THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

-

AT MENGO

COR: MANYINDO, D.C.J, ODER, J.S.C., & PLATT, AG. J.S.C.

CIVIL APPEAL 24/1994

CONSTRUCTION ENGINEERS AND BUILDERS LTD……….. APPELLANT

- VERSUS —

THE ATTORNEY GENERAL……………………………………RESPONDENT__

(Appeal arising from the Judgment and Decree of the High Court of Uganda at Kampala (Tsekooko J.) in High Court Civil Appeal No. 980/1986).

JUDGEMENT OF PLATT AG. J.S.C

The appellant/plaintiff Company Construction Engineers and Builders Limited, sued the Attorney General of Uganda as representing the Ministry concerned with the building contract, whereby the appellant undertook to construct a first class tarmac road from Pakwach to Arua Municipality boundary. The contract was entered into on 23rd September 1977, and the work was ordered to be commenced on 6th October 1977, operative from 1st December, 1977. The date of completion was to be 1st June, 1980. Unfortunately, the Liberation war intervened and on 11th April 1979, the Engineers Representative allowed the works to be suspended.

The Indian High Commissioner sought the evacuation of the Indian nationals working on the contract and they left for Kenya with part of the building plants. The Offices of the Company site were destroyed and a good deal of damage was done to the works and equipment. Two Arab States had contributed funds to the contract price of 306, 555,050/= of which 294,555,050/= was the contract price and 12,000,000/= was reserved for contingencies. At

some stage, the Arab States appear to have withdrawn and funds were sought from OPEC. It was difficult to re-start the work. At length in 1985, the appellant understood that the Respondent had no more funds and could not continue. The appellant treated this attitude as a breach or abandonment. On 4th November 1985,(Ex.P.40) the Appellant wrote to the Permanent Secretary, Ministry of Works, explaining this situation, and claiming dues, especially the foreign currency elements, and claims under the special risk claim (clause 65 (7) which includes war). Payment was not made by the Ministry and thus this suit was brought claiming a total of Deutschmarks 13,234,213.00 and 20,094,420/= (as amended).

The Respondent denied the claim and counterclaimed 6,000,000/= which had been paid on account. The Respondent s case was that Appellant had abandoned the contract.

The learned Judge agreed on the whole with the respondent, that the appellant had abandoned the work. But there were issues on which the appellant won. The appeal is represented on the basis that the learned Judge was right on some issues and wrong on others. Another aspect of the appeal is that neither has the appellant appealed on all matters that it disagrees with, nor has the respondent cross appealed on all matters that it disagrees with. Of the issues raised the learned judge answered them as follows : -

l.A It was held that not all moneys on Interim Certificates, 1,2,3,4, and 5 was paid to the Appellant.

1. B The Judge stated what he thought was owing and the appellant alleges that the Judge did not award the full amount.

2. A It was held that Interim Certificate No. 6 was valid and entitled the appellant to claim.

2. B The Judge set out the sums he thought was payable in local and foreign currency.

3. The Judges held that the action taken by the Engineers Representative on 11th April 1979, was not a legal suspension, but permitted the appellant to leave the site to avoid the war.

4. Subsequently the Respondent did no abandon the contract.

5. The plaintiff was entitled to certain reliefs claimed, and not others.

6.a The appellant did not fraudulently or erroneously obtain the sum of 6,000,000/=.

b. The respondent was not entitled to counterclaim 6,000,000/=.

7. a The appellant abandoned the contract in breach of the term of the contract
b The respondent was entitled to counterclaim damages.

Then, what does the appellant say was wrong with these findings.

In ground 1of the appeal, the appellant says that the learned Judge was wrong to hold that the appellant was only owed D.N. 22,296/= Ug. Shs. 1,133, *282/*= had been missed out of that account. The appellant had claimed in paragraph 16 (a) (ii) as balance on Certificates Nos. 1-5 Ug. Shs. 1,139,282.74 retention money on the same at Ug. Shs 2, 374, 04. It seems to be true that the learned Judge referred briefly to Ug. shs. 1,139,282.74. It also appears from the Respondent address that it was agreed that Ug. Shs. 1,139,282.74 should be added. Ground 1 of the appeal succeeds as far as it goes. There will be a later question whether the Currency Reform Statute affects this figure.

In ground 2 it is argued that the learned Judge had held that the Uganda money outstanding on Interim Certificate number 6 payable in foreign currency was shs. 3,535,892/= when a further figure of Ug. shs. 429,371.97 as retention money should have been added. The problem here was whether any retention money could be paid since that money could only be paid after completion. The learned Judge said in the circumstances, Certificate No. 6 must be treated as final. The respondent agreed that as he had not cross-appealed the sum of shs. 429, 271.97 should be added, except that by virtue of the Currency Reform that sum is put at

Ug. shs. *42,937/*= converted into D.M. 11,989/=. The appellant *has* substantially succeeded in this ground of appeal except that the proper *D.M.* equivalent would seem to be 1,107,204.29.

In ground 3, the question is whether the Currency Reform Statute 1987, applies. It has been held to usher in the reform of the Uganda Currency. In my opinion the Statute does not apply here. The terms of the contract were designed to help the Contractor to mobilize and carry out

his contract with international financing. The terms of the contract specified both D.M. and Ug shs. all the way through. It seems to me therefore that sums which are for all intents and purposes D.M. should not be subject of the Currency Reform Statute which affected money, in this Country.

Ground 4 can be dealt with shortly. The economic dislocation clause which appears in the special conditions of the contract 70 (4) concern currency restrictions and devaluation only in a special way. The Employer shall pay to the contractor any increased costs of or incidental to the execution of the works, which is however attributable to or consequent on or the result of or in any way whatever connected with such economic dislocation." The appellant is not claiming increased costs. They claim compensation for devaluation on sums owing. It is abundantly clear that the contract does not support such a claim. Therefore ground 4 cannot succeed.

In ground 5, the argument is that the employer did issue a suspension order. The argument is attractive only because of situation and the lack of activity by the Permanent Secretary. The latter had been alerted by the Consultant as to the difficulties. But nothing was done. So in the end the Engineer's Representative did the best that he could and bravely issued the letter of 11th April, 1979.

But looking at the situation in the calm light of sixteen years later on, the Judge must be correct to say that on the terms of condition to only the Permanent Secretary could suspend the work. The Engineers Representative is not entitled to do so. The learned Judge also did the best that he could, and devised an anodyne formula that the letter was not a suspension, but it was on permission to leave site. That saved the Contractor from being held to have abandoned the Contract. That was very reasonable as no Contractor can possibly carry on with a shortage of supplies promised by Government and with a war raging around him, and the foreign nationals on the staff having to leave, as indicated by their High Commissioner. The work had to be shut down. It is also pleasant to record that no harsh attitude was taken after the war receded, as the work was sought to be recommenced. That allowed the learned Judge to hold the situation stemming from the letter of 11th April 1979, was ratified. So far, the two parties acted very sensibly.

For my part 1 would also observe that intrinsically condition 40 could not apply. The purpose of condition 40 is to preserve the works. The Contractor is not paid any extra costs necessary

in the proper execution of the work, or by reason of weather conditions affecting the safety or quality of the works, or if the suspension is due to fault on the part of the contractor himself. The suspension may also be necessary for the safety of the works. The Contractor is only paid extra costs incurred in proper protection of and securing the work so far as is necessary in the opinion of the Engineer when the suspension is for other reason necessary. The extra costs are all running wages to be paid on the site salaries depreciation and maintenance of plant site on costs and general overhead costs incurred by the Contractor in giving effect to the Engineers instructions. The purpose of Condition 40 is that for some good reason the work must be suspended, but yet the work must be preserved and staff remain on site, thus increasing the wages and overhead costs, as well as depreciation. Bad weather conditions do not bring them payment for extra costs. That was not the situation here. This contract foundered because of the war and the lack of agreement thereafter how to get the work re-started. This difficulty fell under condition 65 the special risks Clause. The contractor was to be compensated in loss or damages to property Clause 65 (1). The employer could terminate the Contractor, clause 65(5), and payment could be made for work done, Clause 65(7). The parties could declare that the Contract was frustrated, clause 66. In this instance, the contract was not terminated, nor declared frustrated, and so claims for compensation were made, including the reasonable costs of repatriation of the staff, clause 65 (7) (f).

It follows that ground 5 fails. In ground 6 the question arises whether the Appellant had abandoned and so broken the contract as the learned Judge held. I beg to differ from the view of the learned Judge.

To begin with the implication of the letter of 11th April 1979, was misunderstood or read too narrowly. It was not that the work should start after two months, but two months after the state of affairs returned to normal. It was conceded on the appeal by the Respondent that this would be around December 1979.

Finally it was said that the work had been slow up to 11th April 1979, but no action had been taken by the Employer on that account. There was over a year to run still. It was said that the Contractor delayed to start again. It was not properly seen what a difficult position the Contractor was in. His offices had been demolished, equipment sent to Kenya, and other equipment had deteriorated. In fact the learned judge accepted that the damage to the Contractor amounted to shs. 60,000,000/=. Now, how was the Contractor to remobilize. Was

the war his fault? Of course, if the contract was not to be terminated, then the re—commencement had to be re-negotiated. But in this event, there was some fault on the Employer, who did not attend a crucial meeting for this purpose, and it took a long time to assess the Contractor's loss.

Thirdly, at no time did the Engineer certify in writing to the Employer that the Contractor had abandoned the contract, nor did the Engineer serve notice on the Contractor that he had failed to commence the work after suspension, or in any other way indicate that the Engineer thought that the appellant had abandoned the contract. The parties went on seeking some way to get the work going, but finance was a growing difficulty. So much so that on 17th November, 1982, the Employer re-designed the contract to a lower specification. The appellant responded on 19th November, 1982, agreeing to reschedule the work. It is not clear whether the Employer accepted the new terms. On 22nd August 1983, the Respondent regretted that it was unable to make any further payments local or foreign on the project. The end came in 1985 to alleged lack of funds.

. The appellant points out that if the appellant is said to have abandoned the contract, it is not clear when that was. The learned Judge does not seem to have been clear on that point. The respondent's argument does not appear to me to clarify the point. I cannot think that the contractor abandoned the contract before 17th November 1982 otherwise the employer would not nave asked him to vary the style of the project and submit his costs; except in saying that the contractor had abandoned the contract, but that now a new contract had been offered. But that was not what was said. It was a redesign of the old contract. After November 1982, I cannot ascertain what the parties were doing. There seems to have been no point at which the Employer terminated the contract or amended contract, for the catalogue of the Contractors faults which the Employer now relies ion. The Employer did not accept the new terms either. What it seems to come to is that the Employer did not rely on the Contractors faults under condition *63,* and the contractor expected payment due to the war to re-mobilize, and both hoped that somehow the work could be saved, until in the end there was no money for the project. With the greatest respect to the learned Judge, I feel that the straw that broke the came is back was lack of finance, and that the appellant was entitled to repudiate on that ground. It would have been better, as things have turned out, for the contract to have been terminated by the Employer as a result of the war, under condition 65 (5). But that is hindsight.

In my opinion ground 6 must therefore succeed.

Ground 7 no longer requires much thought. The counterclaim fails entirely if the shs. 6,000,000/= was validly received, and if it was the respondent who *was* forced to break the contract through lack of funds, then no damages are payable by the appellant to the respondent for breach of contract.

On the other hand, award (e) of the memorandum of appeal calls for damages for breach of contract in the terms found by one Judge. That would mean D.M. 100,000/= general damages and secondly *21/2* of shs. 250,474,960/= (see pages *294, & 295* of the judgment). This last sum to be split, according to the judge's Order, 50% D.M. and 50% in Ug. Shillings. I leave these calculations to the parties.

In the result, I would accept that the appeal should be allowed and that the judgment of the High Court should be varied as prayed in prayers 2(a*)*, (b) and (e) of the i4emorandum of appeal as follows:—

(a) awarding to the appellant the full amount proved as outstanding and due (including retention money) on Interim Certificate i—6 inclusive) as prayed setting aside the awards for

(A) (a), (b), (c), (d) and (e) of the judgment;

(b) Ordering that money payable in foreign currency under Interim Certificates and by way of compensation for loss of plant and establishment is not subject to the provision of the Currency Reform Statute;

(e) awarding damages for breach of contract in terms found by the learned Judge.
I would not award compensation for economic dislocation or suspension costs as prayed for in prayers (c) and (d) of the Memorandum. I would award three quarters of the costs of this appeal to the appellant with a Certificate for two Counsels.

I would vary the order of costs in the High court. The respondent shall pay the costs of the suit and the counterclaim to the appellant.

I would reduce the interest of *30%* payable on the Monetary claims to *12%,* and interest on costs I would leave at 6% as the Judge ordered (see awards (f) and (g) of the judgment).

For the guidance of Counsel i would note the recalculations of figures during the appeal as follows:

Under 16 (a) the total is shs. 7,497,173.13 and that the conversion was D.M. 2,088,799.59.
— 16 (c) not proved.
— 16 (d) calculated from 60,000,000/=.
— 16 (e) loss of profit at rate of 2 1/2% of 250,474,960 as well as D.M. 100,000/=.
The totals are to be recalculated by the parties and to be approved by the Court. Currency Reform Statute applies to local payment of debts owed but not damages, nor payments in D.M.

I would allow this appeal to this extent.

DELIVERED at Mengo, This. .5th . . .day of. . .September 1995.

H.G. PLATT,

AG. JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL.
E.K,E. TURYAMUBONA,
REGISTRAR THE SUPREME COURT.