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

Civil Appeal
Case No. 18/1193 CoA/CIVA

BETWEEN: **MALTAURIKI TRANS IFIRA DEVELOPMENT COMPANY LTD**
Appellant

AND: **THE REPUBLIC OF VANUATU**
Respondent

Coram:	***Hon. Justice John Mansfield*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice David Chetwynd*** ***Hon. Justice Gus Andrée Wiltens***
Counsel:	*Mr. Justin Ngwele for the Appellant* *Mr. Kent Tari for the Respondent*
Date of Hearing:	*13th July 2018*
Date of Judgment:	*20th July 2018*

JUDGMENT

Introduction

1. This is an appeal against the judgment of the Supreme Court dated 29th March 2018 whereby the trial judge found there was no variation of contract and dismissed the appellant's claims with costs.

Background

2. The appellant sued the respondent under an agreement dated 15 December 2014 where by the appellant was to supply 40,000 cubic meters of assorted quarry gravel for the backfilling and levelling of the Convention Centre site.

3. The appellant supplied the initial 20,000 cubic meters of gravel and the respondent paid VT35 million therefore at a rate of VT1,750 per cubic meter.

4. The appellant supplied the remaining 20,000 cubic meters of gravel. The respondent paid the appellant for this supply as well.

5. Together with all other services rendered by the appellant, the respondent paid a total of VT71,968,850.

6. On 12 July 2016 the appellant issued a further invoice in the sum of VT14,837,500 for delivery of back material and top soil. The respondent paid VT5,433,750 and retained the balance of VT9,403,750.

7. The appellant therefore sued the respondent for the retained amount, for all outstanding loan arrears owed by the appellant to the ANZ Bank for general damages in the sum of VT5 million, for interest at 5% per annum and for costs. The claim was unsuccessful.

The appeal and ground

8. The appellant filed their appeal against the whole judgment of the Supreme Court on these grounds namely that:-

   (a) The trial judge failed to take into consideration the appellant's submissions that a contract may be varied orally despite written variation requirements.

   (b) The judge failed to rely on the unchallenged evidence of Joshua Kalsakau that variation of the contract was made orally by conduct; and

   (c) The judge raised an issue that was never pleaded in the respondent's defence, more specifically pointing out clause 5.8 of the second contract as being the mechanism for varying the contract.

Discussion

9. In respect to the first ground Mr. Ngwele accepted the contracts were government contracts. However counsel argued that the trial judge had misconstrued the term "*may*" in section 4(2) of the Government Contract and Tenders Act [CAP. 245] (the GCT Act) to put a mandatory gloss which he submitted was an error. Counsel relied on the case of *Mohan Singh v. International Airport Authority of India* (1997) 9 SCC 132.

10. The trial judge set out the law in paragraph 14 of the judgment as follows:-

"14. It is not disputed that the first and second contracts were concluded and executed pursuant to the provisions of the Government Contracts and Tenders Act [CAP 245] (the GCT Act). Of relevance for the purposes of this proceeding are the following provisions:-

1. Purpose

The purpose of the Act is to establish the rules and procedure that must be followed with the Government contracts and tenders.

2 A. Government contracts defined

(1) Subject to subsections (3) and (4), each of the following is a Government Contract:-

(a) A contract or arrangement for the supply of goods or services or the execution of public works in consideration of payment act of public moneys...."

(3) *The consideration in relation to any contract arrangement, franchise or concession must exceed VT5, 000, 000.*

3. Government Contracts

(1) Every Government contract must be in writing

...

4. Execution of Government Contracts

(1) Every Government Contract entered into under section 3 must be in the name of the Government of the Republic of Vanuatu represented by the responsible Minister and every document required to be signed evidencing the terms of the contract may be executed by the responsible Minister on behalf of the Government.

(2) The terms of a Government Contract may be varied or discharged in the same way.

7. Effect of Government contract entered into a breach of this Act.

"A Government contract entered into after the commencement of this Act, which is in breach of the provisions of this Act, will be void, of no effect, and will not be binding on the state or the Government."

11. At paragraph 17 of the judgment the trial judge states:-

"the GCT Act provisions are quite specific. The purpose of the Act is to establish rules and procedure that must be followed with Government contracts and tenders. It is not disputed that the second contract like the first is a Government Contract as the consideration exceeds VT5, 000, 000 (s.2A(3). The Act therefore requires that such a contract must be in writing (s.3(1)) and the terms of such a contract may be varied or discharged in the same way (s.4(2)). Any contract entered into in breach of the Act is void and of no effect (s.7)."

12. The interpretation Act [CAP 132] states:-

"8. General principles of interpretation

An Act shall be considered to be remedial and shall require such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

13. At paragraph 15 of the judgment the trial judge dealt with the submissions of the appellant that a contract may be varied orally by the conduct of the parties. He correctly concluded that that is not correct. Section 4(2) enables a government contract to be varied, but it will require the variation to be in writing.

14. In any event, at paragraph 25 the trial judge found there was no evidence of any variation order issued pursuant to clause 5.8 of the contract. Having so found the judge

ruled at paragraph 27 of the judgment the appellant's submissions that the contract could be varied orally or by conduct was misconceived and dismissed them.

15. The case of *Mohan Singh* as referred was about the consideration of the word "shall" and not "may". However the principle of interpretation of either word is the same. It requires that the word, be it "shall" or "may", be considered in the light of the intention of Parliament as required by section 8 of the Interpretation Act. At the end of paragraph 26 of the judgment the Court said this:-

"Effect must be given to all the provisions harmoniously to suppress public mischief and to promote public justice."

16. We are of the view that the trial judge had achieved this when he considered and applied sections 1, 2A, 3, 4 and 7 of the GCT Act and came to his conclusion at paragraph 27 of the judgment. We see no error in that conclusion and therefore this first ground of appeal fails.

Second Ground

17. Mr. Ngwele argued in relation to this ground that the trial judge failed to rely on or place any weight on the evidence of Joshua Kalsakau.

18. The trial judge did record the evidence of Joshua Kalsakau at paragraphs 21 and 22 of the judgment. Against Mr. Kalsakau's evidence the judge also considered Mr. Dick Abel's evidence in paragraphs 23 and 24 of the judgment. Weighing that evidence the judge recorded in paragraphs 25 and 26 of the judgment that there was no evidence of any variation order to cater for the remaining 8, 000 cubic meters. The submissions by Mr. Ngwele that Mr. Kalsakau's evidence was unchallenged is not correct.

19. In respect to the arrears of loans with the ANZ Bank, the trial judge noted the appellant's evidence in paragraph 28 of the judgment and found the evidence falling short of providing any further documentary evidence to clarify whether the invoices issued were the company's or Mr. Kalsakau's.

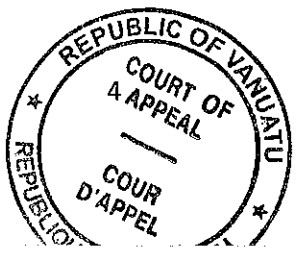
20. We find no error and therefore this second ground of appeal fails.

Third Ground

21. Finally Mr. Ngwele argued that the trial judge had erred when he raised issues not pleaded in the respondent's defence in particular, that the respondent had not raised clause 5.8 in their defence.

22. In his judgment the trial judge also quoted clause 5.9.1 of the Second Contract in paragraph 18 and further to clause 5.8 in paragraph 19.

23. The respondent raised these clauses in paragraph 2.18 of the defence in which it said:-



"...clause 5.9.1 of the second contract provides that the total payments to be made against the contract shall not exceed the contract price stated in the contract, except for changes made to the contract as provided for in clause 5.8 which does not apply to the current case."

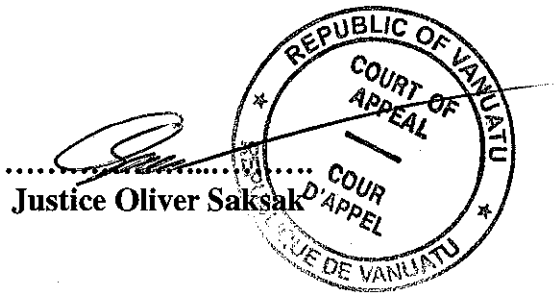
24. In light of the above defence, the appellant's argument is untenable and this ground of appeal therefore fails.

Result

25. The result is that this appeal is dismissed with costs which we fix at VT75,000 to be paid by the appellant to the respondent, being costs of the appeal.

DATED at Port Vila this 20th day of July, 2018

BY THE COURT



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Justice Oliver Saksak