

**BETWEEN: Maltauriki Trans Ifira Development Company
Limited**
Claimant

AND: Republic of Vanuatu
Defendant

Before: Justice Aru

**Counsel: Mr. J. Ngwele for the Claimant
Mr. K. Tari for the Defendant**

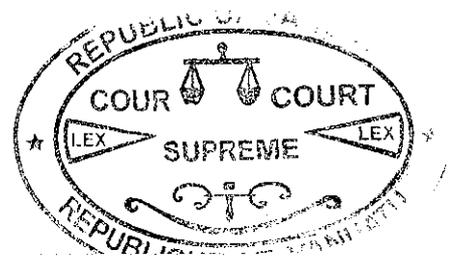
JUDGMENT

Introduction

1. This is a claim filed by Maltauriki Trans Ifira Development Company Limited (MTIDCL) against the Republic of Vanuatu. It arises out of a dispute between the parties over a contract for the supply of backfill material by MTIDCL to the new Convention Centre site. The total backfill required was 40,000m³. MTIDCL won the tender to supply the backfill material.

Background

2. In view of the timing to complete the Convention Centre project, the arrangement for the supply of 40,000m³ of backfill material was to be made in two parts. The first 20,000m³ was to be supplied in 2014. The remaining 20,000m³ was to be supplied in 2015. The agreed price for each supply of 20,000m³ was VT 35, 000, 000. On 15 December 2014 the parties entered into an agreement (the First Contract) for the supply of the first 20,000m³ of backfill for the amount of VT 35, 000, 000.



3. On 11 September 2015 the parties then entered into a further agreement on similar terms (the Second Contract) for the final supply of 20, 000m³ of backfill material which would complete the total backfill requirement of 40,000m³. Payments made by the Government to MTIDCL under the First and Second Contracts are as follows:

A. First Contract

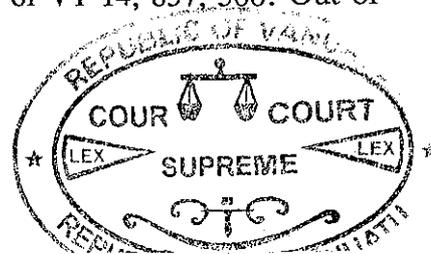
Invoice Date	Amount (VT)	Date of payment	LPO No.
17/12/14	10,500,000	22/12/14	350-01756
23/3/15	13,956,350	27/3/15	350-018023
1/6/15	12,512,500	4/6/15	350-018431

4. Under the First Contract, the total backfill supplied was 21,125m³ and MTIDCL was paid VT 36,968,850. This is not disputed.

B. Second Contract

Invoice date	Amount (VT)	Date of payment	LPO No.
	17,473,750	11/9/15	350-019003
	2,800,000	11/4/16	350-020148
	1,548,750	11/4/16	350-020185
22/5/16	7,743,750	25/5/16	350-020417
12/7/16	14,837,500	20/7/16 - VT 5,433,750	350-020716

5. Under the Second Contract, the first three payments made to MTIDCL on 11 September 2015, 11 April 2016 and 15 April 2016 amount to VT 21,822,500. It is not disputed that those payments were made. The final payment was made on 20 July 2016 in the sum of VT 5,433,750. Overall, the total payments made by the Government to MTIDCL under the Second Contract as per the LPOs issued was VT 35, 000, 000.
6. The dispute arises concerning the balance of the final Invoice issued by MTIDCL under the Second Contract on 12 July 2016 for the sum of VT 14, 837, 500. Out of



that figure, the Government paid VT 5,433,750 saying that is the final amount owed to MTIDCL to complete its legal obligations as purchaser under the contract.

Claim

7. MTIDCL alleges in the claim that it issued its invoice of 12 July 2016 to the Government in the sum of VT14, 837, 500 for the delivery of backfill and topsoil material as agreed but the Government has only made part payment with the balance still owing. The relief sought is as follows:-
- a) An order that the defendant pay to the claimant the sum of VT 9,403,750;
 - b) An order that the defendant settle all outstanding loan arrears owed by the claimant to ANZ Bank;
 - c) General Damages of VT 5,000,000 for loss of business and opportunity;
 - d) Interest at 5% per annum;
 - e) Standard costs to be taxed if not agreed;
 - f) any other orders deem fit.

Defence

8. The defendant says that the sum of VT14, 837, 500 invoiced for 10,050m³ gravel (topsoil) exceeds the agreed price in the Second Contract. It says that the meeting between Dick Abel and Joshua Kalsakau was in relation to the delivery of the left over 8000m³ backfill material to complete the 20,000m³ requirement contracted under the Second Contract. It says that in the meeting with Joshua Kalsakau, Mr. Kalsakau was informed to supply the remaining 8000m³. Thereafter, 4,425m³ was supplied on 20 May 2016 at the cost of VT 7,743,750 which was settled by the Government on 25 May 2016. The defendant says that the final amount supplied was in excess of the remaining 4,000 m³ and the amount invoiced exceeds the contract price.

Claimant's evidence

9. The claimant relies on the following sworn statements filed:-

- Sworn statement of Joshua Kalsakau in support of claim filed on 22 September 2016 [Exhibit "C1"] ; and



- Further sworn statement of Joshua Kalsakau filed on 3 March 2017 [Exhibit “C2”].

10. Mr Kalsakau was not cross examined on his evidence.

Defendant’s evidence

11. The defendant also filed and relies on the following sworn statements:-

- Sworn statement of Dick Abel in support of defence filed on 13 December 2016 [Exhibit “D1”]; and
- Sworn statement of Dorothy Erickson in support of defence filed on 13 December 2016. [Exhibit “D2”]

12. Mr Abel and Mrs Erickson were cross examined on their evidence.

Issue

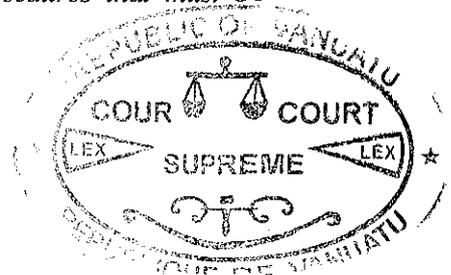
13. The main issue is twofold. First I need to consider whether the Second Contract was varied by an oral agreement or by the conduct of the parties. The answer to this first question will determine whether or not the claimant is entitled to be paid the sum of VT 9,403,750 and damages.

Law

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 proceedings are the following provisions:-

“1. Purpose

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



...

2A. 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 out of public moneys;

.....

(3) The consideration in relation to any contract, arrangement, franchise or concession must exceed VT 5,000,000.

.....

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.

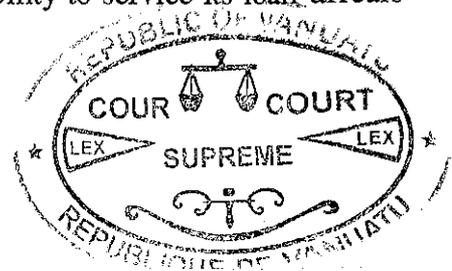
.....

7. Effect of Government Contract entered into in 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."

Discussions

15. The claimant's submissions are essentially that the parties were at liberty to vary their written contract either by conduct or by oral agreement. It was submitted that the Second Contract was varied by oral agreement and conduct of the parties and therefore the claimant is entitled to payment of the balance of its invoice of 12 July 2016. It was submitted that if the court finds that there was a breach then by means of the breach the claimant suffered damage being its inability to service its loan arrears with the ANZ Bank.



16. The defendant on the other hand submits that the Second Contract like the First is a Government Contract governed by the provisions of the GCT Act which requires that it be in writing. Any breach renders the agreement void and of no effect and will not bind the Government. It was submitted that the supply of remaining back fill material was in excess of the supply required under the contract. Furthermore, it says that the claimant was fully aware and informed of the amount required therefore the defendant was only entitled to pay for the contracted sum. It denies that it is obliged to pay the balance in the sum of VT 9,403,750.

17. The GCT Act provisions are quite specific. The purpose of the Act is to establish the rules and procedures 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. (s2A (3)). The Act therefore requires that such a contract must be in writing (s3 (1)) and the terms of such a contract may be varied or discharged in the same way (s4 (2)). Any contract entered into in breach of the Act is void and of no effect. (s7).

18. Clause 5.9.1 of the Second Contract provides as follows –

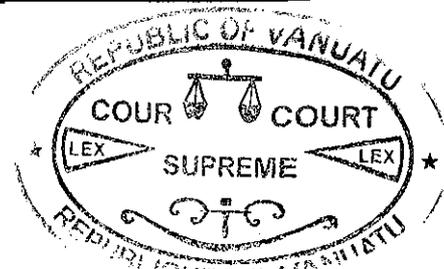
“Unit costs and / lump sum charged by the contractor for the works performed under the contract shall not vary from the Unit costs/lump sum offered by the contractor in its tender. The total payments to be made against the contract shall not exceed the contract price stated in the Contract Agreement except for changes made to the contract as provided in clause 5.8 “

(emphasis added)

19. Clause 5.8 relates to Variation Orders and specifies that:-

“(1) The construction supervisor may prepare a variation order making changes to the works, specifications, timing and /or cost of the contract and submit it to the purchaser with a brief justification for the variation, for approval to issue the variation order .

(2) The contractor may submit a written proposal to the construction supervisor requesting a variation in the works. The proposal shall include a reasonable estimate of the time and/ or of the variation as well as a brief justification for the variation .If the construction supervisor agrees to the proposal he shall submit it to the purchaser for approval to issue a variation order .



(3) After receiving approval from the purchaser, the construction supervisor shall issue the variation order to the contractor within 3 days. By signing an returning a copy of the variation order the contractor agrees to the terms and conditions of the variation order.

(4) The contractor shall in writing and within 7 days of receiving the variation order, notify the construction supervisor of any disagreement with the variation order. Any disagreement shall be settled in accordance with clause 5.14.”

(emphasis added)

20. The parties acknowledge in the contract that the purchaser being the Government accepted the quotation provided by MTIDCL for 20,000m³ of quarry for the sum of VT 35, 000, 000 including VAT.

21. Mr Kalsakau in his sworn statement Exhibit 'C1' at paragraphs 14 to 17 says:-

“14. Although the written agreement simply stated that the price of the agreement would be VT 35,000,000 for 20,000 cubic meters of material, due to the works not completed , a representative of the defendant Dick Abel Manuake verbally informed the claimant or its representative being myself to continue supplying the backfill material until the foundation and landscape work was completed .

15. The verbal Agreement was made between Dick Abel Manuake and I as representative of the claimant for the company to continue supplying backfill material until the foundation and landscape work was completed.

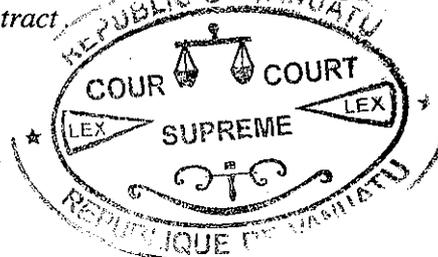
16. The defendant through its representative Jotham Napat and Dick Abel Manuake informed me to provided invoice and details of backfill materials provided and the defendant would settle the claimant's invoice.

17. I recall I had a few meetings with Dick Abel Manuake relating to the progress of the work carried out by the claimant.”

22. As noted above, Mr Kalsakau was not cross examined on his evidence. Mr Abel's evidence on behalf of the defendant is that when the amount of VT 21,822,500 was paid (via the following LPOs: 350-019003; 350-020148 and 350-020185) the total backfill material supplied out of the 40,000m³ requirement was 32,000m³. What remained was 8000m³ to reach 40, 000m³. Mr Abel says that the understanding with Mr Kalsakau was for MTIDCL to provide a further 8000m³ of topsoil to complete the contract.

23. At paragraph 14 to 20 of his sworn statement Exhibit 'D1' Mr Abel says:-

“14. Upon payment of the part of the work carried out in the sum of VT 21,822,500 Maltauriki Company Ltd had yet to provide around 8000m³ in order to complete the total 20,000m³ required under the second contract



15. On 31 March 2016, the Acting Director general of the Ministry of Infrastructure and Public Utilities sent a letter to the Director general of the Prime Minister's office that the supply of 40,000m³ of backfill material by Maltauriki Company Ltd to the project had been completed at 32,000m³ so far and accordingly sought its endorsement for the remaining 8000m³ of topsoil for planting purposes. The true copies of the letters confirming the same are attached and marked DA'9' and DA '10'.

16. I confirm that around the same time of the process of getting approval of the remaining 8000m³ of topsoil by the Prime Minister's Office, Mr Joshua Kalsakau came and met me in my office where he informed me that so far he has provided 32000m³ of work materials and that he has a remaining 8000m³ to provided and accordingly enquired as to where to place that remaining quantity. In response, I asked him to provide the remaining 8000m³ for only top soil and place such materials in front of the National Convention Centre.

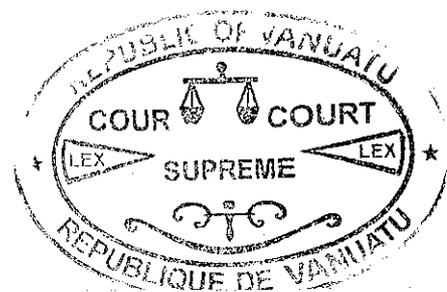
17. On 20 May 2016, the Maltauriki Company supplied 4425m³ of sand (instead of top soil as verbally agreed) for an amount of VT 7,743,750. A true copy of the invoice is attached and marked DA'12'.

18. The DFEM has settled the invoice o VT 7,743,750 through a progress report (progress report of May) that I have prepared. The true copies of the LPO and progress report are attached and marked DA'12'.

19. In the progress report of May, I have confirmed that Maltauriki Company Ltd after completing the previous quantity of delivery outlined under paragraph 18, has remaining supply of around 4000m³.

20. On 12 July 2016, Maltauriki Company Ltd issued to the State its final invoice in the sum of VT 14,837,500 for a total supply of 10,050m³.....”

24. Under cross examination, Mr Abel maintained his evidence that only 8000m³ was required. Although the first 4425m³ supplied by MTIDCL was sand rather than topsoil, the invoice was settled by the Government with LPO No 350-020417 in the sum of VT 7,743,750 [see: Exhibit “D1” - Annexure “DA11” and “DA12”]. Following this delivery, Mr Abel in his progress report of May 2016 confirmed that the remaining supply was 4000m³ yet to be delivered. When on 12 July 2016 MTIDCL issued its invoice in the sum of VT 14,837,500 for 10,050m³, he says the Government was only legally obliged to pay for 4000m³. Payment was then made in the sum of VT 5,433,750 with LPO No 350-020716 on 27 July 2016 and that completed the Government's legal obligations to pay for 40, 000 m³ of backfill material supplied by the defendant. In his July 2016 progress report Mr Abel confirmed that the contracted amount of backfill has been delivered.

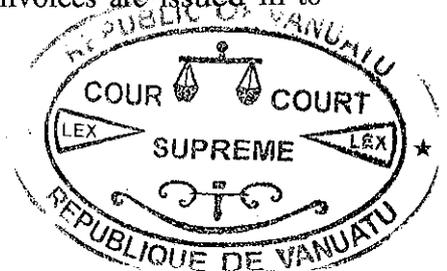


Variation of Contract

25. The Second Contract is a written contract which complies with the provisions of the GCT Act and binds the parties. Clause 5.8 of the Second Contract provides the mechanism for varying the contract. The contract can only be varied by a variation order. There is no evidence that there was a variation order issued for the variation of the Second Contract.
26. The evidence of Mr Abel given in his sworn statement and under cross examination confirms that there was no variation order made in respect of the Second Contract nor was there any variation made orally or by conduct. The remaining supply after payment of VT 21,822,500 was 8000 m³ and Mr Kalsakau was fully aware of that when they met. This is confirmed by Mrs Erickson in her sworn statement at paragraph 12 and 13. She says that when Mr Kalsakau collected the cheque for VT 5,433,750, she advised him that that was the final payment of the contract price under the Second Contract.
27. The claimant's submissions that the contract can be varied orally or by conduct are misconceived and are hereby dismissed.

Damages

28. The claim for damages as a result of the alleged breach relates to non-payment of salaries for MTIDCL employees, outstanding loan arrears with ANZ bank and outstanding debts with Bodiam Engineering Ltd. The submissions claim that the claimant is now in receivership as a result of unpaid loans with ANZ. I note that no evidence is provided of the company going into receivership or liquidation. Secondly, there is no evidence that the loan arrears with the ANZ belong to MTIDCL which is a company. Annexure JK '13' to Mr Kalsakau's sworn statement is a letter to Mr Kalsakau personally not as a Manager or Director of the claimant company and nowhere in the letter does ANZ mention that the arrears are owed by MTIDCL. Of a similar nature is the claim for outstanding debts with Bodiam Engineering Ltd. Although the statement is addressed to MTIDCL, four (4) invoices are issued in to

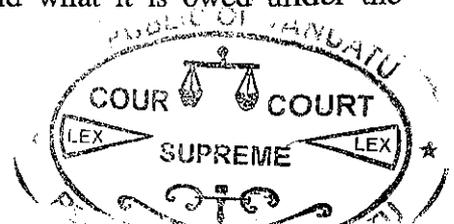


Joshua Kalsakau. No further evidence is provided to clarify whether these invoices are the company's or Mr Kalsakau's.

29. Finally, concerning the MTIDCL employees, no evidence is provided of who the five (5) employees are and how much each of them is paid in a month.

Supplementary appropriation by Parliament

30. In his evidence [Exhibit 'C1'- Annexure JK'11'], Mr Kalsakau says that Parliament has appropriated an amount of VT 14,000,000 to be paid to him for the quarry supplied to the Convention Centre. The submissions in support appear to suggest that since Parliament as the supreme law maker has enacted an Act for Supplementary Appropriation that he be paid the above amount, the Government cannot prevent payment being made to him.
31. The claimant relies on the decision of this Court in **Dovo v Attorney General** [2017] VUSC 95 to further submit that once monies are appropriated by Parliament for a specific purpose or item of expense, the Government or Prime Minister cannot defer or put a halt on such payment.
32. The defendant on the other hand submits that the claimant was paid in full pursuant to the Second Contract before the supplementary appropriation was made by Parliament. It was further submitted that the supplementary appropriation was an internal Government arrangement to replenish funds used in completing payments to MTIDCL under the Second Contract.
33. I reject the claimant's submissions that I should apply the same principle applied in **Dovo v Attorney General**. That case is distinguished on the facts from the current proceedings. The claimants in that case were not paid the increase to their salaries immediately following the GRT determination. After Parliament had appropriated funds to reflect the salary increase, the Prime Minister intervened and directed the Director General of Finance not to pay the monies appropriated to the claimants. In the current proceedings, MTIDCL has been fully paid what it is owed under the



Second Contract. The dispute over the VT 9,403,750 is only claimable if the Court were to find that the Second Contract was varied either orally or by conduct as alleged by the claimant. The claimant's submissions on that point are dismissed as discussed above.

Findings

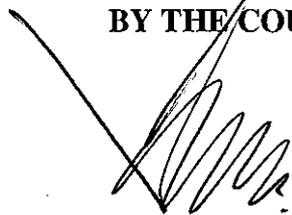
34. The claim was filed by the claimant, he bears the onus of prove with whatever evidence he provides in support of the claim. Having heard and considered the evidence, I find that there was no variation to the Second Contract. The consideration agreed for the supply of 20, 000m³ of back fill material was VT 35, 000, 000 and this amount was paid in full to the claimant.
35. Concerning the claim for damages, I am not satisfied that the evidence proves that the claimant is entitled to any damages or that the Government should settle the claimant's loan arrears with ANZ Bank.

Conclusion

36. The claim is therefore dismissed and the defendant is entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila this 29 day of March, 2018

BY THE COURT



.....
D. Aru
Judge

