

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC 15/2013

[2014] SCSC

Eastern European Engineering Ltd
Plaintiff

versus

Vijay Construction [Proprietary] Limited
Defendant

Heard: 17 January 2014
Counsel: Basil Hoareau for plaintiff
Bernard Georges for defendant
Delivered: 24 February 2014

JUDGMENT

Egonda-Ntende CJ

[1] The plaintiff is a company incorporated in Seychelles and it is the project manager of the development and construction of ‘Savoy Resort & Spa’ Hotel Project at Beau Vallon, Mahe. The defendant is a construction company incorporated in Seychelles. Both parties entered into a written contract for the construction of the hotel project in the sum of €20,504.063.86. This was a fixed lump sum contract. An advance payment of €3,000,000.00 was paid by the plaintiff to the defendant.

- [2] The plaintiff contends that it was an implied term of the contract to use the advance payment to pay, *inter alia*, for preliminary and temporary works, including the provision of accommodation of the defendant's workers who were to work on the project. The plaintiff avers that the workers' accommodation was to be the property of the plaintiff upon the completion of the project or earlier termination of contract.
- [3] The plaintiff further contends that the defendant using part of the advance payment imported prefabricated housing units from Singapore which housing units were to be located on the building site, where the workers were residing. In breach of the contract the defendant failed to deliver the prefabricated units to the building site of the project and fraudulently misappropriated the said prefabricated housing units. This breach of contract has caused the plaintiff damages in the sum of US\$34,752.90, the cost of the prefabricated units, which the plaintiff claims from the defendant together with interest and costs of this suit.
- [4] The defendant admits that it entered into a written contract with the plaintiff to construct the hotel project and that it received the advance payment. It denies that the temporary accommodation and or prefabricated housing units belonged to the plaintiff at all times, whether at the end of the contract or at the earlier termination of the contract. It contends that in accordance with the contract the defendant had to remove the temporary accommodation for the workers at the end of the contract. It prayed that this suit be dismissed with costs.
- [5] The facts of this case as can be gathered from the pleadings and the evidence of the parties are not really in much dispute. What is in dispute is the application of those facts to the written contract or vice versa; the application of the written contract to those facts. I will initially set out the facts.
- [6] The parties entered into a building contract in writing. It is in English and Russian. It was the construction of a hotel project at Beau Vallon, Mahe called the Savoy Resort and Spa. The defendant was the contractor. The value of the contract was €20,504.063.86. The plaintiff paid and the defendant received an advance payment of €3,000,000.00. The defendant was responsible for providing for temporary accommodation for its workers on

and off site. The number of workers accommodated on site was limited by the Planning Authority. The defendant had to erect temporary accommodation off the site from where it trucked those workers to and from the site every day. The defendant imported pre fabricated units from Singapore and it erected the same on Eden Island where the majority of the workers were housed.

[7] As the performance of the contract was on going the parties developed differences which resulted in the plaintiff unilaterally terminating the contract. The plaintiff ejected the defendant from the site. Disputes related to this termination between the parties are the subject of a multiplicity of proceedings before this court and elsewhere.

[8] The issue for a decision in this case is whether the plaintiff is entitled to the sum claimed, US\$34,752.90, being the value of the prefabricated housing unit imported by the defendant?

[9] This claim is stated in the plaint as follows:

‘7. The plaintiff avers that workers accommodation was to be the property of the Plaintiff, upon the completion of the hotel project by the defendant or earlier termination of the contract.’

[10] The defendant asked for further and better particulars of this claim from the plaintiff in the following words:

‘Of the allegation that the workers’ accommodation would be the property of the Plaintiff upon completion of the project or termination of the contract, please indicate in pursuance of which provision, contractual or otherwise, this was to be the case and , if contractual, please indicate the relevant provision by reference to a document or agreement.’

[11] The plaintiff answered as follows:

‘The Plaintiff avers that the averments, set out in paragraph 7, is pursuant to:
(i) Clause 15.2 of the Contract and / or clause 16.2; and or
(ii) By implied terms of the contract.’

- [12] Before we examine the contractual provisions relied on by the plaintiff I will start by looking at the definition section of the contract and what it provides in relation to the following several words and phrases: Contractor's Equipment, Goods, Materials, Temporary Works and Permanent Works. Contractor's Equipment is defined as 'means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. In addition to the, contractor's equipment includes Temporary works, Employer's equipment (if any), Plant, Materials and other things intended to form or forming part of the Permanent Works.'
- [13] 'Goods' means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.' 'Materials means things of all kinds (other than plant) intended to form or forming part of the Permanent Works (while executing and completing the Works or remedying the defects), including the supply- only materials (if any) to be supplied by the Contractor under the Contract.'
- [14] 'Permanent Works' means the permanent works to be executed by the contractor under the Contract. 'Temporary Works' means all temporary works of every kind (other than the Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of the defects.'
- [15] Clause 15.2 relates to termination by the employer as happened in this case. The relevant portion thereof for this dispute states in part,

'..... The Contractor shall then leave Site and deliver any required Goods, all Contractor's documents, and other design documents made by or for him, to the Employer. However, the Contractor shall use his best efforts to comply immediately with any reasonable Contractor's instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination the Employer may complete the Works and or arrange for any other entities to do so. **The Employer and these entities may then use any Goods, Contractor's documents and other design documents made by or on behalf of the Contractor.**

The Employer shall then give notice that the Contractor's equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items, may be sold by the Employer, in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.'

[16] Though the employer, the plaintiff in this case, would have been entitled to use of the temporary works on site, clearly the ownership of the same is to the contractor, the defendant in this case, rather than the plaintiff.

[17] It is also useful to have in mind the provisions of clause 6.6 of the Contract, captioned, 'Facilities for Staff and Labour', which states,

'Except as otherwise stated in the Specification, the Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's personnel – this costs are included in the Contract Price. The Contractor shall also provide facilities for the Employer's Personnel as stated in the Specifications or the Schedules.

The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters within the Site.'

[18] Site is defined under the contract as

'the places where the Permanent Works and Temporary Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.'

[19] On the one hand the contractor was obliged to provide accommodation for its workers. On the other hand it is clear from foregoing provisions that living quarters for the contractor's workers were prohibited on site by virtue of clause 6.6 of their agreement. So there was really no obligation upon the contractor to erect on the site housing units for accommodation of its employees. This was prohibited. This is so notwithstanding the fact that it is acknowledged that the contract price will include provision of accommodation to the contractor's workers. The accommodation would substantially be off site rather than on site.

[20] Had this contract been successfully executed and completed clause 11.8 of the contract would have been applicable. It states,

‘Upon the completion date the contractor shall remove any remaining Contractor’s Equipment, surplus materials, wreckage, rubbish and Temporary Works from the site.

If all these items have not been removed within 28 days after the Employer receives a copy of the Performance Certificate, the Employer may sell or otherwise dispose of any remaining items.

The Employer shall be entitled to be paid the costs incurred in connection with, or attributable to, such sale or disposal and restoring the Site. Any balance of the moneys from the sale shall be paid to the Contractor. If these moneys are less than the Employer’s costs, the Contractor shall pay the outstanding balance to the Employer.’

[21] It is clear from foregoing provision and consistent with the clauses 15.2 that Temporary Works which are on the site were always to be the property of the contractor at all times and the contractor was obliged to remove it or it would be removed by the Employer at the cost of the contractor. I am unable to find any provisions of the contract from which it can be implied that temporary works, including temporary accommodation for contractor’s workers, on and off site belonged to the Employer. The argument of the plaintiff that this should be inferred from payment of an advance or because the cost of accommodation was included in the contract price is not tenable against the clear provisions that temporary works belong to the contractor.

[22] I have looked at clause 16.2 of the contract. This provision applies in case the contractor had terminated the contract. That is not the case here. Nevertheless an examination of the same does not support the plaintiff’s claim that it is the owner of an imported prefabricated housing unit. It states,

‘After termination of the Contract the Contractor shall promptly:
(a) cease all further work, except for such work as may have been instructed by the Employer for the protection of life or property for the safety of the Works.
(b) hand over Contractors documents, Plant, Materials and other work, for which the Contractor has received payment, and

(c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.’

[23] The contractor under the foregoing clause is obliged to hand over to the Employer only contractors documents, Plant, Materials and other work for which it had received payment.’ Contractor’s documents, Plant, Materials and other work does not include Temporary Works. Temporary works are included in Goods which the contractor is obliged to remove from the site. As I have indicated above this provision is not applicable let alone support the plaintiff’s claims in this case.

[24] In light of the foregoing this suit cannot succeed. It has no merit. It is dismissed with costs.

Signed, dated and delivered at Ile du Port on 24th day of February 2014

F M S Egonda-Ntende
Chief Justice