

TANZANIA / JUDGMENT

20151120 TZHC Dar es Salaam3

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IN THE
HIGH COURT OF TANZANIA (COMMERCIAL DIVISION), AT DAR ES SALAAM,,
COMMERCIAL CASE NO. 13 OF 2014 TWIGA PACKERS LIMITED PLAINTIFF
VERSUS APPLIED MECHANICAL ENGINEERING CO. LIMITED: 1ST
DEFENDANT INSURANCE GROUP OF TANZANIA LIMITED 2ND
DEFENDANT

JUDGMENT

Mansoor, J: Date of JUDGMENT- 20TH NOVEMBER 2015 Twiga Packers Limited, the plaintiff' filed a suit against Applied . Mechanical Engineering Co. Limited "the 1st defendant" and

- Insurance Group of Tanzania Limited, .. "the 2 nd defendant" for payments of THz 31,172,000.00 being costs of bonds, payment 1 . of USD 52,962.34 as special damages for loss of business, general damages, interests and costs of the suit. In the plaint, the plaintiff alleges that on 18 th December 2012, the plaintiff and the 1st defendant entered into a construction agreement for construction of lift extension in the DRTC Building and installation of New Panoramic Elevator on Plot No. 191 Nyerere Road, Dar es Salaam for a sum of THz f 155,860,400. The plaintiff alleges further that, the 2 nd defendant issued a guarantee for the performance of the work by the 1st defendant. The 2 nd defendant provided an Advance Payment Bond of THz 15,586,040.99 and Performance Bond of THz 15,586,040. The plaintiff alleges that the 1st defendant received advanced payments of THz 15,586,040 from the plaintiff, but the 1st Defendant did not show up to accomplish the Work. The plaintiff alleges further that the agreed time frame for completion of the Work was 20 weeks, and relying on that the plaintiff entered into a lease agreement with Swiss Port Training Centre for two years for two floors of the area measuring 556 square meters at the monthly rent of USD 52,962.34. Swiss Port Training Centre had to terminate the contract as the Elevator was not done and occupied only 278 square meters instead of 556 square meters excluding the top floor for there was no lifts/ elevators. Further, the plaintiff alleges that the plaintiff reputation was tarnished as the other tenants vacated the building. The 2 nd defendant issued a discharge voucher of THz 15,000,000 as full and final settlement of the plaintiffs claims under the Bonds, the plaintiff refused to take the amount offered by the 2 nd defendant, hence the plaintiffs suit against the defendants. The 1st defendant did

not appear in Court, and it did not file - any defence, hence a Default Judgement was entered against it on 25 th .June · 2015. under Rule 22 (1) of the 'High , Ccn~rt (Commercial Division) Procedure Rules, 2012, for all the prayers contained in For~ No. 1 except the - prayer for general ..., damages. As for the 2 nd defendant, the insurance company, they filed their written statement of defence saying that it was not a party to the Construction^o" Contract betweei;i the plaintiff and the 1 st defendant and it was not bound by its terms, and that it had no obligations to execute works relating to the lift extension in the DRTC Building. While the 2 nd defendant admits to ·have issued the Advance Payment Bond and the Performance Bond, it denies that those were not guarantees to . the effect that the 1st defendant will finish the contractual works within 20 weeks, and that the Bonds are pot the guarantees to either the plaintiff or the 1st defendant but admits that the Bonds are contracts of surety, whereby the 2 nd defendant stands as surety ·of the 1 st defendant for the sum not exceeding THz 15,586,040 in the Advance Payment Bond and fdr the: sum not. exceeding THz 15,586,040 in the - 4 Performai.7.ce Bond, and. that the ainount of. surety must always ·conform to the specific reliefs stated in the Bonds, It was the defence taken by the 2 nd defendant that the plaintiff did not take necessary steps to show and prove that there was a valid claim under any of the Bonds in a manner that would have entitled the plaintiff to any relief. That there were no particulars of proof of advanced payment by the plaintiff to the 1st defendant, there was no proof of discharge of° the employers obligations, or a notice of claim, or termination that was served on the Contractors and the Surety, and that there were no particulars of actual loss suffered under the Contract, or . the defects that have occurred to the Works under· the Contra.et which. would have constituted a claim under the Bonds. That the Plaintiff was offered some payments but have refused to accept those payme~ts that v\ould have been payable to the plaintiff under the Advance Payment Bond, subject to proof that the · plain~ff had paid the Advance payment to the 1st defendant, ·and that having said in the ' · plaint that the Contractor·performed no work at: all under" the 5 Corttract; the Plaintiff is not ·entitled to present:a.i.7:y claim vvith respect to the money payable under the Performance Bond, and that the entire claim is premature and unacceptable for want of proper""claim procedures. The 2 nd defendant stated in its defence that the plaintiff being an employer was negligent and contributed to its own loss as it was negligent and reckless in that it entered into a Contract with the Contractor without taking steps to ensure that the Contractor is trustworthy, duly qualified, registered and experienced for the Class of the Contracted Works, and that the plaintiff entered into a lease agreement on a building known to them to being under construction without taking . any precautions or making any provisions for circumstances that would warrant extension of time to complete the works. The 2 nd plaintiff therefore prayed for dismissal of the suit against it. 6 - . ' ,...-;-:-:___.:.....:,;....: "";;:-:.. ~- ----, :...~~;,..~~ ~ ~ . '~~~~ During·· the · Final Trial . Conferenc~) • the. -. ',- Court . ~ ', in . consultations with the Counsel for the Parties recorded the fallowing issues;

1. Whether the 1 st defendant breached the Agreement;

2. Whether the 2 nd defendant is bound to indemnify the plaintiff for default of the 1st defendant;
3. To what reliefs are the parties' entitled. It should be noted that issue number one need not be determined as there was a Default Judgement already entered by the Court as against the 1st Defendant, thus the issues remained for determination were the 2 nd and 3 rd issues.
1. Whether the 2 nd defendant is duty bound to indemnify the plaintiff for the default of the 1st defendant: The plaintiff brought only one witness one Mary Musira, she presented to court the following exhibits: 7 1. Exh P1- The Agreement between the plaintiff and the 1st defendant for Construction of the Elevators; . .
2. Exh P2- Performance Bond executed by the 2 nd Defendant;
3. Exh P3- Advanced Payment Bond executed by the Defendant;
4. Exh P4 - Handover Agreement between Twiga Packers Limited and Swissport Tanzania Limited;
5. Exh PS- correspondences between Swissport Tanzania Limited and Twiga Packers Limited; This witness admitted during cross examination that she did not attach any receipt or voucher showing that Twiga Packers have paid the Advance Payment payments to the 1st defendant, and admitted that the Rules under the Advance Payment Bond is to pay the Contractor. She also testified during cross examination that at the time the 8 .. plaintiff entered into 3..t.7. agreement with Swissport, the lift was not yet installed. The 2 nd defendant admitted to have issued the two bonds that is the 1st Advance Payment Bond was issued on 25 th February 2013 for the period of 18th February 2013 to 17 th February 2014, covering the amount not exceeding THz 15,586,040, and the 2 nd Bond was the Performance Bond issued on 18 th February 2013 for an amount not exceeding THz 15,586,040. As admitted by PW 1 that she did not prove before the Court that the Plaintiff had actually paid the 1st Defendant, the Contractor, the Advance payments, the plaintiff cannot be heard to claim for refund of the Advance payment which PW1 had admitted not to be able to prove before the Court that the plaintiff had paid this money to the Contractor. I agree with the submissions by the Counsel for the 2 nd defendant that payment of this money to the Contractor is an express "condition of indemnity under the Bond. The.. 'plaintiff. alleged that it paid the Advance Money to the Contractor in paragraph 8 of the Pleadings and also paragraph 9 and 11 of (PW)) Mary Musira's statement in lieu of evidence in chief, but when cross examined, this witness of the plaintiff admitted that she did not bring any proof before the Court; a receipt or voucher proving that the plaintiff had actually paid this money to the Contractor. Thus failure to prove the Payment of the Advanced Payment to the 1st Defendant, which is the basis of the Claims against the 2 nd defendant is fatal and extinguishes the plaintiff's claims against the 2 nd defendant. On the performance Bond, the plaintiff would have been entitled to payment of the indemnity by the Surety, if it had declared the Contractor to be in default of the performance of the Contract, and that as the Employer it has performed the Employer's Obligations under the Contract.; J'he

Employer, the plaintiff hereip. has failed to prove by evidence that it complied with the conditions set in the Terms and Condition Clauses of the Contract .., between the plaintiff and the 1st defendant. Even when it were to be found that the plaintiff is entitled to indemnity by the Surety, the plaintiff failed to prove before the Court that it followed the procedures for payment of surety, this was clearly explained by one Yvette Deogratius, the Claims Officer of the 2 nd Defendant, who admitted during cross examination that she had received the Claims Forms and copies of Bonds from the Plaintiff. She also admitted that the 2 nd defendant issued the discharge voucher to the plaintiff, but the voucher was written without prejudice, meaning that the document was not conclusive, and the plaintiff was required to fulfil some conditions to entitle them to payments of indemnity. The plaintiff never submitted to the Surety a Notice or a Declaration that the Works

- Bond was issued was not under which the Performance ' ' 11 performed. The Declaration is required to be certified by the Registered Engineer from the Contractors Registration Board, there was no such Declaration presented to the Surety. Thus the Claimant/the plaintiff had failed to prove its claims to entitle it to payments. In answer to the issue, I would therefore say that the Surety, i.e. 2 nd Defendant would have been liable to pay or indemnify the plaintiff herein, if the plaintiff would have been able to prove its case on the required standards. The plaintiff failed to prove before the Court that it actually made the payments to ... the 1st defendant to entitle it to recover from the Advanced Payment Bond, and also it failed to prove that it has complied with the conditions set in the Contract between the employer and the Contractor to entitle it to payment under the 2 nd Performance Bond, also it has failed to prove that it has followed the procedure in presenting its claims for indemnity before the 2 nd defendant .2. To what remedies are the parties entitled. 12 ... The prayer of payments of THz 31,72,080 as costs of the Bonds, this cannot be recovered from the 2 nd defendant, for the reasons given herein above. As for the prayer of USD 52,962.34 claimed as specific damages for loss of business resulted from termination of lease agreement between the plaintiff and Swissport, I would say that the loss if any, suffered by the plaintiff has not been established and even though it was established and this loss is .. not attributable or recoverable from the 2 nd defendant, I agree with the 2 nd defendant that if there was any loss suffered by the plaintiff resulting from the lease agreement between itself and Swissport, those losses are attributable to the plaintiff themselves due to then failure to diligently contract and take Contingency Contractual measures that usually cater for leases of buildings under construction. There was an admission that the plaintiff had entered into a contract with Swiss port when the building was still under construction without making any precautions or making any provisions for ... 13 circumstances that would warrant extension of time to complete the work. In this case, the plaintiff is the Landlord to Swissport, and as between the landlord and Swissport, the landlord is responsible for the installation of the elevator, the tenant will have three primary concerns: (a) getting the most work it can out of the landlord, (b) getting the landlord to stand behind its work with some sort of warranty obligation, and (c) achieving completion by a specified date. In this case, it has not been shown when was the

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