

UGANDA / JUDGMENT

vambeco Enterprises Ltd v vienna Academy Ltd (HCT-00-CC-CS 419 of 2005) [2006] UGCommC 35 (11 June 2006)

[2006] UGCommC 35

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

HCT-00-CC-CS 419 of 2005

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\par IN THE HIGH COURT OF UGANDA AT KAMPALA

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\par COMMERCIAL COURT DIVISION

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\par HCT-00-CC-CS-0419-2005

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\par VAMBECO ENTERPRISES LTD PLAINTIFF

\par

\par VERSUS

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\par VIENNA ACADEMY LTD DEFENDANT

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\par }{\b\ul\insrsid12343414\charrsid6711231

\par BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

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\par JUDGMENT

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\insrsid11631975 The plaintiff is }{\insrsid4148722 construction}{\insrsid11631975 firm seeking to recover from the defendant US\$ 22,405.00, general damages, interest and costs of this suit. In its claim the plaintiff contend

s that it was awarded a contract by the defendant, in November 2000, to build a multipurpose hall, covered }{\insrsid7803422 link way}{\insrsid11631975 to dining hall and kitchen, dormitory block and associated earthworks and services at the }

\insrsid211422 defendant\rquote s}{\insrsid11631975 premises at Kyaliwajala, Namugongo. }{\insrsid211422 The contract value was US\$134,982.00 to be paid as certified by the Project Manager.}{\insrsid12343414

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The plaintiff contends that it embarked on the said works. However, the contract was unlawfully terminated by the defendant, and a sum of US\$ 22,405.00 remained due and owing to the plaintiff from the defendant}{\insrsid4148722

for the work already executed}{\insrsid11631975 . In}{\insrsid6711231 }{\insrsid11631975 spite of demands for the same the same remains due and owing from the defendant, hence this suit.

\par {\listtext\pard\plain\lang2057\langfe1033\langfenp1033\insrsid11631975

\hich\af0\dbch\af0\loch\f0 3.\tab}The defendant}{\insrsid3041265 },}{\insrsid11631975 while acknowledging that it entered into the said contract with the plaintiff}{\insrsid3041265

, denies that it owes the plaintiff any money. Secondly it asserts that the contract was terminated lawfully after the plaintiff had exhibited unsatisfactory workmanship. It prayed that this suit be dismissed with costs.}{\insrsid11631975

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\hich\af0\dbch\af0\loch\f0 4.\tab}}{\insrsid7803422 During the scheduling conference the parties agreed on certain facts, admitted 10 documents by consent, and agreed on three issues. }

The agreed facts were that in November 2000 the defendant contracted the plaintiff to construct a single storey multi purpose hall, a covered link way to the Dining hall and kitchen and a single storey dormitory Block at the defendant

s premises at Kyaliwajala at an agreed sum of US\$ 134,942.00. The plaintiff embarked on the works and was issued with 5 interim certificates for payment.

Each party called one witness at the trial and closed their cases. PW1 was

Viswalingam Varatharajan, a director of the plaintiff company. He testified that the building contract with the defendant was signed in November 2000. Thereafter mobilisation took place and construction works started on 1

st

December 2000. The contract period was four months. According to the contract the plaintiffs were to receive 25% of the contract sum within 2 weeks but this was not paid until after 2 months. 5 interim certificates (exhibit P2 to P6)

were issued by the project manager and these show that by the time the contract was terminated work worth US\$ 64,306.47 had been done by the plaintiff. And when VAT at 17% is added this brings the figure due at that stage to US\$75,238.56. Of this amount

the defendant had only paid US\$52,800.00, leaving a balance of US\$22,400.00.

As a result of the delayed payments from the defendant the plaintiffs slowed down the work. On 26

March 2001 they met with the defendant's lawyers, Kasirye, Byaruhanga. They agreed that they would be paid US\$ 22,000.00 on 27

March 2001 but instead on that day they got a warning letter from the consultants, exhibit P 10. Two days later the plaintiffs received a termination letter from the defendants.

PW1 further testified that the

termination of the contract was not in accordance with the agreement as no notice was given to the plaintiffs. He stated that they had borrowed money from banks to do the work and had to incur interest as payments were not paid in time. He prayed that the

his court should help them recover the overdue payments with costs.

\par {\listtext\pard\plain\lang2057\langfe1033\langfenp1033\insrsid4075928
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Virgil Idusso, a consultant surveyor, retained by the defendant, as part of a team of consultants to oversee the construction project. His role was to assess the wo

rk done and advise the architect to issue an interim certificate, certifying the value of work done. The last certificate was issued on 23{\super\insrsid2910053\charrsid2910053 rd}{\insrsid2910053

April 2001 and was for the sum of US\$ 3,390.59. After issue of the interim certificates he would not know if they h

ad been paid or not. He was aware that there a lot of complaints by the contractor of not being paid during site meetings. The work initially proceeded with a lot of enthusiasm but the rate of progress declined over the course of time.}{\insrsid4075928

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\hich\af0\dbch\af0\loch\f0 9.\tab}}{\insrsid1592547 Issue No.1 was whether the plaintiff was entitled to US\$ 22,405.00. Addressing me on this issue, Mr. Brian Othieno}{\insrsid16067475

, learned counsel for the plaintiff,}{\insrsid1592547 submitted that the plaintiff}{\insrsid16067475
\rquote s}{\insrsid1592547 claim is the difference between the value of work done and payments so far made to it. }{\insrsid4148722 No }{

\insrsid1592547 eviden}{\insrsid4148722 ce was adduced by the defendant}{\insrsid1592547

to show that this money was paid. In answer, Mr. Paul Rutisya, learned counsel for the defendant submitted that interim certificate no. 5 shows that US\$3,390.05 was due on that certificate. This is the amount therefore due

to the plaintiff and not the sum claimed.

\par {\listtext\pard\plain\lang2057\langfe1033\langfenp1033\insrsid1592547
\hich\af0\dbch\af0\loch\f0 10.\tab}It appears to me that Mr. Rutisya ignored the previous interim certificates as well as }{\insrsid12659983

the value of work done up to the time interim certificate no.5 was issued, and contract terminated. In assessing the value of

the work done, this had to be an aggregate of all interim certificates to date. And this is summarised in exhibit P 6. The work done up to that stage as well as materials on site were valued at US\$ 64,306.47. To arrive at the figure of US\$ 3,390.59 as due

on that certificate, deductions are made of the sums allowed in all the previous certificates. This does not mean that this certificate certifies that all earlier interim certificates had been paid}{\insrsid1008934 by the defendant}{\insrsid12659983 .}{

\insrsid1008934 The defendant adduced no evidence of payment whatsoever. }{\insrsid1592547

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All interim certificates are presented to the employer for payment. In this case the plaintiff has adduced evidence to the effect that they only received {\insrsid4148722 a total of } {\insrsid12659983

US\$52,800.00 from the defendant. The defendant has not adduced any contrary evidence whatsoever. {\insrsid13439304 T}{\insrsid12659983 he gross value of work done and materials on site}{\insrsid13439304 (certified by interim certificate no. 5, }{

{\insrsid5405868 exhibit P6,}{\insrsid13439304) less the total sums of money paid by the defendant to the plaintiff leaves a balance of}{\insrsid12659983 US\$}{\insrsid13439304 22,438.56 inclusive of VAT at 17% still due and owing to the plaintiff}{

{\insrsid5405868 . }{\insrsid12659983

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\hich\af0\dbch\af0\loch\f0 12.\tab}}{\insrsid1008934 I am satisfied that the plaintiff has proved, on a balance of probabilities, that US\$ {\insrsid211422 22,438.56}{\insrsid1008934

remained unpaid on the contract, by the defendant. I accordingly enter judgment for the plaintiff in the said sum. This su

m ought to have been paid not later than 14 days from date of issue of the interim certificates. Under the contract, clause 30(1) (b), any unpaid sums by the defendant would carry interest at the commercial lending rate obtaining at the time of default.}{

{\insrsid424654 No evidence was led of what the commercial lending rate has been during the period of default. I am unable therefor}{\insrsid13513375 e to make an award of interest } {\insrsid424654

at commercial lending rate on this amount, as there is no evidence before me as to what that rate is. Instead I shall allow interest at court rate from 7}{\super{\insrsid424654\charrsid424654 th} {\insrsid424654

May 2001 till payment in full of the said amount.

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I now turn to the issue of breach of contract. It is contended for the plaintiff that the termination of the contract was unlawful as it did not comply with Clause 25 (1) of the agreement between the parties. {\insrsid11618059 The defendant\quote

s answer to this contention on the pleadings was that the contract was terminated on account of unsatisfactory workmanship on the part of the plaintiff. This would ordinarily mean that the qualit

y of the work done by the plaintiff or its workmen was unsatisfactory. No evidence to this effect was adduced by the defendant. This was not one of the complaints raised against the plaintiff in exhibit P{\insrsid4148722 10.}{\insrsid11618059

\par {\listtext\pard\plain\lang2057\langfe1033\langfenp1033\insrsid13513375
 \hich\af0\dbch\af0\loch\f0 14.\tab}}{\insrsid13513375 The evidence in this regard is that the Architect gave notice to the plaintiffs on 27}{\super\insrsid13513375\charrsid13513375 th}
 {\insrsid13513375 March 2001,}{\insrsid4148722 (vide exhibit P10),}{\insrsid13513375 that }
 {\insrsid10102729 there were }{\insrsid9845247 three}{\insrsid10102729

specific matters it had to address. There were no materials on site. The labour was insufficient. And the general activity at the site was insignificant. The notice reminded the plaintiff of }
 {\insrsid16067475 its}{\insrsid10102729

contractual obligations.}{\insrsid1008934

\par {\listtext\pard\plain\lang2057\langfe1033\langfenp1033\insrsid9845247
 \hich\af0\dbch\af0\loch\f0 15.\tab}}{\insrsid9845247 Two}{\insrsid10102729 days later, on the 29}
 {\super\insrsid10102729\charrsid10102729 th}{\insrsid10102729

March 2001, the defendant wrote to the plaintiff determining the contract. I shall set out the letter in full. }{\insrsid9845247

\par }{\pard \ql \li2160\ri1440\widctlpar\aspalpha\aspnum\faauto\adjustright\rin1440\lin2160\itap0\pararsid9845247 {\insrsid10102729 \lquote The Managing Director, }{\insrsid9845247 }
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Vambeco Enterprises Ltd, }{\insrsid9845247 }{\insrsid10102729 PO Box 16220 Kampala }
 {\insrsid9845247 }{\b\insrsid10102729\charrsid9845247

RE: Determination of Contract}{\insrsid10102729 }{\insrsid9845247 }{\insrsid10102729 With
 reference to Ar

ticle 25(1) (b) of our agreement and Schedule of Conditions of Building Contract between The Board of Directors Vienna Academy Ltd and Vambeco Enterprises Ltd (dated 30/11/00: Document No.145) and the letter of M M Associates (Ref: MM/VEL/005; dated 27/3/

01) we hereby determine with immediate effect the above mentioned contract because of repeated default, raised in the notice by M. M.& Associates referred to above. }
 {\insrsid9845247

}{\insrsid10102729 By copy of this notice the other connected parties are advised accordingly. }
 {\insrsid9845247 }{\insrsid10102729

Kampala, this 29}{\super\insrsid10102729\charrsid10102729 th}{\insrsid10102729 March 2001 }
 {\insrsid9845247 }{\insrsid10102729 Mag. Rudolf Gabriel (Managing Director){\insrsid6510305

) Cc MM & Associates, {\insrsid9845247 }{\insrsid6510305 Q&C Associates }{\insrsid9845247 }{\insrsid6510305

Multiplan Consulting Engineers, {\insrsid9845247 }{\insrsid6510305 Kasirye, Byaruhanga & Co Advocates\rqoute }{\insrsid10102729

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\insrsid6510305 The provision referred to in the agreement by the defendant in exhibit P7, under which they purp}{\insrsid9845247 orted to act provides in part,

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25 (1) If the Contractor, shall make default in any one or more of the following respects, that is to say, (a) {\insrsid9845247 }{\insrsid6510305 (b) {\insrsid9845247

{\insrsid6510305 (c) {\insrsid9845247 }{\insrsid6510305 (d), {\insrsid9845247 }{\insrsid6510305

\insrsid9845247 }{\insrsid6510305

then the Architect may give to him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue suc

h default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continua

nce or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract, provided that such notice shall not be given unreasonably or vexatiously.\rqoute

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 \hich\af0\dbch\af0\loch\f0 17.\tab}}\pard \ql \fi-360\li720\ri0\sl360\slmult1\widctlpar\jclisttab\tx720
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\insrsid14699090 It is clear from the foregoing provisio

n that the contractor had to be given 14 days within which to remedy the conduct complained of, and if he did not, the employer was entitled, in the ten days following to terminate the contract but neither unreasonably nor vexatiously. It is clear that th

e employer did not comply with the said provisions though he quotes the same as the empowering provision for the action of termination of contract. The notice was on 27} {\super\insrsid14699090\charrsid14699090 th}{\insrsid14699090

March 2001 and the letter of termination followed two days later on 29} \\super\\insrsid14699090\\charrsid14699090 th}\\insrsid14699090 March 2001. Clearly the defendants terminated this contract, not in accordance with the agreement that they had signed.

\\par {\\listtext\\pard\\plain\\lang2057\\langfe1033\\langfenp1033\\insrsid14699090 \\hich\\af0\\dbch\\af0\\loch\\f0 18.\\tab}The purpose of a notice is }\\insrsid16539912 to } \\insrsid14699090 give the contractor an opportunity to remedy the defects or conduct complained }

\\insrsid16539912 of }\\insrsid14699090 and continue with the contract performance. In this case the contractor was not allowed the notice the agreement provided for before termination. The termination was therefore }\\insrsid16539912

not in accordance with the agreement between the parties,}\\insrsid14699090 for which the plaintiff is entitled to general damages. The contractor could have completed the contract and earned the anti}\\insrsid16539912

cipated income on the contract. The contractor lost this opportunity. }\\insrsid10766486

\\par {\\listtext\\pard\\plain\\lang2057\\langfe1033\\langfenp1033\\insrsid10766486 \\hich\\af0\\dbch\\af0\\loch\\f0 19.\\tab}Damages for breach of contract are based on }\\insrsid12480608

\\par }\\pard \\ql \\li2160\\ri1440\\widctlpar\\aspalpha\\aspnum\\faauto\\adjustright\\rin1440\\lin2160\\itap0\\pararsid12480608 {\\insrsid10766486 \\lquote a well established principle in law that in a claim for damages of breach

of contract, the party to the contract who is not guilty of such breach is to be placed, financially, in the position in which he would have been if the contract had not been broken, and if he had been allowed to carry out his part of the contract.

\\rquote See }\\i\\ul\\insrsid10766486\\charrsid10766486 Woodruff v Dupont [1964] E A 404 at page 407 per Sir Samuel Quashe-Idun, P.}\\insrsid10766486

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\\insrsid16539912 Taking into account the value of the whole contract, the part that was performed, and the part that remained to be performed, I }\\insrsid12480608 am satisfied that} \\insrsid16539912 an award of Shs1}\\insrsid4148722 8}\\insrsid16539912

,000,000.00 as general damages would be sufficient compensation for the loss suffered by the plaintiff}\\insrsid12480608 , as a result of the breach of contract by the defendant} \\insrsid16539912 .}\\insrsid14699090

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\hich\af0\dbch\af0\loch\f0 21.\tab}}{\insrsid16539912 Judgment is entered for the plaintiff}
{\insrsid4148722 ,}{\insrsid16539912 as set out above, with the decretal amount}{

\insrsid12480608 }{\insrsid16539912 bearing interest at court rate from the date of judgment till
payment in full. The defendant shall pay the costs of this suit to the plaintiff.

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\li0\ri0\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0\pararsid16539912
{\insrsid16539912 Dated at Kampala this 12}{\super\insrsid16539912\charrsid16539912 th}
{\insrsid16539912 day of June 2006

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\par FMS Egonda-Ntende

\par Judge

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