IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 41 OF 2004

HSG PHILIP HOLZMANN
TECHINISCHER SERVICES GmbH.....PLAINTIFF
VERSUS
TANZANIA RAILWAYS
CORPORATION.....DEFENDANT

J U D G M E N T

KIMARO, J.

The plaintiff is suing for an amount of T.shs 272,432,317 or its equivalent in Euros 336,376.00 being additional costs incurred in the execution of a Project covered by a contract between the Defendant and the Plaintiff. The facts which are not disputed by the parties as reflected by the pleadings and the evidence run as follow:

In 1996, the defendant invited bids for the production of ballast and application at its quarry identified as Tura. The plaintiff participated in the bid. It won and was awarded the contract. Prior to bidding, a meeting and site inspection took place for purposes of getting a detailed information on the project and ascertaining the condition of the quarry as well as that of the machinery and equipments. At the time of the inspection of the quarry, it was not operative and the information which the plaintiff was given was that the quarry had remained inoperative for four months. It was after the inspection that bidders submitted their bids. The price which was

offered by the plaintiff was based on the plaintiff's findings on the condition of the quarry as well as that of the plant, machinery and equipment during site inspection.

The plaintiff avers that after the pre-bidding inspection and the award of the contract, the defendant changed or caused the change of the condition of the quarry, machinery and equipment and operated the quarry in a manner which caused a deterioration of the machinery and equipment. The plaintiff alleged further that although the defendant was asked to stop operation pending handover of the quarry to the plaintiff, the defendant continued operation of the quarry. As a result, there was serious deterioration of the plaint, machinery and equipment between pre-bidding inspection of the quarry and after bidding and award of the contract and it is that deterioration which gave rise to the additional costs.

The defendant was informed of the deterioration and the additional costs. A joint assessment of the additional costs by the plaintiff and the defendant was carried out and it was agreed that the plaintiff was entitled to T.shs 272,432,317/= equivalent to Euros 336,769.00.

Although the defendant denied operating the quarry, causing the deterioration and the plaintiff not being entitled to additional costs, during the trial, evidence was brought by the defence that the additional costs were legitimate. However, the defendant denied to have an obligation to pay. The defendant claims that the obligation

lies with the European Union (formerly European Economic Communities).

The issues framed for the determination by the court are:-

" i) Who were the parties to the Contract entered on 18th May 1997 and what were the terms thereof.

ii) Whether the bid price was based on the condition of the plant and machinery at the date of pre-bidding inspection.

iii) Whether the plant and machinery was operational prior to and during the pre-bidding inspection.

iv) Whether the said contract had any terms restricting the defendant from utilization of the plant once bidding was in the process.

v) Whether the defendant changed or caused the change of the condition of the machinery and equipment to deterioration after the pre-bidding inspection and the award of the contract.

vi) If the answer to issue No. v is affirmative whether the plaintiff reported to the defendant the deteriorated condition of the plant and machinery.

vii) Whether the correspondences in Annexture HGS-5 (a)(b)(c)(d) and (e) to the plaintiff's plaint amounted to an admission of liability to pay for additional costs without involving or approval of the European Economic Community and the National Authorising Officer – Ministry of finance as per the contract.

viii) Whether the defendant agreed to pay an amount for an additional costs as result of the deterioration of the machinery and equipment within a period of 120 days.

ix) To what reliefs are the parties entitled to.

The contract under which the plaintiff is suing for the additional costs was tendered and admitted in court as exhibit P2 by David Mosha (PW2). Being a written document, I am in agreement with the Learned Advocates for the Plaintiff (Epitome Advocates) that it is exclusively governed by Section 101 of the Law of evidence Act, 1967. As correctly submitted by the said advocates the top page reads:

" TANZANIA RAILWAYS CORPORATION
RAILWAYS RESTRUCTURING PROJECT
CONTRACT

BETWEEN

TANZANIA RAILWAYS CORPORATION

AND

M/S HSG PHILIP HOLZMAN TECHNISCHER
SERVICES GmbH

FOR PRODUCTION AND APPLICATION
OF BALLAST – TURA QUARRY
(TENDER NO.4319)..."

Similarly page 1 of exhibit P2 shows that the parties to the contract are Tanzania Railways Corporation and M/S HSG Philipp Hollzmann. Signatures to the Contract are shown at page 8 of exhibit P2. They are Ottor Weixler, Managing Director of the Plaintiff and Berthold Hermann Hoffmann, Executive with full power. For the Defendant, they are Mr. J.K.Chande, Chairman of the Board of the Defendant and Mr. L.Mboma, the Director General. At the same page it is also endorsed by a delegate from the European Economic Community and Alternative National Authorizing Officer for EDF from the Ministry of Finance.

The evidence on record shows that the project which forms the subject of the contract was financed by the European Economic Community (now EU) under European Development Fund (EDF). Mr. J.J. Msemwa, the Learned Advocate appearing for the defendant, submitted that since the contract was also endorsed by EEC (EU) and the National Authoring Officer, they are also parties to the contract. With greatest respect to Mr. Msemwa, I fail to see how the endorsement is linked to parties to contract. The contract is distinct on who are the parties. The contract states categorically that it is Tanzania Railways Corporation and M/S HSG Phillip Holzman Technischer Services GmbH. Exhibit P2 by itself is self evidence on who are the parties and there is no need at all for a wrangle on this

matter. In the circumstances the first issue is answered affirmatively that the parties to the contract are the Defendant and the Plaintiff.

Regarding issues number two to six the Defendant had no comments. This was for an obvious reason which has already being stated. Much as the Defendant did deny liability in its pleadings, during the trial the legitimacy of the plaintiff's claim was not disputed. In this regard, I will proceed to answer the issues two to six as follows:

The bid price offered by the plaintiff was based on the condition of the plaint and machinery at the date of pre-bidding inspection. This was the testimony given by Theodor Horch (PW1) and David Marsel Mosha (PW2). This evidence was not controverted.

As for issue number three, I must say that it was an issue which was inadvertently framed. That issue does not arise at all from the pleadings because the Defendant did not deny that the plant and machinery was not operational prior to and during the pre-bidding inspection. The advocates for the plaintiff submitted correctly that the Defendant only made a note in the written statement of Defence and so it is bound by its pleadings. Exercising the powers conferred to this court by order XIV rule 5(2) of the Civil Procedure Code, 1966 I strike out issue number three because it was wrongly framed.

On issue number four the answer is that whether the contract contained a specific term restricting the Defendant to stop utilization

once bidding was in process or not, it did not matter. Since the second issue was answered affirmatively and issue number three has been held to have been wrongly framed, there is no way in which the defendant could have claimed a right to use the machinery and equipment, after inspection of the site. Such use could alter the subject matter of the contract. Whether such a term was contained in the contract or not the Defendant ought to have known that the contract in which it entered with the plaintiff had limitations. Among them was to ensure that the state of the machinery and plant at pre-bidding and during bidding inspection had to remain the same until the taking over by the plaintiff. The answer to the fourth issue is affirmative and that term was implied in the contract.

The answer to the fifth issue is yes. The testimony of PW2 was that in his second visit to the site he found the equipment and machinery in a different and deteriorated condition. His assessment was that the deterioration was not caused by normal tear and wear but it was a result of usage and lack of maintenance. A report was then prepared and submitted to his superiors in Germany and the Defendant was accordingly notified vide a letter dated 3rd June, 1997 which was tendered and admitted in court as exhibit P1. Again, this is evidence which was not controverted.

Exhibit P1 answers the sixth issue affirmatively. Vide exhibit P1 the deteriorated condition of plaint and equipment was reported to the defendant. Exhibit P1 reads thus:

" The condition of the plaint and equipment between the first inspection in July, 1996, which was the basis of our Quotation, and site inspection of Mr. Horch and Mr. Brenninger of HSG and member of your staff Mr. K.K.Ryattura, Mr. K.P.E.Magunda and Mr. Wangiboma in May 1997 was significantly deteriorated."

Exhibit P1 is therefore, self explanatory on this issue.

The seventh issue is whether Annextures HSG-5(a)(b)(c)(d) and (e) to the plaintiff's plaint amounted into an admission of liability to pay additional costs without involving or approval of the European Economic Community and the National Authorizing Officer – Ministry of Finance as per the contract.

Relying on exhibits P3, P7, P5 (Annexture HSG-5(c) and annexture HSG 5(d) (not tendered in court as exhibits) and the evidence of Leonhardi (PW3) in cross examination, Mr. Msemwa submitted that none of the exhibits or annextures show that the defendant admitted liability at any point in time. He said the commitment of the defendant was to forward the claim to EEC (EU).

Exhibit P3 (Annexture HSG-5(a)) are minutes of a meeting held by the parties on 30th June 2000. The meeting was specifically convened for discussion on the plaintiff's claim for additional costs. After a lengthy discussion the parties settled for T.shs 272,432,317/=. Exhibit P7 Annexture HSG-5(b) is an invoice No.130000/ ,

00115/2000 raised subsequently, for the claim of T.shs 272,432,317/= by the plaintiff. Annexture HSG-5(c) which was tendered and admitted in court as exhibit P5 gives the defendant the conditions of the machines at first inspection in July 1996 and at the time of taking over as well as the repairs effected after official handing over. Annexture HSG-5(d) are minutes of a meeting held by the parties on 13th April where additional costs for repair of plant and equipment was also discussed. This meeting was also attended by A Lamers, a delegate from EEC (EU). Representatives of the plaintiff who attended the meeting informed the meeting that they were not conversant with the matter and that their mechanic Mr. Horch would give details. It was then agreed that the parties will sort out the amount of the additional costs and the same will be submitted to the EEC (EU) for scrutiny and approval.

Annexture HSG-5(e) (also not tendered in court) is a letter by the plaintiff to the defendant informing it about additional costs.

In their submission, the Advocates for the plaintiff agreed that not all documents are relevant for the determination of this issue. They requested the court to exclude all other documents and rely only on exhibits P3 and P7 because all other documents were written prior to exhibits P3 and P7. The Advocates submitted further that the reason which is being used by the defendant to justify their exemption from liability to pay additional costs cannot assist them.

The argument by Mr. Msemwa has throughout been that the liability to pay additional costs is on EEC (EU) simply because the EEC (EU) was the financiar of the project and endorsed the contract. With respect to Mr. Msemwa, this court has already held that the endorsement of the contract by EEC(EU) did not make it a party to the contract. Parties to the contract are known. It is the Defendant and the Plaintiff. Exhibit P3 is clear admission that the plaintiff is entitled to an amount of T.shs 272,432,317/= as additional costs. Source of funds for payment of the additional costs is not a relevant consideration in determining this issue. The defendant knew or ought to have known the limitation of the contract. It is the defendant who caused the deterioration of the plaint and machinery which has given rise to the claim for additional costs. Whether they will pay from their pockets or from someone else's pockets the fact remains that the defendant has admitted that the plaintiff is entitled to the additional costs. In answer to the issue, I will hold that on the basis of exhibits P3 and P7, the defendant admitted liability. Whether the source of funding for payment of the additional costs is EEC (EU) or not, that is immaterial in as far as the plaintiff's claim is concerned.

On the eight issue the submission by Mr. Msemwa is that the Defendant's obligation was to arrange that payment was made within 120 days of amicable settlement. He referred to article 36 of exhibit P6 arguing that the general conditions for supply contracts financed by EEC (EU) under European Development Fund (EDF) do not impose an obligation on the defendant to pay in case of delay. Mr. Msemwa further relied on article 28.1 and 28.2 of exhibit P6 for

procedures specified in special conditions. His argument is that the article provides for settlement of disputes relating to additional costs by the following parties: the plaintiff supplier, the defendant, contracting authority and the EEU (EU) the supervisor. According to Mr. Msemwa, the article empowers the supervisor to determine the amounts payable in case agreement cannot be reached between contracting authority and the supplier. That the defendant agreed to arrange to pay the said sum but that arrangement was not an admission to pay the plaintiff because the defendant did not breach any terms of the contract between the parties.

The counter submission by the Advocates for the plaintiff is that exhibit. P4 answers the issue. In exhibit P4 the defendant agreed that the claim for additional costs for T.shs272, 432,317.00 (equivalent to Euro 336,769) was a legitimate claim and that the Defendant would arrange for payment within 120 days of amicable settlement. The Advocates for the plaintiff requested the court not to construe exhibit P4 as only limiting the liability of the defendant to forwarding the claim to the EEC (EU). I do not think that there is need for the court to waste time on this issue because the answer has already been provided for while answering the seventh issue. Sources of funding for the additional costs is immaterial so long as the defendant admitted that the plaintiff was entitled to the additional costs. It is for the defendant to sort out how the plaintiff is to be paid. I do not consider this to be a point which this court should venture on. The defendant invited the additional costs. It should also know how to pay. As regards Mr. Msemwa citing articles 35 & 36 of exhibit P6, I

agree that so long as the main contract is not an issue, the articles were cited out of context. The answer to the eighth issue is that the defendant admitted liability to pay additional costs within 120 days amicable resolution period. In conclusion, I hold that the plaintiff has proved on balance of probabilities that the plaintiff is entitled to payment of additional costs. Hence judgment is entered for the plaintiff for Euros 336,379.00 equivalent to the agreed sum of T.shs 272,432,317/=. The plaintiff is also granted interest at 2% from 30th June 2000 till date of judgment. Thereafter interest to be calculated at the court rate of 7% till payment is made in full together with costs.

N.P.KIMARO,
JUDGE
30/03/2005

Date: 31.3.2005
Coram: Hon. N.P.Kimaro, J.
For the Plaintiff – Mr. Mwandambo.
For the Defendant – Mr. Mwandambo/Mr.Msemwa.
CC: R.Mtey.
Court: Judgment delivered today.
Order: Judgment is entered for the plaintiff for T.shs 272,432,317/= equivalent to Euros 336,379.00. The plaintiff is also granted interest at 2% from 30th June 2000 till date of judgment. The plaintiff is

granted further interest at courts rate (7%) from date of judgment till payment in full. The plaintiff is also granted costs.

N.P.KIMARO,

JUDGE

31/03/2005

3,084 - words

I Certify that this is a true and correct
of the original Order Judgement Ruling
Sign ..... Mayi .....
Registrar Commercial Court Dsm.
Date ..... 31/3/05 .....