testified that on execution of the contract the plaintiff paid by cheque

50% of the contract sum and then by 2 other cheques subsequently of Shs. 12 Million and Shs. 10 Million. The payments were confirmed by the plaintiff's bankers, Bank of Baroda by their letter dated 9th March 1999, exhibit.P6. The Bank in that letter confirmed that three cheques drawn by the plaintiff in favour of the defendant were honoured and the drawer bank received the funds. The bank attached photocopies of the said cheques, and the respective confirmation of payments. One cheque was dated 16th April 1999, for shs. 22,000,000/-. The second cheque was dated 10th May 1999, for shs. 12,000,000/-. The third cheque was dated 30th June 1999, for shs. 10,000,000/-. The bank further attached a copy of the plaintiff's bank statement showing that these funds were deducted from the account of the plaintiff. This confirmed that those cheques issued to the Defendant were paid.

This evidence was not challenged or controverted. This evidence by the witness was not disputed. The defence did not lead evidence to the contrary. The evidence was that a total amount of shs. 44,000,000/- was duly paid to the defendant in satisfaction of the contract. I noted that a sum of shs. 50,350/- of the contract sum remained unpaid. Court finds and holds that the plaintiff paid the defendant the contract price of Shs. 44,000,000/= out of the full contract sum of shs. 44,050,350/-.

The 3rd issue was whether the defendant breached the said contract. The claim of the plaintiff was that the defendant supplied only part of the equipment contracted for, did not service the existing equipment or install new ones at the said factory premises, and that the defendant did not train the plaintiffs staff in use of the said equipment. The plaintiff averred that the

defendant did not supply new equipment worth Shs. 10,595,000/= and that it did not supply services worth Shs. 1,827,672/=.

PWI testified that the defendant made three deliveries. On 26th April 1993, 4th June 1993 and 2nd September 1993 on delivery notes 669, 690 and receipt No. 104 respectively. These delivery notes were tendered and admitted collectively as exhibits P2.

He further testified that under Item 14 of exhibit P1 (item 12 herein), the defendant failed to supply 18 fire extinguishers, with plumbing materials and spare parts worth Shs. 8,100,000/=.

Under item 15 of exhibit P1 (item 13 herein) the filing cabinets lacked cabinets inside. They were incomplete. The missing parts were valued at shs. 1,500,000/=.

Under item 1 of exhibit P1 the defendant did not deliver 1 piece valued at Shs. 995,000/=.

Under appendix two, regarding servicing, refilling and respraying of existing extinguishers; most of the work was undone. The witness enumerated the undone work as follows.

Item 1. 3 pieces of Carbon dioxide type of capacity 3 Kg were not serviced. The cost was Shs. 135,000/=.

Item 2. All the 16 pieces of Carbon dioxide type Capacity 5Kg were not serviced at a cost of Shs. 720,000/=.

Item 3. 16 pieces of Water/gas pressure type not serviced and the cost was Shs. 352,672/=.

Item 4. All the 15 pieces of Dry Chemical Powder type of capacity 5kgs not serviced at Shs. 450,000/=.

Item 5. All the 6 pieces of Foam Compound type were not serviced at a cost of Shs. 180,000/=.

Item 6. 55 pieces of new instruction labels were not supplied free of charge were not supplied.

The total cost of the undone work under appendix two as shown above was shs. 1,827,672/-. When the figures under appendix one are added to those from appendix two the total of the amount for the materials and service not delivered comes to Shs. 12,422,672/=, the amount of the claim.

Under cross-examination by the defence Counsel, the witness admitted receiving letters from the defendant were put in evidence as defence exhibits D1, D2, D3 and D4.

Exhibit D1 was written on the 18th June 1993. In that letter the defendant admitted that it had not delivered items 1, 15 and 16 as agreed in the contract exhibit P1. Apparently after that letter the defendant delivered some items on 2nd September 1993 on receipt No. 104, but only in respect of item 1.

Exhibit D2 was a letter from the defendant dated 14th September 1993 explaining that they had not installed the equipment delivered at the plaintiff's factory premises because of un-rest at the Plaintiff's factory premises.

Exhibit D4 was in response to exhibit D3 in which the plaintiff was asking the defendant to complete their part of the contract. In their response exhibit D4, the defendants stated that they delivered all the equipment as agreed, only that installation and training could not be done due to unrest at the plaintiffs factory premises.

Section 103 of the Evidence Act provides that the burden of proof to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. When the suit was fixed for hearing, the defendant did not adduce evidence to prove that they delivered all the equipment as agreed in the contract. Even before filing the suit, they were asked to produce any delivery notes or receipts to show that full delivery was effected. None was produced then or at the trial. The burden of proof in that respect was not discharged.

The argument by the defendant was that it could not service and install the fire fighting equipment at the plaintiff's factory premises due to labour unrest. The contract exhibit P1 provided that the supply, installation and service were to be completed within 5 weeks of confirmation of the order. Confirmation of the order was on the date of payment of the 50% contract fee. This was on 14th April 1993, one week after signing the agreement; exhibit P1 on the 7th April 1993. The last date for completion was therefore, 20th May 1993.

According to PWI there indeed was some labour un-rest at the factory premises. This was in June and July 1993, well after the agreed completion

date. At the time of writing of exhibit D1 on 18th June 1993, exhibit D2 on 14th September 1993, and exhibit D4 on 7th April 1997, the defendant was already behind schedule. The defendant did not lead evidence to show that the completion date was altered by the parties. See S. 91 of the Evidence Act.

In the circumstances therefore, from the evidence as shown above, the plaintiff proved that the defendant did not perform their obligations as stipulated under the contract exhibit PI and therefore was in breach of the contract.

The last issue was on the remedies. S. 50(1) of the Sale of Goods Act Cap 82 gives the buyer the right to maintain an action against the seller for damages for non-delivery.

Sub-Section (2) of that Section provides that the measure of damage is the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

PWI testified about the failure by the defendant to deliver some of the items contracted for, and to service others and yet the plaintiff paid the contract price, resulted in loss by the plaintiff. Such a loss was put at Shs. 12,422,672/=.

This was a natural and direct result of the defendant's breach of the contract and the plaintiff would be entitled to recover that sum. However, I noted that the evidence of payments was shs. 44,000,000/-, yet the contract sum was shs. 44,050,350/-. That means that the plaintiff did not pay a sum of shs.

50,350/- to the defendant. He did not incur that loss. That sum of shs. 50,350/- shall be deducted from the plaintiff's claim of shs. 12,422,672/-, leaving the sum, which is herein awarded to the plaintiff as shs. 12, 372,322/.

PW1 also testified that because of the failure by the defendant to perform the contract in full it contracted another firm from Kenya to supply the equipment and to service the existing equipment. He however did not disclose how much this cost the plaintiff.

There was no evidence adduced that any money was paid to this firm, or that they indeed carried out any work at all. PW1 was meticulous in his dealings and whenever so required, produced documentary evidence to back up his oral evidence. In this case there was no such back up. I would not therefore award any damages under that head. But the plaintiff is nonetheless entitled to damages for breach of contract. I will award shs. 500,000/- under that head as prayed.

Lastly the plaintiff prayed for interest at bank rate on the sum claimed. Lord Denning MR in Harbutt's Plasticine Ltd. V. Wayne Tank & Pump Co. Ltd., [1970] 1 All. E.R. 225 held that,

‘An award of interest is discretionary. The basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.’

In Ecta (U) Ltd. V. Geraldine Namubiru & Ano. SCCA No. 29 of 1994, Odoki Ag. DCJ., (as he then was) held that awards arising out of commercial

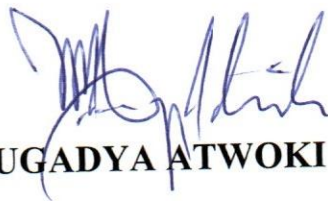
or business transactions usually attract higher rates of interest, while awards of general damages are mainly compensatory. One could not agree more.

The sum claimed has been locked up since April 1993. The plaintiff firm is a commercial entity. The plaintiff will therefore be awarded interest on a higher scale than that of general damages.

Judgement is accordingly entered for the plaintiff against the defendant in the following terms.

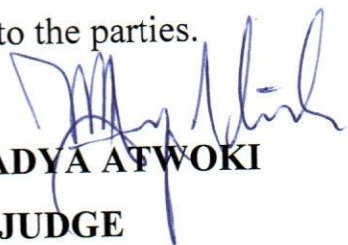
1. the plaintiff shall recover the sum of shs. 12,372,322/-.
2. the plaintiff shall be paid general damages for breach of contract of shs. 500,000/-.
3. the plaintiff shall have the costs of the suit.

The sum herein awarded in No. 1 above shall carry interest at bank rate from the date of filing the suit till date of judgement, and thereafter at court rate till payment in full. The award of general damages and the costs shall attract interest at court rate from date of judgement till payment in full.


RUGADYA ATWOKI
JUDGE

06/07/05.

Court: The Deputy Registrar shall deliver this judgement to the parties.


RUGADYA ATWOKI
JUDGE
06/07/05.