THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CIVIL SUIT No. 0007 OF 2013

1. CAFE TECHNICAL SERVICES LTD. }
2. WOBAS CONSTRUCTION (U) LTD. } …… PLAINTIFFS

VERSUS

J. W. OPOLOT CONSTRUCTION (U) LTD. …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiffs jointly sued the defendant for general and special damages for breach of contract. It was the plaintiffs' case that on 23rd January 2012 and subsequently on 15th October 2012, they were respectively sub-contracted by the defendant to offer services which included supervision of the construction of classroom blocks and construction of a five stance water borne toilet at Arua Public Secondary School respectively. The agreed contract price for the supervision was shs. 25,000,000/= while that of construction of the five stance borne toilet was shs. 18,000,000/=, and supply of 10,000 concrete blocks at shs. 30,000,000/=. The second plaintiff was as well required to pay to the defendant a sum of shs. 20,000,000/=, hence making the whole contract price to be shs. 140,000,000/=. It is the plaintiffs' case that due to the defendant's breach of the head contract, the defendant was given notice of termination on 9th March 2013 and the head contract was eventually terminated on 10th April 2013.

By the time of termination of the head contract, the second plaintiff had made 7,000 blocks worth shs. 21,000,000/= at the rate of shs. 3,000/= each. After the head contract was terminated, the defendant instructed the second plaintiff to level and remove the top loose soil at the costs of shs. 23,000,000/= The second plaintiff's total claim is shs. 64,000,000/= inclusive of the commitment fee of shs. 20,000,000/= while the first plaintiff's claim is for shs.25,000,000/= hence a total of shs. 89,000,000/= is claimed by both plaintiffs against the defendant.

In its written statement of defence, the defendant denied both plaintiffs' claims. It contended that the first plaintiff was to be paid after completion of works but it failed to. It denied having stopped the second defendant from making more blocks and instead level the ground, which was never part of the contract. The defendant instead counterclaimed against the first plaintiff a sum of shs. 5,000,000/= made to it as advance payment to mobilise construction material and deposit the same on site which the first plaintiff failed to do resulting in the termination of the head lease. The defendant therefore counterclaimed for general and special damages for breach of contract, interest and costs.

When the suit came up for hearing, the defendant was unrepresented in court a return of service on court record that showed the defendant had been served. There being no explanation for the defendant's absence, the plaintiffs were granted leave to proceed ex-parte.

P.W.1, Mr. Tatia Allan, testified that the first plaintiff is a company limited by shares and its major activities are undertaking construction works and supply of various items like furniture, building materials, equipment, etc. 23rd January 2012, the first plaintiff was sub-contracted by the defendant to supervise construction of classroom blocks and a five stance water borne toilet at Arua Public Secondary School. The agreement stipulated that the plaintiff was supposed to supervise the construction of classroom blocks and toilets (the whole works). The work was supposed to be done by workers employed by the defendant. The duration of the work was for 48 weeks. Work commenced in August 2012 and the agreed remuneration was shs. 25,000,000/= after completion of the work.

The plaintiff executed its work for about five months. However, the contractor eventually failed to supply materials for the works to the second plaintiff which was the company executing the works. The defendant's contract was consequently terminated by Arua Public Secondary School. There was no provision of termination in the agreement we made with the defendant. The first plaintiff's role was to ensure that the approved plans were being followed in execution of the works, overseeing the testing of materials at the UNRA Lab in Arua, ensure that the materials used are of proper quality, ensure quality workmanship, including the qualification of workers, and their physical activities on the site e.g setting out of the buildings, the tools that were being

used and prepare progress reports from time to time. In performing its duty, the first plaintiff guided by specifications given by the Ministry in the copies of the bills of quantities. The first plaintiff was based on site daily. It had about five employees of the company at the site daily. The first plaintiff was supposed to be paid 25,000,000/= for that work but the money was not paid since it suddenly lost touch with the defendant, hence the suit.

P.W.2, Ms. Zulaika Ali, the Manager of the second plaintiff., testified that the defendant is a construction company which sub-contracted the second plaintiff to construct a five stance waterborne toilets and supply 10,000/= concrete blocks. Before the second plaintiff started work, it paid shs. 20,000,000/= as commitment fee to the defendant on 15th October 2012. The defendant was supposed to pay the second plaintiff 140,000,000/= upon the execution of the work. The second plaintiff executed part of the work but was never paid. the second plaintiff was unable to compete the work because the head contract between the defendant and Arua Public Secondary School was terminated before completion. The defendant was given notice of termination on 9th March 2013 and the head contract was eventually terminated was on 10th April 2013. By the time of termination, the second plaintiff had made 7,000 blocks worth shs. 21,000,000/= at the rate of shs. 3,000/= each.

After his contract was terminated, the defendant instructed the second defendant to level and remove the top loose soil at the cost of shs. 23,000,000/= , which the second plaintiff did, hence the total claim is shs. 64,000,000/= including the commitment fee. The second plaintiff demanded for payment but it has never been paid. When the head contract was terminated, the defendant left in the second plaintiffs' custody, a van and a tipper lorry. The van is in custody of the first plaintiff while the second defendant has the lorry. The Director of the defendant left the vehicles with the plaintiff in the year 2013 promising he would come back to pay, but has never showed up since then. The second plaintiff thus seeks to recover shs. 64,000,000/=, general damages for breach of contract and the costs of the suit.

P.W.3 Mr. Ayub Khan, the Site Foreman of the second plaintiff testified that the second plaintiff excavated a pit about ten meters by six metres for the construction of the waterborne toilet. They started by demolishing the old structure, which was a block of three classrooms, during late

August and early September 2013 using an earth mover. They later removed the loose soil around. They secured a machine for making concrete blocks and installed it. They ferried stone dust and the work of making blocks kicked off in October 2012. They produced around 7,000 blocks but were producing below capacity because of limited space and the weather was not conducive because it was a rainy season. They laid the foundation on the five stance waterborne toilet. They were unable to compete the work within the contract period because the machines were delivered late from where they were hired and they would break down often. The works executed by the second plaintiff have not been paid for as agreed, hence the suit.

In his written final submissions, counsel for the plaintiffs Mr. Henry Odama in summary argues that both plaintiffs have proved the execution of valid sub-contracts with the defendant. They have also adduced evidence proving that they executed work under those contracts for which they have not been remunerated by the defendant. They are therefore entitled to an award of general damages for breach of contract, special damages of shs. 64,000,000/=, which were specifically pleaded and proved, interest on both awards and the costs of the suit.

Although the defendant in this suit did not offer any evidence, the plaintiffs still bear the burden to prove their respective cases on the balance of probabilities since the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case is heard on formal proof (see *Kirugi and another v. Kabiya and three others [1987] KLR 347*). The issues for determination are as follows;

1. Whether there exists valid contracts between the plaintiffs and the defendant.
2. Whether the defendant breached any of those contracts.
3. Whether any of the plaintiffs is entitled to the reliefs sought.

First issue: Whether there exists valid contracts between the plaintiffs and the defendant.

During his testimony, P.W.1, Mr. Tatia Allan mentioned a contract dated 23rd January 2012 but it was never tendered in evidence. Under section 10 (2) of *The Contracts Act*, 7 of 2010, a contract may be oral or written or partly oral and partly written or may be implied from the conduct of the

parties. From the testimony of this witness, it was established that the first plaintiff entered into a contract with the defendant and that the plaintiff executed a part of the contract.

During the testimony of P.W.2 she tendered in evidence a contract dated 15th October 2012 which was received and marked as exhibit P. Ex. 4. Having examined both contracts, I find that the basic requirements of validity, i.e.; valid offers met by valid acceptance, an intention by both parties to create legal relations, certainty of the terms agreed upon, valuable consideration given by both parties and capacity to contract, are satisfied. None of the contracts is affected by any illegality or other voiding circumstances. The first issue is therefore answered in the affirmative.

Second issue: Whether the defendant breached any of those contracts.

A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. This includes failure to perform in a manner that meets the standards of the industry or the requirements of any express or implied warranty. Under each of the contracts, the defendant was obliged to pay the respective plaintiffs for their service; with regard to the first plaintiff, for supervisory services and with regard to the second plaintiff, with regard to construction of a five stance waterborne toilet and supply of 10,000 concrete blocks. There is no evidence that the defendant paid for any of those services.

It is an implied term in every construction contract that the contractor will carry out work in a "good and workmanlike manner" (see *Duncan v. Blundell (1820) 171 ER 749; Cousins v. Paddon 150 Eng. Rep. 234 (1835); Conquer v. Boot [1928] 2 KB 336, [1928] All ER 120* and *Purser and Co. (Hillingdon) Limited v. Jackson and Another, [1971] 1 QB 166*). This term imposed upon the plaintiffs an obligation, during the performance of their part of the contract, to employ that degree of skill, efficiency and knowledge which is possessed by those of ordinary skill, competency and standing in the particular trade or business for which they as sub-contractors were employed, preformed in a manner generally considered proficient by those capable of judging such work. The focus is not on the result of the work, but the manner in which the work was performed.

The first plaintiff undertook to complete the task within a period of 48 weeks from the signing of the contract, hence by 24th December 2012. However, the head contract was terminated on 10th April 2013 before the works under the first plaintiff's supervision could be completed. With regard to the second plaintiff, the contract period was unspecified but by 10th April 2013, approximately six months after the signing of their contract, out of the 10,000 blocks contracted, they had produced only 7000 blocks. The implication is that they were producing an average of 1000 blocks per month or approximately 30 blocks a day or 4 blocks an hour, assuming they operated an eight hour working day. The second plaintiff attributed this low productivity, to faulty machines, bad weather, interruption by ongoing school activities and limited space. None of these is a frustrating event capable of excusing the second plaintiff from executing its part of the bargain. None of the reasons will excuse the second plaintiff from liability for delay or non-performance of its obligations.

Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and / or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance (see *National Carriers Ltd v. Panalpina (Northern) Ltd, [1981] AC 675, [1981] 1 All ER 161*). Generally, these are events beyond the parties' control, which could not have been foreseen at the time the contract was entered into or prevented by the affected party. Thus, the fact that a contract has become uneconomic or commercially impractical will likely not be considered a force majeure event unless expressly provided for.

In the first place, there is no implied term for a builder of a school to have uninterrupted possession of and access to the site (see *Porter v. Tottenham U.D.C [1915]1K.B. 776*). Secondly, inclement weather, if at all it occurred, which fact was not proved during the trial of this case, could not excuse the delay. For example in *Davis Contractors v. Fareham UDC [1956] AC 696*, the plaintiff agreed to build 78 houses in eight months at a fixed price. Due to bad weather, and labour shortages, the work took 22 months and cost £17,000 more than anticipated. The builders

said that the weather and labour shortages, which were unforeseen, had frustrated the contract, and that they were entitled to recover £17,000 by way of a *quantum meruit*. The House of Lords held that the fact that unforeseen events made a contract more onerous than was anticipated did not frustrate it.

It is a well-established rule that where a party agrees to do a certain thing, and does not specify how it shall be done, the law implies a promise on his part to do it in the usual manner (see *Hattin v. Chase 33 A. 989 at 658 (Me. 1895*). In the instant case, at a production rate of only 30 blocks a day or 4 blocks an hour, the second plaintiff cannot claim to have performed its part of the bargain in a good and workmanlike manner. Similarly, the first plaintiff undertook to supervise performance of the contract for a period of 48 weeks and 51 weeks later, the works were yet to be accomplished. The first plaintiff too cannot claim to have performed its part of the bargain in a good and workmanlike manner. That notwithstanding, when the head contract was terminated, the defendant assigned the second plaintiff additional work of levelling the site, which was not part of the work the second plaintiff had contracted for originally.

Improper performance provides a basis for finding non-performance which may, in a proper case, not only discharge the recipient of the services of its payment obligation, but also subject the service provider to a claim for breach of contract. One party's failure to deliver the quality of performance promised may potentially result in discharge of the other party's performance obligation on account of failure of consideration. However, it is only when the failure to perform in a workmanlike manner renders the work of no value to the service recipient, that the latter's obligation to pay for services is discharged. Otherwise, the plaintiffs would be entitled a claim and the defendant a corresponding obligation to pay reasonable remuneration for work done which is freely accepted, under the doctrine of *quantum meruit*. In a quasi-contractual case such as this, the court will look at the true facts and ascertain from them whether or not a promise to pay should be implied irrespective of the actual views or intentions of the parties at the time when the work was done or the services rendered.

In *British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd, 1984] 1 All ER 504, [1984] 1 WLR 504,* Goff J said:

The question whether.....any contract has come into existence must depend on a true construction of the relevant communications which have passed between the parties and the effect (if any) of their actions pursuant to those communications. There can be no hard and fast answer to the question whether a letter of intent will give rise to a binding agreement; everything must depend on the circumstances of the particular case. In most cases where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence; because if the party who has acted on the request is simply claiming payment, his claim will usually be based upon a *quantum meruit*, and it will make no difference whether that claim is contractual or quasi-contractual. Of course, a *quantum meruit claim* (like the old actions for money had and received and for money paid) straddles the boundaries of what we now call contract and restitution; so the mere framing of a claim as a *quantum meruit* claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi-contractual.....As a matter of analysis the contract (if any) which may come into existence following a letter of intent may take one of two forms: either there may be an ordinary executory contract, under which each party assumes reciprocal obligations to the other; or there may be what is sometimes called an 'if' contract, ie a contract under which A requests B to carry out a certain performance and promises B that, if he does so, he will receive a certain performance in return, usual remuneration for his performance. The latter transaction is really no more than a standing offer which, if acted upon before it lapses or is lawfully withdrawn, will result in a binding contract. The former type of contract was held to exist by Judge Fay QC in *Turriff Construction Ltd. v. Regalia Knitting Mills Ltd (1971) 9 BLR 20*; and it is the type of contract for which [Counsel for CBE] contended in the present case. Of course, as I have already said, everything must depend on the facts of the particular case; but certainly, on the facts of the present case – and, as I imagine, on the facts of most cases – this must be a very difficult submission to maintain.' If there is no contract there can be no question of a party to a transaction being in breach of an obligation of the type which can only arise under a contract. 'In my judgment, the true analysis of the situation is this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter – as anticipated – a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract of which the terms can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution.

In the instant case, the work done by the second plaintiff in levelling the site is not referable to the contract of 15th October 2012, but was nevertheless done at the request of the defendant. In the circumstances, the law imposes an obligation on the defendant as the party who made the request to pay a reasonable sum for such work as was done by the second plaintiff pursuant to that request. The services offered by the two plaintiffs are not of a kind which would normally be given free of charge. In absence of evidence suggesting that either plaintiffs' failure to perform in a workmanlike manner rendered the work of no value to the defendant, the defendant therefore breached its part of the contract when it failed or refused to pay the plaintiffs a reasonable sum for that part of the work as was done pursuant to the two contracts and the subsequent request. The second issue is therefore answered in the affirmative too.

Third issue: Whether any of the plaintiffs is entitled to the reliefs sought.

Under section 61 (1) of *The Contracts Act*, 7 of 2010, where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. For a loss arising from a breach of contract to be recoverable, it must be such as the party in breach should reasonably have contemplated as not unlikely to result. The precise nature of the loss does not have to be in his or her contemplation, it is sufficient that he or she should have contemplated loss of the same type or kind as that which in fact occurred. There is no need to contemplate the precise concatenation of circumstances which brought it about (see *The Rio Claro [1987] 2 Lloyd's Rep 173*).

On account of the plaintiffs' failure to prove that their performance of their obligations under the contracts met the "good and workmanlike manner" standard, their claim for general damages cannot be sustained. Under the principle of *ex turpi causa*, the court will not assist the plaintiffs to recover compensation for consequences that are partly out of their own shortcomings. The claim for general damages for breach of contract is thus rejected.

Although the plaintiffs are not entirely blameless for the failure of the head contract and of their respective sub-contracts, the circumstances are such that the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which the plaintiffs

deserve to be paid, on a *quantum meruit* basis. The fundamental principle that equity is concerned to prevent unconscionable conduct applies to a case like this. The court will impose such an obligation where the defendant has received an incontrovertible benefit (e.g. an immediate financial gain or saving of expense) as a result of the plaintiffs' services; or where the defendant has requested the plaintiff to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely. The court regards it as just to impose such an obligation on the defendant who has received the benefit and has behaved unconscionably in declining to pay for it. The court is more inclined to impose an obligation to pay for a real benefit obtained by the defendant, since otherwise the circumstances will leave the defendant with a windfall and the plaintiffs out of pocket.

The law is that special damages must not only be specifically pleaded but must also be strictly proved. (See *Kyambadde v. Mpigi District Administration [1983] HCB 44*). The plaintiffs not only pleaded the special damages claimed but also adduced evidence proving them. The plaintiffs are therefore entitled, on a *quantum meruit* basis, to payment for their services, and the value of that should represent the extent of the unjust enrichment obtained by the defendant.

For that reason Judgment is entered for the plaintiffs severally against the defendant in the following terms;

a) Special damages of Shs. 25,000,000/= in favour of the first plaintiff.
b) Special damages of Shs. 64,000,000/= in favour of the second plaintiff
c) Interest on the awards in (a) and (b) above at the rate of 15% p.a. from the date of judgment until payment in full.
d) The costs of the suit.

Dated at Arua this 10th day of July 2017

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Stephen Mubiru
Judge
10th August 2017.