

DRAKE & GORHAM (ZAMBIA) LIMITED v ENERGO PROJECT LIMITED
(1980) Z.R. 58 (S.C.)

SUPREME COURT
GARDNER, AG .D.C.J., BRUCE-LYLE, J.S. AND MUWO, AG. J.S.
29TH NOVEMBER, 1979 AND 19TH JUNE, 1980
S.C.Z. JUDGMENT NO. 14 OF 1980

Flynote

Contract - Construction of contract - Surplusage of words to be treated as words adding something.

Headnote

The appellant was a sub-contractor to the respondent for the performance of electrical work at the Kafue Gorge Hydro-electric Power Project. The respondent issued tender documents for sub-contractors in respect of various parts of the project and the appellant was the successful tenderer under tender document CD 21 for local power equipment, and tender document CD 22 for lighting of power station and 330 kv switch-yard. On completion of the work the respondent withheld the sum of K13,170.20 from the contract price of K533,133.00 as charges for rental of accommodation of the appellant's servants. The appellant claims that the respondent had no right to withhold this money because the respondent, by the terms of the contract, had undertaken to provide such accommodation free of charge.

Held:

In construing a contract, effect should be given to all words and the treatment of some words as mere surplusage should, if possible be avoided.

Cases referred to:

- (1) S.A. Maritime et Commerciale of Geneva v Anglo Iranian Oil Co.Ltd,[1954] 1 All E.R. 529.
- (2) Mulenga v Rucom Industries Ltd, (1978) Z.R. 21.

For the appellant: J.H. Jearey, D H. Kemp & Co.

For the respondent: M. Lwatula, Ellis & Co.

Judgment

GARDNER, AG.D.C.J.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court whereby the appellant's claim for the sum of K13,170.20, in respect of the balance due for work done and goods sold and delivered by the appellant to the respondent, was dismissed.

The facts of the case are that the appellant was a sub-contractor to the respondent for the performance of electrical work at the Kafue Gorge Hydro-electric Power Project. The respondent

issued tender documents for sub-contractors in respect of various parts of the project and the appellant was the successful tenderer under tender document CD 21 for local power equipment, and tender document CD 22 for lighting of power station and 330-kv switchyard. On completion of the work the respondent

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withheld the sum of K13,170.20 from the contract price of K533,133.00 as charges for rental of accommodation of the appellant's servants. The appellant claims that the respondent had no right to withhold this money because the respondent, by the terms of the contract, had undertaken to provide such accommodation free of charge.

The contract agreement, signed after the successful tenders were accepted, provide (*inter alia*) as follows:

"Documents being integral part of this Contract Agreement Article 2:

The following documents which are annexed hereto shall be deemed to form and be read and construed as part of this Agreement:

1. Tender Document CD 21 - Local Power Equipment and Tender Document CD 22 - Lighting of Power Station and 330-kv Switchyard .

filled in and signed by the Sub - Contractor and referred to in Section O-General, of the Record of Agreement dated 27th November, 1969, signed by the Sub - Contractor and the Engineer, except references to CD 24 which shall be considered excluded from this Agreement.

2. Record of Agreement dated 27th November, 1969, signed by the Sub - Contractor and the Engineer with the exclusion as stated above under 1.

3. The Sub - Contractors' letters to the Main Contractor and the Engineer as referred to in Section O-General of the above Record.

4. Form of Performance Bond.

In the event of discrepancies between the contents of any of the above Documents, the meritory order of the mentioned Documents shall be 2,3,1....

The Provisions of the Contract Agreement made between the Main Contractor and the Sub - Contractor shall always prevail in their mutual relations over the provisions of the Conditions of the Contract and other parts of Contract Documents CD 21 and CD 22. . .

Contract Price

Article 5:

The Contract Price to read as follows:

For CD 21:

Total Price as per Sub - Contractors Tender	K
375,763.00	
Deletions as per Record of Agreement:	
as per Para 10.1.	K
621.00	
as per Para 10.2.	<u>K</u>

23,705.00

K

24,326.00

Resulting Total Tender Price for CD 21

.K

351,437.00

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For CD 22:

Total Price as per Sub - Contractors Tender . .

K 187,384.00

Deletion as per Record of Agreement:

as per Para 10.3 ..

K 5,688.00

Resulting Total Tender Price for CD 22 . .

K 181,696.00

Total Price for CD 21 and 22 ..

K 533,133.00

(Five hundred and thirty-three thousand one hundred thirty -three Kwacha and no Ngwee.)

The Contract Price does not include customs and import duties.

The Contract Price as indicated above also covers and includes the following:

- (i) Overseas packing and packing applicable to proper transporting of the Plant from a sea port to the Site of Erections;
- (ii) Storage of the Plant,
- (iii) Insurance costs as provided in Article 7 hereof;
- (iv) The transport and other expenses concerning the Sub Contractor's equipment;
- (v) All other charges as provided in the Contract.

The following shall be borne by the Main Contractor:

- (i) The provision of all facilities on the Site under the terms and according to Clause 2.3, Chapter 2 (Information to Tenderers) CD 21 and 22;
- (ii) Cost of building and sheds for the storing of the Plant at the Kafue Siding or the Main storage on the Site.

The Employer shall provide the necessary Certificate to ensure duty free status before the arrival of the Plant."

The tender document, which the court was informed was similar to all other sub-contracting tender documents, contained the following relevant provisions:

"2:3 HOUSING AND FACILITIES AT THE SITE

:31 Housing

There are four Camps at the Site and they are designated as follows:

Camp I comprising the housing for the future operating staff

Camp II contains certain office buildings, housing and facilities for skilled labour.

Camp III contains housing, and facilities for semi-skilled and unskilled labour.

Camp IV is a special area reserved for the unemployed and squatters.

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Included in the facilities provided at the Camps are office buildings, mess and guest-house, shop buildings, school, various service buildings and a hospital.

The rentals to be paid by the Sub - Contractor for houses and facilities obtained in the Camps shall cover all reasonable running costs incurred by the Main Civil Engineering Contractor, who shall pay to the Employer the rentals listed in Table 2:1 (appended to this Chapter) for the use of the Camp first stage and the permanent houses here above mentioned.

:32 Other facilities

:32 (1) Electric power will be supplied to the Site from February, 1968. The Sub - Contractor shall obtain electric power from the Main Civil Engineering Contractor at 380/220 V 50 Hz and at a distance not exceeding 100 yards from the place where the power shall be used. The following tariffs will be applied:"

Thereafter the rates for electricity consumed by the sub-contractor were set out.

On behalf of the appellant, Mr Jearey argued that the contract agreement was a variation of the provisions of the tender document in that the tender prices in respect of both tenders were reduced, and special provisions relating to customs duties, packing, storage, insurance, transport and other charges were specified, and, in particular, there was a special agreement that the respondent should bear the provision of all facilities on the site under the terms and according to clause 2.3 of CD 21 and 22, and the cost of buildings and sheds for the storing of plant at Kafue siding or the main storage on the site. Mr Lwatula, on behalf of the respondent, argued that in view of the fact that the agreement for the provision of all the facilities on the site was expressed to be under the terms and according to clause 2.3 of CD 21 and 22, the provision that the appellant should pay rent for the accommodation provided was applicable; especially having regard to the fact that CD 21 and 22 were specifically incorporated into the contract agreement.

There was some argument as to the word "bear" and I have no doubt, after considering the context, that the meaning is "bear the cost of ". The most important question however is the construction of the word "provide" in the context of the agreement in the contract that the respondent will bear the cost of provision of all facilities on the site. Mr. Jearey contended that the proper construction of the whole of the contract as constituted by the tender documents CD 21 and 22 and the contract agreement was that the agreement in the contract for the provision of the facilities referred to meant that such facilities would be provided free of charge. He argued that, as, the provision of such facilities was already dealt with in clause 2:3 of the tender document, if the special clause in the contract agreement meant exactly the same thing, there was no need to set it out again because the tender document had already been specifically incorporated into the agreement. In support of his

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argument Mr Jearey cited the case of *S.A. Maritime et Commerciale of Geneva v Anglo - Iranian Oil Co., Ltd* (1), where the Court of Appeal in England said at p. 531:

"Although one finds surplusage in contracts, deeds, and Acts of Parliament, one leans towards treating words as adding something, rather than as mere surplusage."

In reply to this Mr Lwatula argued that, as the words "under the terms and according to clause 2:3 of CD 21 and 22" were used, they must be given some meaning, and that meaning was that rent was payable.

On considering the whole of the contract I note that the only other comparable provision, which has been put before either the trial court or this court, is sub-clause 32 of clause 2:3 of the tender document. This sub-clause provides that electric power will be supplied to the site from February at a distance not exceeding 100 yards from the place where the power shall be used. This sub-clause is not repeated in the contract agreement and yet I have no doubt that it applies to the contract, and, had the respondent supplied electricity at a point substantially in excess of the minimum distance of 100 yards, I have no doubt that it would have been in breach of contract, having regard to the fact that the whole of the tender document was specifically included in the contract. This obvious conclusion leads me to consider why in the contract agreement there was a special agreement to provide facilities when such agreement had already been set out in the tender documents and incorporated into the contract.

In his submissions to the court below Mr Jearey said that it was not in dispute that the respondent as main contractor agreed to provide housing for sub-contractors for which the sub-contractors would have to pay a rent. On reading the contract as a whole, however, I have reservations as to whether the providing of such facilities was to be at the expense of the contractor or of the employer, that is, the Government. In the last paragraph of sub-clause 31 clause 2:3 of the tender document there is a provision that the respondent, as main contractor, would pay rental to the employer for the use of the camp first stage and the permanent houses referred to. This indicates to me that the Government was the owner and provider of the houses, which may or may not have been built by the main contractor. It is significant to note that clause 2:3 of the tender document is not an agreement by the respondent to provide the housing and other facilities referred to; it merely states that four camps at the site comprised and contained certain housing and other buildings and that included in the facilities provided at the camps, are office buildings and public amenities. In my view sub-clause 31 as compared with sub-clause 32 indicates that in the former the housing and other facilities were already there and in the latter the facility of electricity would be supplied at a future date, namely February. As this case was dealt with without the hearing of any evidence, this court is bound to accept the situation as stated in the agreed documents, and, although, as I have said, the respondent as main contractor may well have built the

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houses and other facilities, it is clear that the Government, to whom rent was to be paid, was in fact making the buildings available. In my view this is the only construction that can be put upon the

incorporated terms of the tender documents CD 21 and 22. I respectfully agree with the Court of Appeal of England in the cited case that, in construing a contract, effect should be given to all words and that the treatment of some words as mere surplusage should, if possible, be avoided. I also agree with Mr Jearey that, as Article 5 of the contract agreement appears under the heading "Contract Price" and the items therein relate to prices and charges, the reference to the provision of facilities must relate to the cost thereof. I am also persuaded that, especially in view of the fact that Article 5 refers to a reduction in the tendered contract price, it was the intention of the parties to amend the liability for rental of housing and all other facilities. I am therefore quite satisfied that the contract should be construed as meaning that the respondent would be responsible for the payment of rent for the housing of the appellant's employees, and for any charges and expenses incurred in respect of other facilities provided; with the result that the appellant was entitled to occupy the houses and use the facilities free of charge.

I would allow this appeal and order that judgment be entered for the plaintiff in the sum of K13,170.20 with interest thereon at the rate of 7 per cent per annum (*see Mulenga v Rucom Industries Ltd* (2) at p. 23) from the 1st January, 1976, with costs to the appellant in this court and in the court below.

Appeal allowed

Judgment

BRUCE-LYLE, J.S.: I concur.

Judgment

MUWO, AG. J.S.: I also concur.