

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO. 250 OF 2003

DRACO (U) LTD ::: PLAINTIFF

VERSUS

KAMULI DISTRICT LOCAL COUNCIL ::: DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH — AMOKO

JUDGMENT:

The Plaintiff is a limited liability company carrying on the business of drilling contractors, at the material time. The Defendant is a District Local Council.

The Defendant contracted the Plaintiff to drill boreholes in 2002. The Plaintiff executed the contract to the satisfaction of the Defendant. The Defendant paid the Plaintiff the entire amount due except the VAT component of Shs.14,697,000-. The URA made the Plaintiff to pay this sum in June 2002 when the plaintiff tiled its returns. The Plaintiff demanded the refund of the VAT money from the Defendant in vain, hence this suit by which the Plaintiff pays for:

- a. Shs. 14,679,971-.
- b. General damages for breach of contract.
- c. Interest at 20% p.a from date of breach, till payment in full.
- d. Costs.
- e. Any other or further relief as the Court deems fit.

The Defendant contended in its written statement of Defence that the suit does not disclose a cause of action since the payment of VAT was the sole responsibility of the Plaintiff and not the Defendant. The suit should therefore be dismissed with costs to the Defendant.

At the Scheduling Conference, both counsel proposed and the Court decided that the question of VAT was purely that of law and that written submissions be filed on the basis of the admitted documents, without calling any witnesses. The only two issues were:

1. Whether the Plaintiff is entitled to a refund of the VAT it paid URA.
2. Other remedies (if any).

Mr. Gilbert Nuwagaba represented the Plaintiff, and Mr. Lwanga a State Attorney represented the Defendant.

Regarding the first issue, Mr. Nuwagaba submitted that the Plaintiff is entitled to be reimbursed the Shs. 14,679,671- paid to URA as VAT. He relied on sections 5 (a), 18 (1) and 29 (1), of the VAT Act (Cap 349) and the conditions of contract (Exhibit P1 (iii) in support of his submission.

Counsel for the Defendant filed a late submission on 22/6/2004 (the dead line given by the Court was 2/6/2004). Apart from the late filing, I find the submission lacking any seriousness. It does not address the points raised in the plaint or the written statement of defence, or Mr. Numagaba's submissions. The Defendant contended in paragraph 5 of the WSD that:

“5. It is the Defendant's case that payment of VAT was solely on the Plaintiff and not on the Defendant.

This defence did not feature at all in the submissions by the defence counsel. Counsel instead resorted to a directive by the Ministry of Finance to all districts prohibiting them from using the said funds for VAT. Counsel then submitted that the effect of the Ministry of Finance directive amounted to a prohibition and therefore a frustration of the contract. He attached two letters from the Ministry of Finance to all CAC's dated 7/9/2001 on the issue.

I have considered both submissions. I agree with Mr. Nuwagaba that the Plaintiff is entitled to the refund of VAT. Firstly, the conditions of contract provided clearly that he contract price was Shs.75,463,000 excluding VAT (Exhibit P1 (ii)) or Shs.88,291,710 VAT inclusive (Exhibit P1 (i) under contract No.2002/KML/RGCBH/01. The contract price was later on varied under variation Order No. 001. (Exhibit P2).

Secondly, it is not disputed that the Plaintiff is a taxable person and is liable to pay tax under section 5 (a) of the VAT Act; which provides that:

*‘5 Except as otherwise provided in this Act, the tax payable —
(a) in the case of a taxable supply, is to be paid by the person making the supply.*

Section 11 of the Act defines supply of services to include:

“(a) the performance of services to another person.”

Section 29 (1) requires a taxable person making a taxable supply to any person to provide that other person with an original tax invoice for the supply. Under section 31 (1) a taxable person is required to file tax returns with URA within 15 days after the end of the period of supply. Failure to comply with section 31 (1) attracts a fine not exceeding Shs.300,000 or up to six months imprisonment or both. (See section 53 (1) of the Act).

Mr. Nuwagaba has submitted and I agree with him that the Plaintiff did make a taxable supply of services and the certificates of substantial completion (Exhibits P3 (I) & (ii)) show that the amounts were Shs.78,208,843.17- including VAT of Shs.11,363,532.40 under the original contract and Shs.23,259,07.16 including VAT of Shs.3,379,523.16 under variation Order No. 001.

The Defendant has not given this Court any valid reason why VAT should not be paid under the contract. The argument that the plaintiff is not entitled to the refund of VAT is not supported by adduce. In any case, any directive by in MOF does not bid the Plaintiff, because MOF is not a party to the contract. The Defendant IS a separate legal entity, which can sue and be sued in its own right. The contract was between the two of them and not MOF.

Thirdly, the submission by the Defence counsel is at variance with the pleadings. The law is clear. Parties are bound by their pleadings. Any argument outside the pleadings cannot be considered by the Court. The Defendant never pleaded frustration. It cannot therefore rely on that defence in its submissions. The letter sought to be relied on by the Defence counsel is not also part of the evidence admitted by the Court. The Defendant did not tender any documents at the

Scheduling Conference. Fresh evidence cannot be adduced during submissions. I have therefore ignored both the submissions and the evidence.

In the result I accept Mr. Nuwagaba's submission and hold that the Plaintiff is entitled to the refund of VAT.

The second issue regards the other reliefs prayed; namely:

(a). Interest: Mr. Nuwagaba has submitted that the Plaintiff is entitled to interest on this money at the Commercial building rate. In the prayers, the Plaintiff prayed for interest at a rate of 20% p.a from date of breach till payment in full. Mr. Nuwagaba put the date of 9/7/2002 as the date of breach. He has relied on Exhibit P1 (iii), the General Conditions of Contract at page 14. Clause 44 (1) provides that:

“The Employer shall pay the contractor the amount certified by the Supervisor within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made at the rate of interest for Commercial building.”

I think this is the correct — basis not only for awarding interest to the Plaintiff but for the rate as well. The rate now ranges between 18 — 20%. I award the Plaintiff interest on the Shs.14,679,971 at 20% p.a from the 9/7/ 2002 which is after the 28 days provided by clause 44 (1).

(b). General damages:

Mr. Nuwagaba has submitted that the Plaintiff is entitled to general damages because the Defendant breached the contract term. I agree with him. The contract included VAT. The Defendant paid the Plaintiff excluding VAT. The Plaintiff then had to pay VAT from its resources. When the Plaintiff asked for a refund, the Defendant refused to refund. Counsel proposed Shs.6m as general damages. I think that figure is on the high side. I reduce it to Shs.3m.

In the result, I enter Judgment for the Plaintiff as follows:

- a. Shs. 14,679,971-.
- b. Interest thereon at 20% p.a from 1/7/2002 till payment in full.
- c. General damages of Shs.3m.
- d. Costs of the suit.

M.S. Arach — Amoko

JUDGE

25/06/2004

Judgment delivered in Court in the presence of:

1. Mr. Nuwagaba for Plaintiff.
2. Mr. Okuni Court clerk.
3. Attorney General — Absent.

M.S. Arach — Amoko

JUDGE

25/06/2004