IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No.8 of 2015

BETWEEN: EZ COMPANY LIMITED
First Appellant

AND: GEORGE LAPI
Second Appellant

AND: REPUBLIC OF VANUATU
Respondent

Coram: ***Hon. Vincent Lunabek, Chief Justice***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

Counsel: ***Eric Molbaleh for Appellants***
Christine Lahua for Respondent

Date of hearing: ***6th May 2015***
Date of Judgment: ***8th May 2015***

JUDGMENT

Introduction

1. This is an appeal against the judgment of her Honour Justice Sey (the primary Judge) issued in the Supreme Court on 2nd February 2015 dismissing the appellants' claim with costs.

2. Ez's case in the Supreme Court was that it had a contract with the Republic to undertake roadside clearance, pothole patching and regrading on the roads on Malekula Island. The contract provided for two months work to be undertaken in a six-month period. It said it had commenced the work pursuant to the contract in December 2011 and had undertaken 16 days' work. However the Republic had then wrongly suspended the contract and the work had not recommenced. EZ sought damages for the breach of contract.

3. The appellant's case in this Court was that the Judge had wrongly concluded the contract had commenced in March 2011 and therefore wrongly concluded the contract had ended by the end of 2011. If these errors by the Judge were corrected then the appellants say they were entitled to damages for the 44 days' work the Republic had contracted to pay them for, (Two months or 60 days less the 16 days worked and paid for).

4. The primary judge found from the totality of the evidence available to the Court that:

   a) The suspension of works done under the contract was justified,

   b) The respondent did not breach the contract,

   c) All the services rendered by the appellant were paid for.

Background

5. The following background facts are relevant-

   a) On 25th January 2011 George Lapi (second appellant) entered into an agreement on behalf of EZ Company Ltd (first appellant) with the Public Works Department (PWD) as agent of the respondent.

   b) The agreement (contract) is referenced 113/11/Malampa.

   c) The nature of the work was specified as roadside clearance, pothole patching and regrading of roads on Malekula Island.

   d) EZ was to supply fuel and four machines namely 1 dumptruck, 1 loader, 1 grader and 1 roller at the rate of VT 10.000 per hour per machine for the specified works to be carried out.

   e) The maximum completion period for the contract was six months and the period for the works was to be two months.

f) The contract provided that the Republic would fix the commencement date for the works and when it did so the contractor was obliged to begin work within 7 days.

g) By letter dated 20/02/12 the contract was suspended by the Republic pending further notice.

6. The first issue for this Court is therefore the date of the commencement of the contract dated 25th January 2011.If the Judge was correct and the contract commenced in March 2011 then the six-month period of the contract ended well before the suspension by the Republic in February 2012. In those circumstances the appellants could have no claim for damages for any breach of contract by the Republic.

7. If however the appellants were correct and the contract commenced in December 2011 then the six-month period of the contract was still current in February 2012 when the Republic suspended the contract. In such a case there would be a breach of the contract by the Republic and if this occurred a damages claim could be brought.

The Supreme Court Judgment

8. As we have noted the Judge concluded the January 2011 contract commenced on 28th March 2011 and ended on 28th November 2011. It was common ground that EZ had carried out work for the Republic between March and May 2011. The Judge concluded that this work was pursuant to the contract of January 2011. She pointed out that invoices for the work between March and May 2011 from EZ to the Republic had the same contract number, 113/11, as the January 2011 contract. The Judge pointed to the fact that a Work Completion Certificate from the Republic for work undertaken by EZ in April and May 2011 was for *"road clearance and pothole patching"* the same work-required under the January 2011 contract. The Judge concluded this evidence established EZ had begun work on the contract by March 2011. What inevitably flowed from this conclusion was EZ's claim for damages had to fail.

Discussion

9. We are satisfied the Judge was wrong to conclude the contract commenced in March 2011. We are satisfied that the evidence established that the contract did not commence until late December 2011.

10. In a letter dated 29th March 2012 the Acting Divisional Manager of the Public Works Department, Malampa Division, Mr Nixon Fanai set out something of the history of the January 2011 contract.

11. As he noted the contract work was to be for two months with the work to be completed within a six-month period. Mr Fanai said that in mid- December 2011 Mr Lapi (the "owner" of EZ) approached him about the contract. After discussion with other senior officers in the Public Works Department Mr Fanai said in the letter *"An agreement was reached and instructions given to start of (sic) works then"*.

12. Mr Fanai noted EZ had begun work on 23rd December 2011 through until 17th February 2012 when the Republic then told Mr Lapi and EZ it had suspended the work due to *"the financial state of the Department"*.

13. This letter therefore appears to confirm that the Republic gave EZ notice to commence the work under the contract in December 2011.

14. We turn next to the Judge's finding that EZ's work for the Republic in March to May 2011 was work under the January 2011 contract. We are satisfied that the evidence establishes that the work done by EZ for the Republic in March to May 2011 was under different independent contracts which did not trigger or reflect the commencement of the January 2011 contract.

15. The Republic issued a "Local Purchase Order" to EZ relating to the hire of two trucks from EZ in March and April 2011.The Republic provided a certificate that the work under this purchase order had been completed by 15th April 2011. The certificate

notes the work undertaken as the *"Hiring of two tipper trucks for Emergency works on Malekula"*. This work appears to have nothing to do with the contract of January 2011.What may have confused the situation is that EZ used the reference 113/11 for its invoice for the hiring of the two trucks for the emergency work. The use of this contract number was probably incorrect but its use does not change the evidence that the work done by EZ was not associated with that required of EZ under the January contract. This work therefore could not have triggered the commencement date of the January contract.

16. There was other work done by EZ in April and May 2011 for the Republic. Again it was the hire of a truck. Again EZ included in its invoice the contract number 113/11.The Republic provided a Work Completion Certificate for the hire of this truck. However the certificate described the work done by EZ as *"Road Clearance and Pothole patching"* rather than truck hire. This description of the work done we consider is unlikely to be correct. EZ did not take possession of the grader and roller required for road clearance and pot hole patching until mid-2011 after this work was done in April/ May 2011.

17. There is another reason why the work done in April/May 2011 was not part of the January 2011 contract. The January 2011 contract provided for progress payments to made under the contract (clause 8). When a progress payment was approved a Progress Payment Certificate would be issued by the Republic to the contractor. When the contract was completed a Completion Certificate would be provided. Here the certificate provided by the Republic for the work in April/ May 2011 is a Completion Certificate. It is not a Progress Certificate for a progress payment pursuant to the January 2011 contract.

18. These were separate contracts between EZ and the Republic. Counsel for the Republic in her submissions stressed that Mr Lapi had accepted in cross-examination the proposition that there was only one contract in existence between the Republic and EZ during 2011. This Counsel submitted supported their case that all work done by EZ was pursuant to the January 2011 contract.

Mr Lapi is a lay person. The existence or otherwise of contracts between him and the Republic is unlikely to be a matter on which he has particular expertise. There was only one written contract. However the existence of "Purchase Orders" and "Completion Certificates" for work done by EZ illustrates there were a number of different contracts, the others apparently being oral (through evidence by the documents we have mentioned).

19. We are therefore satisfied the work undertaken by EZ for the Republic in March to May 2011 was not work pursuant to the January 2011 contract. The evidence satisfies us that the January 2011 contract commenced as Mr Fanai said on 23rd December 2011.

20. As we have noted EZ then had two months of work to do which had to be completed within the six- month period. When the contract was suspended by the Republic on 20th February 2012 EZ had undertaken 16 days work. They were paid for that work. The six month period for the work to be undertaken had not then expired. The suspension of the contract by the Republic was therefore a breach of the January 2011 contract.

Damages

21. Given the Judge's conclusion that there had been no breach of contract, the Judge made no assessment of damages. EZ kept their machines at Malekula after suspension no doubt hoping for a resumption of the contract but the suspension was never lifted. EZ was entitled to a further 44 days of work under the contract when it was breached by the Republic. And so it is entitled to have damages calculated based on this loss.

22. In the Supreme Court claim EZ did not specify a particular sum for damages. At trial it claimed damages based on each of the four machines working eight hours every one of the 44 days at 10.000vt per hour per machine. We reject that assessment of damages. All four machines would not be operating simultaneously under the contract. The work done over the 16 days during which the contract actually operated, indicated that only one machine was operating at a time. Nor would EZ be entitled to the gross amount payable under the contract for the 44 days.

23. EZ is entitled to claim the loss of profit made over the 44 days, effectively the hourly rate of a machine or machines operating, less the cost of operating the machine (for example diesel, maintenance, drivers wages). No such calculation has been undertaken by EZ.

24. Further EZ may have other damages claims arising from the suspension and effective cancellation of the contract.

25. In those circumstances the appropriate course is to send this matter back to the Supreme Court to hear evidence on and to assess damages.

In Summary

26.

a) We set aside the findings of the primary Judge as to the commencement date of the January 2011 contract.

b) The contract of January 2011 commenced on 23rd December 2011 and EZ undertook 16 days of work under the contract.

c) The Republic breached the contract by suspending the work to be performed under the contract by EZ. As a result EZ was unable to work for 44 days under the contract when it has entitled to do so.

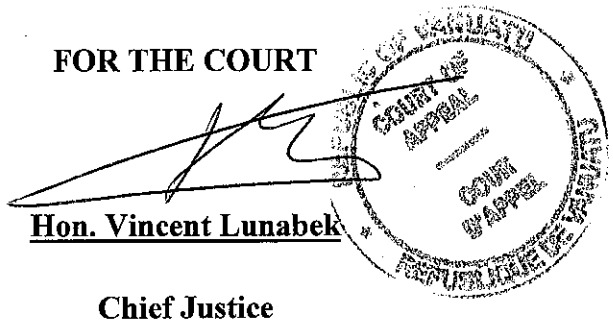
d) The assessment of damages is returned to the Supreme Court to hear evidence and give judgment on the damages claim by EZ.

Costs

27. We allow the costs of the appeal in favour of the appellants on the standard basis.

DATED at Port Vila this 8th day of May 2015

FOR THE COURT



Hon. Vincent Lunabek

Chief Justice