IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 04 /2013

[2014] SCSC 127

EPI CONTRACTING & CO LTD
Plaintiff

versus

EASTERN EUROPEAN ENGINEERING LTD
First Defendant

SAVOY DEVELOPMENT LTD
Second Defendant

Heard:	25, 26 November 2013, 6 February & 4 March 2014
Counsel:	Anthony Derjacques for plaintiff
	Basil Hoareau for defendants
Delivered:	31 March 2014

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff is a company registered in Mauritius and in Seychelles carrying on the business of construction works and renovation. The first defendant is a consulting company incorporated in Seychelles and was retained as a project manager by the second defendant for the construction of the Savoy Resort and Spa. After some initial contacts between the plaintiff and the first defendant over some work that is not in issue in this case the first defendant asked the plaintiff to quote for the Mechanical, Engineering and Plumbing works to complete the Savoy Resort and Spa.

[2] The plaintiff contends that on the 4 September 2012 the first defendant awarded to the plaintiff a contract for MEP Works comprising the Electrical, Mechanical, Air Conditioning, Ventilation, Plumbing and Fire Fighting System at Savoy Resort and SPA for the sum of €5,094,297.23. By a letter dated 4 September 2012 the plaintiff accepted the said contract. After the acceptance of the award the first defendant requested the plaintiff to send 2 members of its staff, Jean Noel Catherine and Axel Catherine, to Seychelles to begin with the preliminary works, following which request the plaintiff successfully applied for and obtained Gainful Occupation Permits.

[3] Notwithstanding the foregoing the first defendant has ceased any contacts with the plaintiff. The first defendant has colluded with the plaintiff's said employees to defraud the plaintiff of the contract. The first defendant has made direct contact with the plaintiff's suppliers mentioned in confidential information passed on to the first defendant by the plaintiff during the pre contract negotiations. The plaintiff contends that there was a valid and binding contract between the plaintiff and the first defendant which the first defendant has breached and cannot unilaterally terminate without compensating the plaintiff.

[4] The plaintiff claims for loss and damages €65,000.00 on account of various travel and ancillary expenses and €1,000,000.00 on account of loss of earnings bringing the total claim to €1,065,000.00 only together with interest at the commercial rate and costs.

[5] The defendants deny the plaintiff's claim and vigorously opposed it. The defendants contend that there were only negotiations between the plaintiff and the first defendant and no contract was ever concluded between them. The first defendant invited the plaintiff as it did other contractors to bid for the completion of the Savoy Resort and Spa. In that regard the plaintiff's director travelled several times to Seychelles on his own discretion during the negotiation for the main tender and no contract was concluded from such negotiations.

[6] The first defendant contends that its letter dated 21 July 2012 to the plaintiff did not create any contractual relations between the parties as it was 'merely a statement of willingness to consider.' The first defendant further contends that the plaintiff did not obtain all the necessary licences and consents from the Seychelles Licensing Authority to

be able to make the MEP quotation or to be able to effect the necessary MEP works. Much as the plaintiff was requested by the first defendant to supply some samples of materials and price quotation for the supply of first fix materials no contract was ever concluded for the same.

[7] The first defendant further contends that the letter of 4 September 2012, exhibit P17, entitled 'Letter of Award' was issued as part of the negotiation process in respect of MEP works and did not create any contractual obligations as expressly stated in the letter. The letter specifically provided that contract documents shall consist of agreed contract terms and conditions, which at the time of the issue of the 4 September letter, had not been agreed. Further the contract was subject to Management approval and it was to be signed after the approval had been obtained. It is contended that until the contract terms and conditions had been agreed; the contract approved by management of the both defendants and reduced into writing and signed by all the parties , there was no contract between the plaintiff and the defendants.

[8] In the alternative if the written exchanges of 4 September 2012 amounted to an offer and acceptance, leading to a contract such contract was subject to 3 conditions precedent. Firstly the contract terms and conditions had to be agreed. Secondly Management of both defendants had to approve the contract. Lastly the contract had to be reduced into writing and signed by the parties. As these conditions were not met no contract came into being.

[9] The first defendant further contends that if a valid contract is proven that such contract was against public policy and was void *ab initio* on account of the fact that the plaintiff had not obtained all the necessary licenses for it to effect MEP works; the plaintiff had not at the time been registered with the Seychelles Business Register, in terms of the Seychelles Business Number Act; and the Plaintiff as an overseas company had not appointed a Managing agent to represent it in Seychelles.

[10] The defendants deny colluding with the Catherine's, claimed to be the plaintiff's employees, to defraud the plaintiff. No illegal approach was made to the Catherine's by the first defendant. After negotiations between the plaintiff and the first defendant broke down, the first defendant employed the Catherine's on short term contract with effect

from the 3rd December 2012. The defendants deny allegations of breach of good faith; breach of trust and breach of contract.

[11] If a contract was concluded on 4 September 2012 the defendants counter claim from the plaintiff the sum of €307,292.50 for loss of profits caused to the second defendant for failure to complete the hotel. It is contended that it was an implied term of the contract that the plaintiff had all the necessary licences to carry out MEP works and that he had complied with the laws of Seychelles to do business in Seychelles. In breach of the said contract the plaintiff failed to obtain any or all of the necessary licences for it to effect the MEP works; failed to register with the Registrar of the Seychelles Business Register, in terms of the Seychelles Business Number Act; and failed to appoint a Managing Agent to represent it in Seychelles.

[12] The plaintiff in its answer to the counter claim denied that it is liable in law for any damages against the defendants which claim was in any case grossly exaggerated and exorbitant. The plaintiff contends that it was lawfully engaged in offering and performing all services provided as required by law.

[13] After hearing the parties and their witnesses and listening to the submission of counsel it is clear that the following issues arise. Firstly whether the parties on the 4 September 2012 concluded a valid contract. Secondly if the parties concluded a valid contract on that day what were the terms of that contract. Thirdly whether the plaintiff is the entitled to the sum of €1,065,000.00 as claimed. Lastly whether the second defendant is entitled to the sum of €307,292.50 claimed in the counter claim.

Whether the Parties on the 4 September 2012 concluded a valid contract?

[14] It appears to me that there are a number of facts not in dispute between the parties and what is in dispute is the inferences and or legal conclusions to be drawn from those facts in order to answer this first issue. Such facts are evident from the contemporary records made at the time. I will set out the said facts.

[15] Prior to the 4 September 2012 the plaintiff's officers and the defendant's officers were in discussions over the possibility of a new contractor(s) taking over to complete the development of Savoy Resort and Spa. Information was exchanged and some of it was in

writing. On 4 September 2012 the first defendant wrote to the plaintiff a letter entitled 'letter of award'. Exhibit P17 stated,

> 'Dear Sir,
> With reference to the tender you have submitted for the above contract dated 04th August 2012 and 1st September 2012, we are pleased to confirm to you that you are awarded the contract for the MEP Works comprising Electrical, Mechanical, Air Conditioning Ventilation, Plumbing and Fire Fighting System at Savoy Resort and Spa for the sum of EUR Five Million Ninety Four Thousand Two Hundred Ninety Seven and Twenty Three Cents only (EUR 5, 094,297.23).
>
> The Contract Documents shall consist of:
> i. Tender documents
> ii. Your acceptance thereof.
> iii. The form of contract
> iv. Agreed Contract terms and conditions.
> v. Contract drawings.
> vi. Contract Specifications.
> vii. Contract Bills
> viii. Schedule of rates
> ix. List of Exclusions supplied by and Mobilization on the Account of Eastern European Engineering Ltd.
> x. Bid Submission form dated 01st September 2012
> xi. A performance security of 10% value of the contract
> xii. An contractor's all risk insurance
>
> The whole of the works shall be completed within 9 months from the commencement date. The Official contract commencement date shall be 10 days after the receipt of advance payment. Contract terms and conditions will be as per tender document.
>
> The Contract is under the management approval and will be signed after mentioned approval as soon as possible. Please confirm in writing by return your acceptance of the terms thereof within 2 days of this letter of award.
>
> Yours truly,
> [signed] Mr. Evgeny Karkachev
> Project Director
> Eastern European Engineering Ltd.'

[16] Mr Badulla the Managing Director of the plaintiff responded to that letter by his letter of the same date in the following terms:

> 'Letter of Acceptance

Dear Sir,
We acknowledge receipt of the Letter of Award dated 04th September 2012 with thanks for the above named project. It is with great pleasure that we are accepting the contract sum, the terms and conditions of the same and we are in position to execute the awarded contract with determination. Based upon our agreed terms of contract, we are awaiting same from your end for signatory. Thanking you in anticipation.

Yours truly,
[signed] Mr. I Badulla
Managing Director
EPI Contracting & Co Ltd.'

[17] Thereafter for the most of September 2012 the parties exchanged a series of emails discussing the main contract document, admitted in evidence as exhibits P26, D11 and D12, with revisions and comments from either side. These emails were admitted in evidence as exhibits P27, D3, D4 and D5. I will not set out all of them. D3 was from Mr Badulla to Ruslan Akchurin of and copied to Alexandr. It is dated 12 September 2012 states,

'Dear Ruslan,
Thanks for the documents duly received, we still found some discrepancies pertaining to the new Amended Contract.
Please inform Project Director and Alexsander accordingly.
REMARKS: HIGHLIGHTED YELLOW:- NEED TO DELETE
RED:- OUR APPROVED COMMENTS

Kind Regards,

I.Badulla.'

[18] Alexandr Kchurin had on 11 September 2012 forwarded to Mr Badulla a draft copy of the MEP Contract. That explains the response of Mr Badulla of 12 September 2012 which was responding to the email of 11 September 2012. Emails continued to and from the parties throughout September 2012 and on 28 September 2012, Mr Badulla wrote to his respondents the following message:

'Dear Mr Evgeny,
Refer to our long discussion about the MEP tender and after consultation with our Management and those of our sub contractor, find enclosed our final MEP REVISION SUMMARY. If it meet your expectation we may proceed with discussion on the contract.

> Yesterday we start to discuss on the contract and suddenly you shifted on mobilization it seems that this discussion will never ends. I afraid to inform you that despite several and my recent visit to Seychelles where all these figures have been approved by your good management and suddenly another issue crop up. In the light of all the above we are I the intention to finalise this file by 30.09.2012 otherwise we are in a situation to withdraw as your contractor as we will agree with me that we did whatever in our capacity unfortunately we are up to our limit.
>
> Kind Regards,
> I. Badulla
> Epi'

[19] Mr Anthony Derjacques, learned counsel for the plaintiff, submitted [both in his written submissions and orally] that there was an agreement between the plaintiff and the two defendants. This agreement was concluded by means of an offer by the defendants and accepted by the plaintiff in their letters of 4 September 2014, exhibit P17 and P18. The rest of the matters that were mentioned, and I presume in exhibit P17, were mere formalities that did not affect the contract between the parties. The plaintiff must now be remunerated for his work. He cited the case of City Development Ltd v F & D Structural Consultant S.C. Appeal No.15 of 2001; Civil Side No. 267 of 1998 in support of his arguments that the plaintiff was entitled to payment under the contract.

[20] Mr Basil Hoareau, learned counsel for the defendants submitted that exhibit P17 was incapable of constituting an offer and its acceptance did not result in the formation of a contract in light of the express provisions in P17 that the contract documents shall consist of agreed terms and conditions which at the time of the issue of this letter were still under negotiations. It was further expressly stated that the contract was under management consideration for approval and had thus not been concluded. He referred to the case of D'Offay v Attorney General [1976] SLR 129 to support his submission that no contract was concluded between the parties.

[21] I have read City Development Ltd V F & D Structural Consultants. In that case the contract had been part performed and there was no question over whether the parties had entered into the contract or not. The existence of the contract was not the issue. It is the issue here. I do not find the case helpful.

[22] D'Offay v Attorney General is somewhat similar to this case. The parties negotiated for a lease of land. It was agreed and it was the law that the lease agreement must be in writing. Subsequently before it could be put in writing the defendant changed its mind about continuing with the lease. The plaintiff sued the defendant claiming the value of the land, arguing that there was a lease between the parties. The Court held that no lease had been concluded as the parties had not signed a lease agreement in respect of the land in question.

[23] I have read the correspondence between the parties for the relevant period and it is clear starting from exhibit P17 that there remained a number of matters to agree upon and or to be obtained. Those are the matters that Mr Derjacques suggests were mere formalities. It is evident that they were not mere formalities. These were substantive matters that parties had to agree upon. In fact when the written contract was provided to the plaintiff they suggested several amendments. The negotiations that followed indicated that even the full extent of work had not been fully concluded given that what was being negotiated was completion of works that had initially been commenced by another contractor who left before completion.

[24] Exhibit P17 stated that 'the Contract documents shall consist of' and it enumerated 12 different documents. Obviously the tender documents which is what the plaintiff had submitted on 4 August 2012 and 1 September 2012 were just one of the twelve items referred to by exhibit P17. The acceptance of the plaintiff was only one of the twelve. To be complete the parties had to have the 12 sets of documents in place, including a contract document setting out the terms and conditions of the contract that was signed by the parties. This was not simply a formality as was pressed on this court by Mr Derjacques. The fact that there were discussions over its terms and conditions reveals that it was not just a mere formality.

[25] In my view exhibit P17 was an invitation to the plaintiff to enter into serious negotiations to finalise the contract between the parties. It indicated that the plaintiff's bid was in principle acceptable to the defendants, subject to approval by the defendants' management, and on that basis the parties could move forward to finalise all other terms and conditions of the contract. The acceptance of the plaintiff, exhibit P18, was in effect

signifying the plaintiff's consent that they proceed to the next stage and negotiate all the other terms and conditions of the contract between the parties. Obviously if there was no management approval subsequently there could be no contract. This is evident from exhibit P17.

[26] It is evident to me that obviously the parties never finalised nor concluded an agreement for the MEP works. Apart from the fact that the letter of award, exhibit P17, is clear as to what will constitute part of the contract, a long list of items over which they continued to discuss, the parties were going to sign a written agreement. There were disagreements over the content of that agreement with proposals going back and forth. In the end no agreement was signed between the parties. It is clear that the parties did not conclude a contract in the circumstances of this case. As a result there was no contract to perform and there is now no contract to enforce.

Decision

[27] It is unnecessary to consider the rest of the issues having found that no contract was entered into by the parties. This suit is without merit. It is dismissed with costs. Having found that there was no contract between the parties it is not necessary to consider the counter claim as it was only contingent on a finding that there was a contract between the parties.

Signed, dated and delivered at Ile du Port on the 31st day of March 2014

F M S Egonda-Ntende
Chief Justice