IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 135 OF 2003

QUALITY GROUP LIMITED . . . . . PLAINTIFF

versus

TANZANIA BUILDING AGENCY . . . . . .DEFENDANT

Date of last order – 27/2/2013
Date of Judgment – 9/5/2013

J U D G M E N T

Mwarija, J.

In this suit, the plaintiff, Quality Group Ltd, seeks for a declaration that the defendant, Tanzania Building Agency is in breach of a lease agreement executed by the said parties on 22/12/2000. The plaintiff seeks further for an order of specific performance as a consequence of the alleged breach. It also seeks for an order directing the defendant to approve the plaintiff's proposal on the mode of execution of contract so as to enable it discharge its obligation under the agreement. It claims also for general damages, costs and any other reliefs which the court may deem fit to grant.

The defendant on the other hand denied the claims stating that it did not breach the agreement. It instead contended that the alleged breach was committed by the plaintiff and as a result, the defendant was compelled to issue a notice of termination of the parties' contract.

The agreement for lease from which the parties' dispute arose is titled *"Agreement and Schedule of conditions for lease and Redevelopment of Housing Estate Complex at Masaki (Ujenzi Village Complex) in Dar es Salaam."* The Lease Agreement (hereinafter "the Agreement") is composed of Agreement Form, Letter of Acceptance, the Bid and the Conditions for Lease. In the Agreement, the defendant leased to the plaintiff a housing estate situated at Masaki area in Dar es Salaam City described shortly as *"Ujenzi Village,"* or as formerly known, the *"Canadian Village"* the name which it derived because it previously used to be occupied by expatriates from Canada.

One of the conditions of the Agreement which is central to the background of the dispute in this case is stipulated in the Letter of Acceptance which, as stated above, according to clause 2 of the

Agreement Form, forms part of the Agreement. Under Clause 2.0 of the letter, the plaintiff was informed that:

> *". . . The Employer has accepted your bid for the Lease and Redevelopment of Masaki Housing Estate at the annual rent of USD 260,000 payable quarterly on advance effective from ninety days after completion of rehabilitation works. The cost of rehabilitation estimated to be 60% of the annual rent shall be recovered from the rent."*

A breakdown of payment of the rental amount of USD 260,000 is shown in clause 5 of the Agreement Form.

The parties' agreement under clause 3.1 of the Conditions for Lease is that the works ought to commence not later than three months from the date of signing the Agreement. The clause provides as follows:

> *"The lessee shall begin with rehabilitation and redevelopment of the Housing Estate complex*

for provision of the services not later than three (3) months after the date of signing this agreement or on such a later date as the parties may agree to in writing."

It is not disputed that until the period stated under the above quoted clause of the Agreement expired, the plaintiff had not commenced the works. As a result, on 29/5/2003, the defendant issued a notice of intention to terminate the Agreement. The plaintiff then filed this suit claiming that the defendant breached the Agreement because the delay in executing the works was occasioned by negotiations which were going on between the parties on the appropriate mode and extent of development of *the "Ujenzi Village"* (hereinafter *"the Property"*). The plaintiff contended further that the defendant unreasonably withheld the requisite approval. According to the plaintiff, it formerly forwarded to the defendant a proposal for redevelopment of the Property but the defendant refused to grant approval and instead, issued to the plaintiff a notice of intention to terminate the Agreement.

In adducing evidence, the plaintiff called one witness, Nàsir Ratansi, the Director of Legal Affairs of the plaintiff. The witness, who is also an Advocate of the High Court, gave evidence as PW1. Led by Dr. Tenga, learned counsel, the witness testified to the effect that, through the advice of its consultants, the plaintiff found that the project will only be economically viable upon redevelopment of the Property by way of demolishing the old buildings and constructing new ones instead of carrying out rehabilitation. For that reason, on 26/2/2002, the plaintiff made a formal communication by writing a letter to the Permanent Secretary, Ministry of Works about the proposal and sought approval for implementation. Despite the letter dated 22/5/2002 (Exh.P3) in which the defendant requested to be given time to consider the proposal, the plaintiff did not, until on 10/6/2002, get a reply. As a result, it wrote a letter of reminder adding therein another proposal for outright purchase of the Property. Through its letter dated 1/7/2002 (Exh. P5), the Ministry of Works refused the plaintiff's proposal to buy the Property stating that in case the same should

be sold, the sale shall be by way of tender. In the letter, the plaintiff was required to abide by the terms of the Agreement.

According to the witness, the plaintiff prepared the drawings and sent them to the defendant on 20/8/2003 for approval but the defendant did not respond until when it was notified by the plaintiff through a letter dated 1/4/2002 (Exh.P7), of reference of the matter to the National Construction Council for arbitration. The defendant responded on 29/5/2003 by issuing the plaintiff with a notice of intention to terminate the Agreement on the ground that it delayed to commence rehabilitation of the Property, thus failing to comply with clause 3.1 of the Agreement. During cross-examination, PW1 stated further that the Agreement provides for both rehabilitation and redevelopment modes of developing the Property. He said however that it does not provide in clear terms that the redevelopment was to be by way of demolishing the existing buildings or an option of buying the Property.

He said further that the advice that it would be economically viable to demolish existing buildings and construct new ones was given by the plaintiff's consultant and that therefore, the defendant

was not bound to follow that advice. As to the grounds for instituting the suit, the witness said that it was because the defendant refused to approve the plans for rehabilitation or redevelopment which were sent for approval through letters dated 15/7/2002 and 1/8/2002. He maintained that the Agreement has the option of redevelopment subject to approval by the defendant and that is why the plaintiff sent a proposal for change of redevelopment style. He went on to state that although clause 6 of the Conditions for Lease provides for redevelopment option, the defendant unreasonably withheld the requisite clearance.

When re-examined, the witness stressed that the Agreement provides for redevelopment of the Property in the manner proposed by the plaintiff. He based his contention on clause 3.1 of the Conditions for Lease. He said that *redevelopment* and *rehabilitation* are terms of art and defined redevelopment as a process involving demolition of old buildings and construction of new structures. As to the word rehabilitation, he defined it to involve refurbishment of existing buildings. PW1 maintained that since the defendant had allowed negotiations to be carried out on the proposal before the

period of construction works provided under clause 3.4 of the Conditions for Lease had not expired, by communicating its refusal 18 months thereafter, the defendant acted unreasonably.

On its part, the defendant also called one witness, DW1 Elius Asangawisye Mwakalinga, the Chief Executive Officer of the defendant. According to his evidence, the Property was leased to the plaintiff on the terms and conditions provided for in the Agreement. He said that the plaintiff had to pay rent as provided under clause 5 of the Agreement Form and to carry out rehabilitation on the existing buildings. In so doing, it could add new things such as swimming pools and dressing rooms. According to the witness, the definitions of the words *rehabilitation* and *redevelopment* do not include demolition of existing buildings. He stated that, to redevelop means to add value to existing buildings. As to the execution of the Agreement, the witness went on to state that after a period of 1½ years from the date of the Agreement, the plaintiff made a proposal for demolition of existing structures and construction of new buildings instead of carrying out rehabilitation.

He said further that the plaintiff also proposed in the alternative, to be allowed to purchase the Property.

The defendant was not however ready to change the terms of the Agreement. According to the witness, the defendant found that the plaintiff had failed to comply with the conditions of the Agreement and despite its failure to pay the agreed rent it occasioned a significant loss of about USD 3,120,000 to the defendant. DW1 said also that the defendant lost the opportunity of developing the Property through the donors who had already released some funds for the project. On the implementation schedule of the works, he said that the plaintiff was reminded through a letter dated 1/7/2002 that it was behind schedule. That was after the period of seven months from the date of the Agreement.

In cross examination, DW1 maintained that the defendant suffered loss of rent and assistance from the donors. He stated that there were donors who had already released funds for the project but withdrew the money because of the present dispute. He admitted however that the claim for the alleged loss was not

specifically raised in the written statement of defence. Obviously that claim is not sustainable. The defendant ought to have raised it in its written statement of defence by way of a counter claim. As to the negotiations which the plaintiff alleged to be the cause of delay in commencing the works, the response by DW1 was that, when the letter dated 22/5/2002 (Exh.P3) was written, the period provided for rehabilitation had already expired and that therefore the invitation for further negotiations made by the defendant is not a sufficient reason for the defendant's failure to comply with the time schedule prescribed in the Agreement.

The learned State Attorney for the defendant and the learned counsel for the plaintiff were allowed to file final submissions. However, only Mr. Mweyunge, learned State Attorney filed his submission. Dr. Tenga, did not do so.

From the evidence and the documents relied upon by the parties, most of which were not controverted, the dispute, as stated at the beginning of this judgment centres on the interpretation of some of the provisions of the Agreement. For that reason therefore,

the answers to the issues depend on the interpretation of the parties' terms of the Agreement. The issues are as follows:

1. *Whether there is any breach of contract between the plaintiff and the defendant.*

2. *Whether the plaintiff's proposed mode of rehabilitation is provided under the Lease Agreement.*

3. *Whether the plaintiff has suffered any damages from the defendant's actions.*

4. *What reliefs are the parties entitled to.*

I intend to begin with the second issue. As stated above, the nature of the works which the plaintiff was to undertake on the Property is provided for under clause 2.0 of the Letter of Acceptance. The plaintiff had to carry out rehabilitation and redevelopment. The description of works was further repeated in

clause 3.1 of the Conditions for Lease. The words used are *rehabilitation* and *redevelopment.*

Interestingly, the words rehabilitation and redevelopment have been used in the Agreement interchangeably and/or alternatively. For example, in clause 2.0 of the Letter of Acceptance the words have been used interchangeably while under paragraph (a) of the Agreement Form, clause 3.6 (a) and 8.1 of the Conditions for Lease, the words have been used alternatively. Under clause 4.1 of the Conditions for Lease, only the word rehabilitation is used. The words redevelopment and rehabilitation are not defined in the definition clause of the Agreement which in the Law of Contract is also known the parties' *Private Dictionary.* It is agreed by the parties that rehabilitation and redevelopment are terms of art. The witnesses for both sides have attempted each to define the words the way such definitions suit their cases.

Since the two words have not been defined in the agreement, they have to be given their literal meaning. They do not, in my considered view, require extrinsic evidence to ascertain their meaning as used in the Agreement.

In the ***Longmans Dictionary of Contemporary English, updated Ed.,*** the word *redevelopment* is defined as follows;

> *" to make an area more modern by putting in new buildings or changing or repairing the old ones."*

As to the word *rehabilitation*, it is defined in the same dictionary as follows:

> *" to improve a building or area so that it returns to the good condition it was in before (renovate)."*

From the definitions therefore, the nature of the works stipulated in the Agreement can be interpreted to involve construction of new structures or repairing the old ones. The definition covers both aspects of development of the Property.

Considering the way on which the two words have been used therefore, it is clear that the Agreement can be construed to have the effect of providing for both rehabilitation and redevelopment

nature of the works. Despite the use of the two terms in the Agreement however, given the existing dispute on the nature of contractual works, the intention of the parties needs to be looked into in determining the extent of redevelopment envisaged in the Agreement. The plaintiff's contention is that the Agreement provided for an option of carrying out redevelopment in the manner it proposed to the defendant. The issue is whether that contention is correct. To answer this issue, it is pertinent to look into the nature of the works proposed by the plaintiff; that which involves demolition of existing buildings and construction of new ones and find whether it is the mode of redevelopment envisaged in the Agreement.

It is trite law that when there is a dispute as to the intention of the parties in a contract, the intention can be ascertained from the parties' subsequent conduct after the contract. In the book, **The *Law of Contract,*** 13th Ed., Sweet & Maxwell, South Asian Edition, by Edwin Peel, at page 219, the learned author states as follows on that principle:

"Such evidence [of conduct] may be admissible to show whether there was contract and what the terms of contract were."

In this case, after signing the Agreement, the plaintiff forwarded to the defendant a proposal for changing the style of works to that of demolishing the existing buildings and putting up new structures. In the letter dated 10/6/2002 (Exh. P.4) which was also referred to by Mr. Mweyunge in his final submission, the Chief Executive Officer of the plaintiff stated as follows in paragraph 1 of the letter:

"We refer to your letter No. GC 535/545/02 dated 22/5/2002 and our discussions in relation to the proposal to change the development from rehabilitation to newly built village project."

Furthermore, in paragraph 2 of the same letter it is stated that;

"On the subject on hand, while we wish to continue to proceed with our suggestion to have

the development of the project as that of a complete new construction pending favourable response from your good selves . . . we wish to put forward an alternative idea which may be more profitable to all the stakeholders."

The contents of the letter referred to above together with that which was written to the National Construction Council (Exh. P.7) show clearly that the redevelopment envisaged in the Agreement is not one of putting up new structures in the area. The parties' agreement was that of rehabilitating the existing buildings. By that letter the plaintiff described clearly that it proposed a change from rehabilitation mode to that of demolishing existing buildings and construction of new ones or in the alternative, be allowed to purchase the Property. According to the letter referred to above, the plaintiff informed the National Construction Council ***inter alia*** as follows:

"On commencement of rehabilitation/redevelopment works, the consultant on 22nd January, 2001 advised both

parties that the project was not feasible to rehabilitate the complex, rather it was more economically beneficial to both parties to ***demolish and construct/redevelop new structures/houses*** *within the complex . . ." (Emphasis added).*

From the contents of paragraph 4.0 of that letter, the consultant who gave the advice was appointed by the plaintiff and as admitted by PW1 in his evidence, the advice was not binding on the defendant. Clearly, by seeking to change the style of works from that of rehabilitation to that of redevelopment by demolishing existing structures and constructing new buildings, the plaintiff intended to change the terms of the agreement. This shows that although the term redevelopment was used in the Agreement, the nature of the works stipulated in the Agreement was that of rehabilitation. I am fortified in that finding by the fact that in the Agreement, the word *redevelopment* was used both interchangeably and in the alternative to the word *rehabilitation.* For these reasons, the 2nd issue is answered in the negative.

Having so found, I now turn to the 1st issue. There is no dispute that according to the Agreement, the works were to commence within 90 days from the date of signing the Agreement. The works did not commence within the prescribed time. According to PW1, the defendant unreasonably withheld its consent to the proposal made by the plaintiff. I have found above that the parties did not agree that the Property should be redeveloped by demolishing the existing structures and construct new buildings. I have found also that the interpretation which the plaintiff put to the use of the word redevelopment to the works which were to be performed is, according to the Agreement not correct.

The fact that the plaintiff sought, but was refused approval of the proposal for changing the mode of redevelopment of the Property from that which is envisaged in the Agreement was not, therefore, a justifiable ground for its failure to abide by the terms and conditions of the Agreement. It cannot thus be taken that the defendant committed a breach because it was not obliged to approve the plans for the nature of works which were not stipulated in the Agreement.

The plaintiff on the other hand, was obliged to send to the defendant the drawings and plans as regards the schedule of works which were to be performed in accordance with the Agreement and commence execution thereof. It however did not do so despite being reminded through a letter dated 1/7/2002. Although in his evidence PW1 said that the plaintiff sent the drawings and the works schedule to the defendant, he did not substantiate that contention with any evidence. Apart from that, the reasons for the failure to commence the works within the prescribed period were not sound, hence a breach of the Agreement.

For these reasons, the answer to the 1st issue is that the defendant did not breach the Agreement. It was the plaintiff who committed the breach as stated above. On the basis of the answer to the 1st issue, it follows that the answer to the 3rd issue must be in the negative, the reason being that the defendant acted according to the terms and conditions stipulated in the Agreement. As to the 4th issue, I find that the defendant was justified in terminating the Agreement out of the breach committed by the plaintiff.

On the basis of the above stated reasons, I find in the final analysis, that the suit is devoid of merit and I hereby dismiss it with costs.

A. G. Mwarija

JUDGE

9/5/2013

Date: 9/5/2013

Coram: Hon. A.G. Mwarija, J.

For the Plaintiff – Ms. Ernestina Bahati for Dr. Tenga

For the Defendant – Mr. Mweyunge, S/A

C.C. Butahe

Court: Judgment delivered.

A. G. Mwarija

JUDGE

9/5/2013