

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil
Case No. 20/108 SC/CIVL

BETWEEN: KD Enterprise Limited
Claimant

**AND: Vanuatu Waikē Group International
Industrial Company Limited**
Defendant

Date of Trial: 3 September 2020
Before: Justice V.M. Trief
In Attendance: Claimant – Mrs M.G. Nari
Defendant – Mr D. Yawha
Date of Decision: 17 September 2020

JUDGMENT

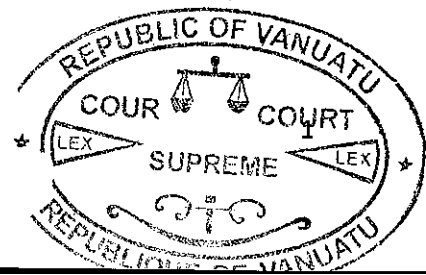
A. Introduction

1. The Claimant KD Enterprise Ltd ('KD Enterprise') supplied sand and coral aggregate to the Defendant Vanuatu Waikē Group International Industrial Company Limited ('Waikē Group'). It is seeking payment of an unpaid invoice. KD Enterprise is also seeking damages in relation to its purchase of spare parts for a Hitachi excavator owned by the Waikē Group. The parties had entered into a sale and purchase agreement for KD Enterprise to buy the excavator. That agreement was cancelled but after KD Enterprise had already purchased spare parts to repair the excavator. Waikē Group agreed to buy those spare parts and then later refused to. KD Enterprise is seeking damages for the monies it spent on the spare parts.

B. Background

2. It is undisputed that:

- KD Enterprise supplied sand and coral aggregate to Waikē Group for construction purposes for its project at Velit Bay, Santo at the agreed price of VT3,600 per cubic metre ('m³') inclusive of VAT.



- Waikē Group has not paid KD Enterprise's invoice dated 18 June 2019 for the supply of sand and coral aggregate.
- On 9 September 2018, the parties entered into a Sale and Purchase Agreement for the sale of Waikē Group's Hitachi excavator to KD Enterprise for VT4,000,000 ('S & P Agreement').
- KD Enterprise then purchased spare parts to repair the excavator.
- By email on 14 November 2018, Waikē Group cancelled the S & P Agreement and said that it would purchase the spare parts from KD Enterprise.
- On 14 December 2018, Waikē Group requested a review of the price of the spare parts.
- On or about 10 May 2019, Waikē Group refused to buy the spare parts.
- In July 2019, the parties discussed buying the excavator at a lower price if KD Enterprise would pay tax on the machine. Ultimately they abandoned that course as no import duty was ever paid by Waikē Group as it had a duty exemption.
- On 2 August 2019, KD Enterprise advised that they had bought their own excavator and no longer needed to buy the Waikē Group's machine.

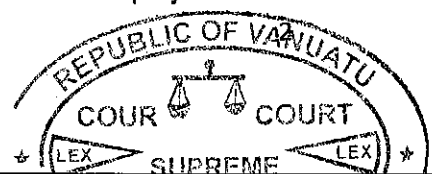
C. Discussion

Supply of sand and coral aggregate

3. The Waikē Group does not dispute that the agreed price for KD Enterprise's supply to them was VT3,600/m³ inclusive of VAT. However, the invoice for which payment is sought sets out unit prices for white and black sand of VT4,200 and VT5,500 per m³, and a unit price of VT4,800/m³ for coral aggregate. These unit prices exceed the agreed price.
4. According to the invoice dated 18 June 2019, KD Enterprise supplied 924 m³ of coral aggregate, 50 m³ of white sand (screened) and 28 m³ of black sand, totalling 1,002 m³ of sand and coral aggregate. Waikē Group did not dispute that this quantity of materials had been signed for when the materials were collected.
5. I am satisfied that KD Enterprise has proved on the balance of probabilities or that it is more likely than not that it supplied Waikē Group 1,002 m³ of sand and coral aggregate materials for which it has not been paid. At the agreed price of VT3,600/m³ inclusive of VAT, the amount that Waikē Group must pay KD Enterprise is VT3,607,200. I will enter judgment accordingly.

Purchase of spare parts for the Defendant's excavator

6. On 9 September 2018, the parties entered into the S & P Agreement for KD Enterprise to buy Waikē Group's excavator. KD Enterprise then bought spare parts to repair the excavator. Before it could repair the machine however, the Waikē Group by email on



14 November 2018, cancelled the S & P Agreement and said that it would purchase the spare parts from KD Enterprise. It expressly stated that it was aware that KD Enterprise had already bought spare parts to fix the excavator, requested an 'actual value calculation of those parts' and that it would buy the parts.

7. On 14 December 2018, Waikie Group requested a review of the price of the spare parts. On or about 10 May 2019, Waikie Group refused to buy the spare parts.
8. The parties did not ever agree the price at which Waikie Group would buy the spare parts from KD Enterprise. Accordingly, I am not satisfied that there was an agreement between the parties as to the purchase of spare parts from KD Enterprise.
9. However, I am satisfied on the facts that there was a negligent misrepresentation by the Waikie Group to KD Enterprise that it would sell it the excavator. This led to the parties entering into the S & P Agreement and then KD Enterprise purchasing spare parts to repair the excavator. Subsequently Waikie Group cancelled the S & P Agreement when it formed the view it could not sell a machine that it had imported duty-free. This resulted in KD Enterprise suffering loss as it had already expended monies on the spare parts.
10. Nowhere in the evidence before me are there any actual receipts for the purchase or shipping of the spare parts to Vanuatu. I am therefore not in a position to determine the amount of damages that the Waikie Group should pay to KD Enterprise in relation to its purchase of the spare parts. In the circumstances, I will enter judgment for KD Enterprises for damages in an amount to be determined in relation to its purchase of spare parts for the excavator.

D. Result and Decision

11. Judgment is entered for the Claimant as follows:
 - a. The Defendant is to pay the Claimant VT3,607,200 for the supply of sand and coral aggregate.
 - b. The Defendant is to pay the Claimant damages in an amount to be determined in relation to the Claimant's purchase of spare parts for the excavator.
 - c. The Defendant is to pay the Claimant interest on the judgment sums at 5% p.a. from the date of judgment until completion of payment of those sums.
 - d. Costs should follow the event. The Defendant is to pay the Claimant's costs as agreed, or taxed by the Master. Once settled, the costs are to be paid within 21 days.

DATED at Port Vila this 17th day of September 2020

BY THE COURT


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Viran Molisa Trief
Judge

