

UGANDA / JUDGMENT

Nassaf Uganda Ltd v Razco Ltd & Anor (Civil Suit No. 827 of 2014) [2015] UGCommC 295 (9 November 2015) [2015] UGCommC 295

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 827 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 827/2014

NASSAF UGANDA LTD PLAINTIFF

VS

1. RAZCO. LTD

2. ZIV RAZ DEFENDANTS

JUDGMENT

The plaintiff filed this suit against the Second Defendant seeking to recover special damages of USD 200,000, general damages for breach of contract, interest on the said sum at the rate of 30% from the date of judgment until payment in full, plus costs of the suit.

The brief facts of the case are that on the 07.01.13 the Plaintiff company was contracted by TRAMINCO SPRL to crash stone base of 0-38mm, 1400m³ and aggregate of asphalt 04mm, 2500m³, 4-9mm 1250m³, and 4-9mm 1250 and 1250m³, bringing the whole total to be crashed to 19000m³ for a period of 5 months.

On 09.01.13, the Plaintiff subcontracted the Defendants to lease her a mobile crusher and to crash the above mentioned quantity of stone for a period of 5 months.

The Plaintiff contends that the Defendants breached the said agreement, causing the Plaintiff to incur expenses, and finally to lose the contract with TRAMINCO SPRL. The Plaintiff puts the total loss incurred at \$200,000.

The suit was filed on 28.11.14 and summons to file a defence were issued.

On 07.01.15, the Plaintiff filed an application for substituted service which was heard on 02.02.15.

The plaintiff was granted leave to serve the Defendants with summons by way of substituted service by advertising in a newspaper widely read.

The summons were advertised/published in the Daily Monitor Newspaper of 06.02.15. A copy of the said Newspaper together with an affidavit of service dated 04.03.15 are on record.

None of the Defendants filed a defence to the suit and formal hearing took off on 17.03.15.

Two witnesses testified for the Plaintiff Company.

PW1 Assaf Natan, the Managing Director of the Plaintiff testified that the Plaintiff Company deals in construction, transportation and other related business.

In December 2012, the company got an opportunity to do business in Goma, DRC to crash stones for road construction. He confirmed that an agreement was then made with the Defendant – Exhibit P1 to crash the stones in the sizes and quantities already described in this judgment with the machinery that the Defendants have. The total quantity of stones to be crashed was 19000 cubic meters. The agreed time was five months.

Payment was to be per quantity per crash. The parties signed the agreement. PW1 on behalf of the Plaintiff Company and the Second Defendant signed on behalf of the First Defendant.

After the agreement was signed, the Defendants were given an advance payment of \$10,000 and trucks were sent to collect the machines from Tanzania to Kampala, and then they were taken to Goma.

A total of \$58,000 was paid for the transportation of the machinery to Bemuga Forwarders Ltd. The first payment was made on 17.01.13 and the final payment on 20.02.13. - See Exhibit P2.

When the machines got to Goma the Second Defendant requested for payment of transport and boarder fees for his staff to go to Goma. The Plaintiff paid a total of about Shs.3,000,000/-.

The first payment of Shs. 80,000/- was made on 10.01.13 to two people.

The second payment of Shs. 20,000/- was made on 11.01.13.

On 12.01.13, \$100 was paid. On the same date another Shs. 100,000 and on 12.01.13, Shs.150,000/- was paid. - The cash payment vouchers numbers. 201-242 were admitted as Exhibit P3.

Some of the money was paid in Uganda while the second batch was paid in Goma. The money was received by the First Defendant Company represented by one Titi who was responsible for all documentation and communication between the companies.

The witness explained that TRAMINCO is indicated as the payer and he had an account with TRAMINCO for another company - Great Lakes Carriers. TRAMINCO was paying the Defendants money upon the instructions of PW1.

All the receipts indicating payment - 34 in number together amount to \$33,379.

They were admitted as Exhibit P4 1- P3 4.

It was explained by the witness that, the vouchers are in respect of salaries and spare parts. The Defendant Company failed to pay its staff or repair its machinery and the Plaintiff Company was constrained to meet those expenses in advance.

The emails instructing the Plaintiff Company to pay salaries to the employees of the First Defendant dated 12.03.13, 29.04.14 and 28.05.14, 10.03.13 and 04.04.13 were admitted as Exhibit P51-P55.

It is the contention of the plaintiff that the salaries were paid as requested as the Plaintiff Company still believed that if the work was done as contracted, the money would be recovered. Secondly, the Plaintiff Company did not want to disappoint TRAMINCO.

However, the machines broke down repeatedly and the Plaintiff Company was forced to buy the spares. Spare parts were purchased in Kampala, Goma, UK and South Africa.

* Receipt to transport Conveyor Belt from Kampala to Goma dated 14.03.13 for \$350.

* Receipt for wire mesh dated 27.02.13- Shs. 4,055,000/-.

* Welding material for the crusher receipt dated 12.02.13 Shs. 1,100,000/- .

* Welding material Shs. 505,000/- dated 11.02.13.

* Spare parts from UK on 16.02.13 \$4,062.

* Conveyor Belt - 06.06.13 \$5,378

* Spare parts for crusher from South Africa - Rand 209,788 equivalent \$22,000 (paid directly from TRAMINCO and charged on the Plaintiff Company).

* Spare parts for crusher that is wire wash screen 08.02.13 \$3,922

The receipts were admitted in evidence as Exhibit P61-P68.

The total cost of spares was approximately \$90,000. Coupled with salaries the total came to \$126,000/-

Despite all the payments, the Defendants failed to crash the stones as agreed and in August 2013, the Plaintiff Company stopped injecting more money as amount already paid exceeded the contract value.

The staff salaries remained unpaid and they reported to police Goma to try and seize the machines to recover their money \$14,640; and Plaintiff Company paid the money on 04.03.14 - See ID1.

The Plaintiff Company expected a profit of \$75,000 after taking off expenses but instead lost about \$200,000.

It was prayed that judgment be entered for the Plaintiff as set out in the plaint.

Pw2, Kyabukombe Manzi Titi stated that he was working for the First Defendant as Coordinator. He confirmed the contract between the Plaintiff and the Defendants and that the Defendants failed to supply the stones the Plaintiff Company had ordered because of the constant break down of the machines.

Further that the First Defendant Company failed to pay salaries and the Plaintiff Company paid them together with TRAMINCO since the Defendants referred them there every time they failed to pay.

He confirmed that Exhibit P4 were receipts on which they received the money from TRAMINCO which was for Plaintiff Company.

The issues for court to determine are:-

1. Whether there was a contract between the parties.
2. Whether there was breach of contract by the Defendants.
3. Whether the Plaintiff is entitled to the remedies sought.

Court wishes to note from the outset that despite that the case proceeded exparte; the burden of proof was on the Plaintiff to prove its case on the balance of probabilities. - See **Mutekanga Equator Growers (U) Ltd [1995-1998] EA 205 SC.**

The issues are to be dealt with in the same order as they have been set out.

Whether there was a contract between the parties.

On this issue, Counsel for the Plaintiff in her submission went through the evidence of the Plaintiff Company and the agreement of the parties Exhibited as P1.

It is apparent from the agreement which was not disputed by the Defendants, that there was a subcontract between the parties, whereby the Defendant Company was to provide to the Plaintiff Company a mobile stone crusher to crush stone in agreed specification amounting to 19000m³. The Defendant Company was also to provide machine operators and staff to be at the site at all times. And the final bill accompanied by delivery notes was to be submitted at the end of each month indicating clearly the quantity crushed on a daily basis.

The agreement was signed by the parties and duly witnessed.

Court accordingly finds that there was a contract between the parties.

As to **whether the contract was breached.**

Again Counsel for the Plaintiff merely went through the evidence of the plaintiff and submitted that the Plaintiff had proved its case on the balance of probabilities.

According to decided cases, **“breach of contract occurs when one or both parties fail to fulfill obligations imposed by the terms of the contract”**.^{*} See **Nakawa Trading Co. vs. Coffee Marketing Board HCC 137/91** and **Wild Cheetah Tours and Travel vs. Amos Nsubuga HCCS 603/2003**

As indicated by the uncontroverted evidence of the Plaintiff Company, the Defendants provided a defective machine which repeatedly broke down and failed to supply the agreed quantity of crashed stones, which in the end led the Plaintiff Company to incur expenses.

The failure to provide a machine in a proper working condition and to provide the agreed quantity of crashed stones amounted to **“a material breach”** of the contract.

A material breach has been defined as **“a breach that has a serious effect on the benefit that the innocent party would otherwise have derived from the contract”**^{*}. – refer to **National Power PLC vs. Limited Gas Co. Ltd and Another [1998] AU ER (D) 231**.

This court therefore finds that the Defendants breached the contract between them and the Plaintiff Company.

Whether the Plaintiff is entitled to the remedies sought.

The Plaintiff sought special and general damages, interest at the rate of 30% and costs of the suit.

It was the submission of Counsel for the Plaintiff that, the Plaintiff is entitled to special damages of US\$200,000; as receipts for expenses incurred right from transportation of the mobile crusher from Tanzania to Goma, up to when the main contract was terminated by TRAMINCO SPRL were ex__

It is trite law that **“Special damages is that damage in fact caused by wrong.... and that this form of damages cannot be recovered unless specifically claimed and proved or unless the best available particulars or details have before trial been communicated to the party against whom it is Claimed”**^{*}. - Refer to **Uganda Telecom Ltd. vs. Tanzanite Corporation SCCA 17/2004 [2005] UG SC 91 [2002-2005] HCB180**

In earlier case of **Kyambadde vs. Mpigi District Administration [1983] HCB 44** - the court held that **“Special damages must be strictly proved though they may not be supported by documentary evidence on all cases.”**^{*}

The Plaintiff in the present case produced tax invoice No. 050/13 (Exhibit P11) indicating that the Plaintiff Company paid \$58,000 to hire transport to take crushing equipment to Goma. Payment was made in two installments.

Transport and boarder fees were also paid as evidenced by Exhibit P3 –cash payment vouchers 201- 242.

Vouchers Exhibit P41 –P434 were in respect of salaries and for spare parts for staff of the Defendant Company and repairs to the machinery respectively.

The emails exhibits P51-P55 confirm that the Plaintiff Company was instructed to pay salaries to the employees of the First Defendant.

And according to Exhibit P6 1 - P6 8 the spare parts were purchased from Kampala, Goma, UK and South Africa.

After carefully going through the receipts, they add up to a total of \$175,256.91 which includes the South African Rand 184.025.01 converted into US dollars plus Shs. 31,083,315/-

Court accordingly finds that the Plaintiff Company proved special damages of \$175,256.91 and UG Shs. 31,083,315/- and is entitled to recover the same.

In any case, the Defendants did not adduce any evidence to controvert the claim.

General damages: As laid down by decided case **“General damages as such damage as the law will presume to be the direct natural or probable consequence of the act complained of”*** - **Storms vs. Hutchinson [1905] AC 515.**

Further that **“General damages are awarded at the discretion of the court. And the principle in assessing damages is that the plaintiff should be put back in the same position they were before the breach”**.* **Uganda Revenue Authority vs. Wanume David Kitamirke CACA 43/2010.**

In deciding the quantity of damage, courts are mainly guided by **“the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party and the nature and extent of the breach”**.* - Refer to **Kamugisha vs. National Housing & Construction Corporation HCCS No. 127/2008.**

It is the Plaintiff’s evidence in the present case that the mobile stone crusher leased from the Defendants repeatedly broken down and therefore failed to crush the required quantity of stone agreed upon. As a result the Plaintiff repeatedly incurred expenses and great inconveniences, which culminated in loss of the contract with TRAMINCO SPRL; and therefore loss of income.

It is trite law that **“where there is breach of contract, the party who suffers the breach is entitled to receive from the party who breached the contract, compensation for any loss or damages caused by them”*** - S.61(1) Contracts Act.

The Plaintiff in this case claims that the expected profit from the contract was \$76,000 but instead they made losses amounting to sums already referred to. The said losses have already been awarded by way of special damages.

There was no proposal as to the amount of general damages court should award in this case, therefore court will take into account the undisputed loss claimed to have been incurred by the Plaintiff in this case.

In arriving at this decision, court is guided by the decided cases already referred to and S.61 (40) of the Contracts Act, which provides that **“in estimating the loss or damage arising from the breach of contract, the means of remedying the inconvenience caused by the non-performance of the contract, which exists shall be taken into account”**.*

Court therefore finds that, the estimated loss of profits of \$76,000 will suffice as general damages for the loss of contract and the inconvenience suffered by the Plaintiff.

Interest: The Plaintiff sought interest on both the special and general damages from the date of judgment until payment in full. The interest sought on special damages was at the rate of 30% per annum.

Court takes into account the established principle that **“the circumstances of the case determine the interest to award in a case”***. – See QB Kitara Malmot t/a Oneya Supplies Ltd. vs. Catholic Relief Services (CRS) Uganda HCCS 121/2001.

In the present case, there was no interest agreed upon by the parties. The court is therefore left with no option but to exercise its discretion to award interest on the decreful sums, under S.26 (2) of the Civil Procedure Act. That is, at a rate deemed to be reasonable.

In exercising its discretion, Court also bears in mind that **“a distinction must be made between an award arising out of a commercial transaction, which award normally attracts a higher interest and an award on general damages which are merely compensatory”***. – Star Supermarket (U) Ltd vs. Attorney General CACA 34/2008 J. P Berko (as he then was).

It is not disputed that the transaction between the parties in this case was of a commercial nature. Considering the circumstances of the breach and the __ loss and inconvenience occasioned to the Plaintiff, court will award interest on special damages at the rate of __% per annum from the date of judgment until payment in full. Court has also taken into account the declaration of the Bank of Uganda that as of ___ the commercial banks prime lending rate is at ___ per annum.

Granted Counsel for the Plaintiff proposed interest at the rate of 30% per annum, however, court finds that the rate is excessive and it would be harsh and unconscionable to grant interest at such rate especially on the dollar.

Interest on the general damages is awarded at the rate of 6% from the date of judgment until payment in full.

Costs: **“Costs follow the event unless for good cause court orders otherwise.”*** – S.27 (1) of the C. P. A and the case of Jennifer Behanga and two Others vs. School Outfitters CA CA 53/1999.

The Plaintiff is accordingly awarded the costs of the suit.

For all the reasons stated herein, judgment is hereby entered for the Plaintiff against the Defendants jointly and severally in the following terms:-

1. Special damages of \$175,256.91 and UG Shs. 31,083,315/-.
2. Interest on the sum at the rate of _\% per annum from the date of judgment until payment in full.
3. General damages of \$76,000.
4. Interest on the sum at the rate of 6% per annum from the date of judgment until payment in full.
5. Costs of the suit.

Flavia Senoga Anglin

JUDGE

09.11.15

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