IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CIV/APN/221/2009

In the matter between:-

TSOELOPELE CONSULTANTS & CONTRACTORS **APPLICANT**

and

LESOTHO ELECTRICITY COMPANY **RESPONDENT**

Date of hearing : 6, 17 June and 20, 26 August and 6 Sept. 2010

Date of Judgment : 15th September, 2010

CORAM : MR ACTING JUSTICE J.D. LYONS

Counsel:

Mr. Letsika for Plaintiff

Mr. Shale for Defendant

SUMMARY

Contract – interpretation of terms – performance bond – forfeiture factual dispute – decided on facts.

JUDGMENT

The Plaintiff is a firm of general contractors. The Defendant is the provider of electricity in the Kingdom of Lesotho.

As part of the electrification of Butha-Buthe village, the parties entered into a written contract dated 10th October 2006 wherein the Plaintiff contracted to provide certain construction services to the Defendant.

The length of the contract was 10 weeks. The Plaintiff commenced on or about 3rd November 2006 with the projected finishing date being 12th January 2007.

The contract price was M330,400.00. The contract was subject to the Plaintiff per-paying a performance bond of 10% of the contract price. I gather that this sum of M33,040.00 was paid, or at least satisfactory arrangements were entered into.

At this point it may be useful if I set out the relevant provisions of the contract.

Clause 5 of the General conditions of the contract reads:

5. Performance Security.

5.1 Within fourteen (14) days of signing of Contract the successful Bidder shall furnish to the Employer a performance security in the amount of 10% of the bid price.

5.2 The proceeds of the performance security shall be payable to the Employer as compensation for any loss resulting from the Contractor's failure to complete its obligations under the contract.

The Plaintiff is defined as the Contractor and the Defendant is defined as the Employer (clause 1 - General Conditions).

Clause 15 of the General Conditions reads:

15. Delays in the Contractor's Performance.

15.1 Delivery of Services shall be made by the Contractor in accordance with the time schedule prescribed in the quotation.

15.2 If at any time during the performance of the Contract, the Contractor or its subcontractor(s) should encounter conditions impeding timely delivery of Services, the Contractor shall promptly notify the Employer in writing of the fact of the delay, its likely duration and its cause(s). As soon as practicable after the receipt of the Contractor's notice, the Employer shall evaluate the situation and may at its discretion extend the Contractor's time for performance, with or without liquidated damages, in which case the extension shall be ratified by the parties by amendment of Contract.

15.3 A delay by the Contractor in the performance of its delivery obligations shall render the Contractor liable to the imposition of liquidated damages unless an extension of time is agreed upon without the application of liquidated damages.

Clause 16 of the General Conditions reads:

16. Termination of the Contract.

If the Contractor fails to deliver any or perform the Services within the period(s) specified in the Contract, the Employer may, without prejudice to its other remedies under the Contract, call up the Contractor's Performance Security and terminate this contract.

In Part 8 – Installation Specifications – the Contractor was required to order and collect materials from the Defendant's stores (8.1.2). The Defendant provided the materials on a 'as needed' basis. When the Contractor reached a certain stage in the works where specific materials were required, he would put in his order to the Defendant and then go and collect the materials from the stores. It was done on this basis to relieve the Contractor of the need to provide storage facilities and to minimize the likelihood of damage or theft occurring if the materials were left idle in the Contractor's possession.

As relates to the handling of these materials, clause 8.3 of Part 8 – Installation Specifications reads:

8.3 Material Handling.

All materials to complete the contract works as described in the contract, will be provided by LEC. The contractor will be responsible for the ordering from LEC stores, collecting, and arranging for off loading of materials and equipment and shall include the cost thereof in the tender prices.

The contractor shall make the necessary arrangements for safe storage on site, offering adequate protection against theft, damage and weather. The responsibility for insurance of materials against any form of damage, or theft after issue thereof, also rests with the contractor.

In cases where the contractor meets the required lead-time for delivery of material on site and the material is not available, any resultant standing time or additional expenditure incurred will still be the responsibility of the contractor. The onus is thus on the contractor to ensure timeous delivery of material on site.

Written notification shall be given to the Project Manager the moment the contractor suspects a possible late delivery. Should late delivery occur, due to a problem of national proportion then the Project Manager will determine the extent of lost time, however an extension of time shall only be considered if the delay is on the critical part of the contractor's program.

The Plaintiff duly commenced the works on November 2006. Some delays were occasioned due to weather, funerals and difficulty with getting timely delivery of stores. The Plaintiff applied for, and was granted extensions in respect of these delays.

On 14th February 2007, the Defendant wrote to the Plaintiff as follows:

Dear Sir.

Proposed Butha-Buthe electrification – project delays.

We acknowledge receipt of your letter dated 12th February 2007, requesting two weeks contract extension to 23rd February 2007. We would like to stress our disappointment in the manner that you are executing this Project. Our personnel attended the site meeting on the 17th February 20007 that was arranged between LEC and yourselves, but you failed to attend and did not apologize. We established during the site inspections that you do not have resources like vehicles on site, and also that the remaining activities cannot be completed within two weeks, as conductor stringing has not started.

However we will grant you an extension of two weeks that you requested, but be aware that we will impose penalties as per clause 15.3 of our contract agreement should you fail to complete the remaining works by 23rd February 2007.

Yours faithfully.

With this letter the defendant established that time was of the essence for the contract. The date for completion was set as 23rd February 2007.

The Plaintiff did not finish the contract until 21st July 2007. From 23rd February to 21st July, 2007 the Plaintiff had not applied for any further extensions to the contract time, nor was any notice given under clause 8.3 of the Installation Specifications.

On 16th May, 2007, the Defendant did, however, write to the Plaintiff. This letter addressed the issue of delay regarding the Butha-Buthe project and two other projects the plaintiff was working on. The letter reads:

Dear Sir.

Pending LEC jobs awarded to Tsoelopele.

LEC awarded you Butha-Buthe Electrification project on the 08th September 2006 and according to the program you submitted to LEC, you were supposed to have stared on the third week of October and complete the Project by 22nd December 2006. To-date you have not yet completed this project.

Again you have Lower Thamae and Roma System Improvement Projects that were awarded to you in November 2006. These small works were expected to be completed within three weeks after commencement.

Despite LEC efforts to urge you to complete these projects on time, you failed to improve your performance. We give you up to the 25th May 2007 to complete all these projects, otherwise the job orders for Lower Thamae and Roma will be cancelled. The Butha-Buthe project is under penalties as we warned you on our letter dated 14th February 2007.

Yours faithfully.

This letter confirmed that time was of the essence in respect of the Butha-Buthe contract. The time for completion of that project was still set as 23rd February 2007. As this time had passed by the time the above letter was written, the Defendant reminded the Plaintiff that it (the Defendant) had decided against terminating the Butha-Buthe contract for non-performance (Clause 16 refers) and instead was relying on the penalty clause in the contract. This clause I take to be clause 15.3.

On 4th June 2007, the Plaintiff replied to the letter of 16th May 2007 as follows (as relates to the Butha-Buthe project:

Botha Bothe: Work is complete except for some mostofer brackets awaiting supply of materials from LEC.

Tsoelopele Consultants and Contractors wish to stress that the delays in supply of materials are problematic for the cost efficient implementation of the projects as these result in cost of labour and transport being considerably higher than estimated. Our work force can not be utilized effectively and truck needs to be doubled as transformers are not available as planned. For example the pillar boxes for Botha Bothe were only supplied two weeks go.

Provided the materials are supplied the projects can be commissioned with one days notice.

Yours faithfully.

To my mind this letter was setting up an excuse and gave an indication of what the Plaintiff's problem really was – it had under-quoted on the job. It was also trying to set up as an excuse for its delay that it was the Defendant who was responsible because it had not had the materials available.

I note, again, that there was no prior correspondence from the Plaintiff since the letter of 14th February 2007 seeking and extension or complaining about delays being caused by the Defendant.

Finally on 23rd July 2007 the Defendant wrote to the Plaintiff as follows (as is relevant):

Dear Sir.

Proposed Butha-Buthe Village Electrification.

This letter serves as a follow-up of our letter dated 14th February 2007 (copy attached). Please note that this project commenced on the 03rd November 2007 and was supposed to be completed by 12th January 2007. Time extension was granted to you up to 23rd February 2007 without penalties, but clearly indicating that your failure to complete will result in LEC applying penalties as per clause 15.3 of our contract agreement. The total number of calendar days from 23rd February 2007 to 21st July 2007 (Project completion date) are 92 days (excl holidays, rainy and stay-away).

The penalties are as follows: Amount per calendar day is M500.00 x 92 days = M46,000.00. Your net contract amount is M330,400.00, therefore LEC will deduct maximum of 10% of the contract price i.e. M33,040.00 from your remaining project funds.

……. Yours faithfully.

The Defendant did just as it said it would – from the final payment to be made to the Plaintiff it retained M33,0400.00.

The Plaintiff now sues the Defendant for this sum, saying that it was wrongly deducted. As the Plaintiff says in the founding affidavit, the court is **'enjoined to adjudicate over this matter in order to determine if LEC was entitled to impose a penalty or not'**.

As this matter was originally commenced by Notice of Motion but later, by consent,

converted to a summons mater for trial with the affidavits to stand as both evidence (to be supplemented by witness statement and viva voce evidence) and pleadings, the above stands in a very general and wide sense, as the nub of the Plaintiff's case as pleaded.

The Plaintiff says that the delays were caused by the delay in getting stores from the Defendant's stores. This it says was the Defendant's fault. As I have noted above, from the 23rd February onwards, the Plaintiff made no written or verbal requests for an extension. Nor did it make any written complaint to the Defendant concerning the issue of the delay and that it was the Defendant's fault. Its letter of 4th June 2007 cannot be considered a complaint. It is more like an excuse. The Plaintiff was well aware of the requirements for getting an extension or lodging a complaint about delays. It had used the correct procedure very early in the piece (see its letter to the Defendant of 12th February 2007). The Plaintiff has put a number of waybill notes before the court as if to support its contention. These bills tell me nothing other than that certain goods for certain jobs were picked up from the Defendant's stores at certain times. They do not tell me when these goods were requested and what the state of the Plaintiff's project was at that time. At best these bills are self-serving.

Furthermore the matching Picking Slips (Exhibit D3 - the documents that generated the orders) showed that in fact there were no delays between order and delivery. The best the Plaintiff could say was that there was a 7-day break between the order for transformers and delivery. This was well after the set date for completion.

The Defendant presented evidence that pointed to the Plaintiff's state of unpreparedness and inability to do the works within the time frame agreed upon. The Defendant says the delays were not caused by unavailability of materials in its stores department. On the contrary, it says the delays were as a result of the Plaintiff's inefficiency and tardiness.

Having heard the evidence and observed the demeanor of the witnesses, I prefer the evidence of the Defendant and its witnesses on this point. I find that the delays were on balance due to the Plaintiff's inability to properly perform the contract on time

and that this was not caused by any fault of the Defendant.

Even if it were to be so, clause 8.3 of the Installation Specifications (which form part of the contract) specifically says that the responsibility for the timely delivery of stores rests with the Plaintiff. The Plaintiff could have given written notice if it suspected that there would be time delays which were not of its doing. It served no such notice.

So far as the question of delays in delivery of materials is concerned, it rests at the Plaintiff's feet whichever way one looks at it. The Plaintiff is clutching at straws in trying to pass the blame for the delay in a timely completion of the Butha-Buthe project on to the Defendant.

The question to be answered (as posed by the Plaintiff - see above) is – 'Was the Defendant entitled to impose a penalty, and if so, did it do so correctly within the terms of the contract?"

In answering this question, it must be noted that this is not a matter akin to judicial review. It is a contract dispute brought by the Plaintiff. The onus is on the Plaintiff to prove its case. Thus the Plaintiff must show that, as a matter of fact and/or law, that the Defendant wrongfully imposed a penalty upon the Plaintiff and thus wrongfully deducted (or withheld) the sum of M33040.00 from the amount owing to the Plaintiff.

In submissions counsel for the plaintiff did not seriously contest that, should it be found the plaintiff was at fault, then the defendant was within its rights to forfeit the security/performance security as damages. This was a sensible approach to take. The contract is very clear. In the event of non-performance, the defendant is able to forfeit the 10% performance security. It is even able, if so minded, to claim additional damages. It did not and restricted itself to the performance security.

The plaintiff's case revolves around two mutually destructive versions. The plaintiff's version is that the late completion of the contract was due to delays in supply of materials from the defendant. The defendant, (acknowledging some

supply problem in the early stages - which was compensated for by an extension), correctly points out that the relevant period is post 23 February 2007. It says there were no delays during that period for which it was responsible. On my assessment of the evidence, the plaintiff has failed to prove its case.

Further, in terms of the contract, the liability for any delays in delivery of materials falls on the plaintiff, unless it serves written notice any problematic delays. As relates to the relevant period under review, it served no such notice, because, I find, there were no such delays.

The case is dismissed with costs to the defendant to be taxed if not agreed.

I thank counsel for the high quality assistance.

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J.D. LYONS
ACTING JUDGE