IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 2 OF 2018

BETWEEN

JL CONSULTANCY TZ LIMITED.....PLAINTIFF

Versus

DANGOTE CEMENT TZ LIMITED.....DEFENDANT

Last Order: 04th Dec, 2019

Date of Judgment: 19th Mar, 2020

JUDGMENT

FIKIRINI, J.

The plaintiff, JL Consultancy Tanzania Limited, is a limited liability company engaged in consultancy and employment service provision. Similarly, the defendant is a limited liability company, engaged in cement production and selling of clinker business in Mtwara, Tanzania. The plaintiff is suing the defendant for, premature termination of contract, several reliefs, interests thereon and costs. The claim was countered by the defendant, who stated the plaintiff to be the one in breach of contract.

At the final pre-trial conference four issues were framed for determination namely:

1. What were the terms and condition of the relationship between plaintiff and the defendant;
2. Whether there was any breach of the terms and condition of the contract;
3. Whether there was frustration of the contract by the government directives; and
4. To what reliefs are parties entitled.

Throughout the trial Mr. Henry Kishaluli learned counsel featured for the plaintiff and Mr. Lucas Elingaya learned counsel appeared for the defendant.

A total of two witnesses were summoned, and a number of exhibits were tendered to prove the above framed issues. The following exhibits were received into evidence from the plaintiff: certificate of registration with Brela, Construction Registration Board (CRB) certificate and a business licence, all received as exhibit P_1 collectively; contract between plaintiff and the defendant was admitted as exhibit P_2 and D_1, respectively; payroll sheets admitted as exhibit P_3; certificate of registration by the Commissioner for Labour admitted as exhibit P_4; a total of three letters, one dated 03rd November, 2017 and two dated 21st November 2017, admitted as exhibit P_5 collectively; a letter addressed to the Minister for Labour, Youth and Disabled dated 10th November 2017, admitted as exhibit P_6; letters dated 30th November 2017 and 8th December 2017, admitted as exhibit P_7

collectively; handing over letter dated 11th December 2017, admitted as exhibit P_8, and invoices admitted as exhibit P_9 collectively.

The defence equally had documents received into evidence; a letter dated 3rd Nov 2017, addressed to JL Construction by Dangote Industries admitted, as exhibit D_2; and the letter dated 29th November 2017, addressed to Dangote Cement admitted, as exhibit D_3.

A summary of what transpired in Court as evidence can briefly be stated as follows: through PW1- Leopard S. Wami - the plaintiff's Managing Director, the Court was informed that on 04th May 2017, the plaintiff entered into contract with the defendant for provision of service of fleet operation, inclusive of the provision of drivers for the defendant's trucks who were under the supervision and monitoring of the plaintiff. The recruited drivers and supporting staff though worked for the defendant but were not the defendant's employees. PW1 thus refuted the claim that the plaintiff had been the defendant's agent. Based on the denial, it was thus the plaintiff's argument that the cancellation of the certificate No. 0025/2016 which was issued to the plaintiff in the capacity as an employment agency had nothing, neither before nor after its cancellation by the Commissioner for Labor, to do with the contract entered between the plaintiff and the defendant. The contract entered on 04th May, 2017, was thus five months prematurely terminated on 21st November, 2017.

And that, following the termination of the contract on 21st November, 2017, on 11th December, the plaintiff handed over the trucks and claimed for unsettled balance of Tshs. 49,127,965.20. In support of the claim invoices nos. 0022, 0025, and 0024 for October were tendered, and nos. 0028 and 0030 for Tshs. 119,455,904/= for services provided. Other unpaid services provided were for invoices nos. 0031, 0032 and 0033 for security charges and rescue of accident trucks, worth Tshs. 5,901,479/=, invoice no. 0029 was for mileage payment for coal transportation. The total claim was thus Tzs. 174,485,348.20. And that all efforts and reminders were not honoured. The plaintiff also claimed for the paid up workers' contribution to the security funds.

Countering the claim on outstanding balance the defence featured DW1- Lilian Phidel Mwidunda –the defendant's Legal officer. In her testimony DW1, did not dispute the presence of contract nor the plaintiff liability, but without clearly agreeing to the amount outstanding with regard to the drivers' dues. She further stated that the defendant received a copy of the letter dated 31st October 2017, from the Commissioner of Labour to the plaintiff, which informed the latter that its certificate of registration as an employment agency has been cancelled. Absolving itself from liability, DW1 testified that it was the plaintiff who breached the contract and not the defendant, because after the cancellation of the certificate by the Commissioner of Labour, the plaintiff had no legal capacity to continue with

the execution of the contract. Due to that the plaintiff was therefore not entitled to the amounts claimed, since the plaintiff had stopped its operation from 27th October 2017.

After the close of the plaintiff and the defendant cases, counsels requested to be allowed to file final submissions, the request which was granted in accordance to **Rule 66 (1) of the High Court (Commercial Division) Procedure Rules, 2012.** The final submissions were submitted as requested, which I shall not reproduce but will be considered in the course of this judgment.

From the evidence on record there is no dispute that there was a valid contract entered between the parties. And that at the time of entering the contract parties relied on certificate of incorporation from Brela, CRB certificate and business licence. In the contract entered the plaintiff was a supplier, for the provision of service of fleet operation to the customer. The supplier was also an employment agent with task of only supplying drivers for the customer's trucks. The supplier was an independent contractor, who was required to act diligently and responsibly in all logistics including hiring and managing qualified drivers, payment of salaries and allowances, security fund contributions, monitor their health and salaries, etc, etc. Based on terms of the contract, it was therefore an uncontested fact that the drivers were employees of the plaintiff and fully under her supervision and control.

What is disputed is the terms and conditions of the contract leading to a question who between the parties failed to fulfill their part and consequently leading to breach of contract?

This brings me to dealing with the four (4) framed issues, starting with the first issue:

"What were the terms and condition of the relationship between plaintiff and the defendant"

The terms and condition of the contract were provided under **exhibit P_2 and D_1** respectively, which stipulate the terms and conditions of the contract between plaintiff and the defendant. Under the contract it has been clearly provided that the plaintiff was contracted to hire and manage drivers and supporting staff for the defendant. The relationship was evidently that of supplier and customer. This has been provided for under Clauses 3; 3.1 (a) to (k); 3.2 and 3.3 (a) –(m), 4 (a), (b) and (c) as well as Clauses 5 and 7 of the contract.

Although the certificate of employment agency was not spelt out as a requirement as far as exhibit P_2 and D_1 is concerned, but it is an uncontroverted evidence that the plaintiff was an employment agency though not necessarily acting on behalf or with the authority of the defendant. As an employment agency or independent contractor the plaintiff was required to comply with law and government

regulations in her undertakings. And this has been visibly illustrated under Clauses 10 and 13. For ease of reference Clause 13 (a) is supplied below:

> *"That it is fully authorized and empower to enter into this Contract, and that its performance of the obligations hereunder will not violate any contract between it and any other person, firm or organization* ***or any law or governmental regulation"*** [Emphasis mine]

So answering the first issue, the terms and conditions of the relationship were that of the supplier and customer but undoubtedly governed by laws and government regulations.

The second issue is:

"Whether there was any breach of the terms and condition of the contract"

Black's Law Dictionary defines "breach of contract" to mean where one party to a contract fails to carry out term. With that definition in place it can as well mean a breach can occur where both parties have failed to fulfill the obligations imposed on each by the terms of thc contract.

Relating this to the case, there is no doubt that there was a breach of service contract entered between the plaintiff and the defendant.

One, although the certificate of employment agency cancelled by the Commissioner of the Labour was not among the suggested requirements (certificate of incorporation from Brela, CRB certificate and a business licence) of the contract that is P_2 and D_1, but as per Clauses 10 and 13 the plaintiff was obligated to comply with the statutory requirements. The exhibit P_1 collectively, while important but were mere documents used in establishing exhibits P_2 and D_1. Therefore, what exactly bounds the parties were exhibit P_2 and D_1 and not exhibit P_1. To state otherwise it will be unrealistic and especially since it was a legal requirement. The plaintiff's failure to observe that has definitely impacted the defendant and the contract entered between the parties, regardless of whether the Commissioner for Labour was not part to the contract. The cancellation of the plaintiff's certificate of employment agency affected the employment contract between the drivers (drivers of the defendant's trucks) and the plaintiff. And this had a spill-over effect to the contract of service between the plaintiff and the defendant. The plaintiff cannot therefore escape the blame for breach of contract.

Two, close scrutiny of exhibit P_2 and D_1 in particular Clauses 4 (a) and (b) the plaintiff has been illustrated as an independent contractor **strictly prohibited** to act as an agent of the defendant. The term agency and independent contractor though carry slightly different meaning and undertaking to that of an agent. Going by the Clauses in the contract the plaintiff was essentially the defendant's agent as it was

through the plaintiff employment agency, drivers and supporting staff were secured. These staffs were however strictly and independently managed by the plaintiff of which the defendant had no any obligations over.

This assertion, though controverted by the plaintiff, but further evaluation of the evidence supports my stance that the plaintiff while carrying herself as an independent contractor but was an employment agency. This is explicitly revealed in the plaintiff's appeal letter to the Minister. In the exhibit P_6, a letter from the plaintiff, she admitted to be defendant's employment agent.

Despite the existing twofold status, the contract between the parties never put in place a Clause which allowed the defendant to act on behalf of the plaintiff in relation to taking care and managing the drivers including the supporting staff. While it was possible for such situation to occur where the defendant's intervention would have been required, but without first consulting the supplier (agent cum independent contractor) the defendant crossed the line and hence breached the contract.

Otherwise the plaintiff had all the obligations and duty of fulfilling part of the contract falling under her, the obligation which was performed until when the Commissioner for Labour cancelled the plaintiff's licence on employment agency, as exhibited by exhibit P_7. This was nonetheless not the termination of the contract

but led to termination of contract which followed later in December, 2017, when handing over took place as reflected in exhibit P_8. The termination was preceded by a letter dated 3rd November, 2017 as exhibited in D_2 which required the plaintiff to remedy the situation within 14 (fourteen) days. And this was in compliance to Clause 3.15. Failure to remedy the problem warranted the defendant who is the customer to exercise her right under Clause 17.2.1. of suspending the contract, the act which was followed with its termination.

Along the same line, the defendant as well breached the terms and conditions of the contract by taking up obligations by paying for the drivers' salaries, allowances and other provisions, without consulting the supplier, if was necessary to do so. This was in breach of what has been stipulated to be of the plaintiff's obligations, pursuant to Clause 5.

Going by how events unfold, each party had contributed to the breach of the terms and condition of the contract signed and executed. The plaintiff, by failing to fulfil all the statutory requirements as per the law and government regulations as provided under Clause 10 and 13(a) of the signed contract. And this negates the assertion that the plaintiff's contract was prematurely terminated. The defendant equally by intervening and performing part of the plaintiff's obligation was in breach of the terms and conditions.

The second issue is answered that the parties each was in breach of the terms and conditions as illustrated above.

The third issue:

"Whether there was frustration of the contract by the government directives"

Frustration of contract occurs when the contract is incapable of being performed due to unforeseen events resulting in the obligations under the contract. There was no frustration of contract by the government directives in the present situation, because no new laws were introduced which affected the contract which was already executed. The plaintiff ought to have known what its obligations were in compliance to the existing laws and government regulations. This has been plainly stated in the contract signed. Parties are bound by their own signed terms and condition of the contract. In order for this to be properly done, parties have to read through the clauses before signing. Since the requirement was in the contract, the plaintiff's failure cannot be passed on to frustration of contract by the government directives.

To what reliefs are parties entitled.

In the case at hand the plaintiff is praying for payment of **Tshs 174,485,348.20** and other benefits plus interest of 30% commercial base for the work done. From the evidence on record, even though the plaintiff has failed to prove that the contract

was prematurely terminated, but she deserves payment for the services provided in the months of October, 2017 up to 3rd November, 2017 prior to the suspension and ultimately termination of the contract. The suit is thus partly dismissed and partly granted. The reliefs are granted as follows:

1. That the plaintiff deserves specific damages of Tzs. 22, 958,195/= being salary for the months of October 2017 as per exhibit P_3 which includes payroll of October 2017, which was prior to issuance of a letter dated 03rd November, 2017 –exhibit D_2.
2. That the plaintiff deserves specific damages of Tzs. 1,160,000/= being NSSF contribution for employees for the months of October 2017 as per NSSF receipt ST171666165 dated 27th November, 2017 evidently stating it was October's Statutory contribution.
3. That the plaintiff deserves specific damages of Tzs. 760,000/= being PPF contribution for employees for the months of October 2017 as per PPF receipt no. 389385 dated 28th November, 2017.

   The plaintiff has failed to produce receipts for LAPF and GEPF contributions as provided when proving contributions to NSSF and PPF funds. This claim is thus declined, unless a receipt to that effect was supplied.

4. Equally a number of invoices were mentioned claiming different amount of payments, which included invoices nos: 0022 of 06th November, 2017 claiming for mileage for the month of October, 2017 amounting to Tzs. 122, 588,971/=. This invoice had no sufficient information compared to other previous invoices, whereby quantity or number of drivers was given. The reviewed invoices include nos: 0001 of 13th June, 2017; 0002 of 1st July, 2017; 0003 of 1st July, 2017; 0004 of 1st July, 2017 which gave description of the motor vehicle involved and places.

   Other invoices not included are Invoice no: 0024 for October, 2017 for Tzs. 3,327,505/=. This invoice's reliability is doubted as the inscription of month and year made with a red pen seem to be an entry inserted afterwards;

   Invoice no. 0025 for Tzs.37, 844,308.00/= is ineligible due to overwriting both at the date slot as well as particulars to allow the Court to make its assessment.

   Invoice no. 0028 dated 04th December, 2017 for mileage totaling kilometers 730,117 amounting to Tzs. 87,015,344/=; 0029 dated 04th December, 2017 for mileage totaling kilometers 18,148 amounting to Tzs. 2, 162,879/=; 0030 of 30th November, 2017 being payment for retention in November for 116 drivers for Tzs. 32,440,560/=; and 0033 dated 18th December, 2017 worth Tzs. 1,616,600/= were for claims beyond 3rd November, 2017 when the

defendant wrote the plaintiff informing her of the breach of contract as per Clauses 13 (a) (b) and (c) of the contract as well as Clauses 17, 17.1 and 17.2.1 all referred in exhibit D_2, Since the plaintiff's services were suspended pending clearance from the Commissioner for Labour within 14 (fourteen) days, the outcome which was never reported back. The claims put forward that services were provided during those dates as reflected in the invoices are therefore doubted.

Invoice no. 0031 dated 18th December, 2017 claiming for Tzs. 2, 124,000/= being payment for rescue security and transfer of accident truck which occurred on 29th September, 2017, no reasons were advanced as to why the claim surfaced in December and not in October or at least November.

5. Interest at 15% commercial rate from 04th December, 2017 when the handing over was done to the judgment date.
6. Interest of the Court rate at 7% from the date of decree till full payment, and
7. Each party to bear its own costs.

The suit is partly allowed as indicated above and partly dismissed that the contract was prematurely terminated. It is so ordered

P. S. FIKIRINI

JUDGE

19th MARCH, 2020