



SUPREME COURT OF NAURU

IN THE SUPREME COURT OF NAURU
YAREN

Civil Case No 36 of 2015

BETWEEN

Danard Dongobir, Bless Debaue and Jamie Laeo all
of Nauru (trading as Elite Protective Services)

PLAINTIFFS

AND

Wilson Security Pty Ltd (ABN 90 127 406 295)

DEFENDANT

Before: Khan J
Dates of Hearing: 10 March, 13 September 2016
Date of Final Submission: 4 January 2017
Date of Judgment: 9 June 2017

Case may be cited as: Dongobir & others v Wilson Security

CATCHWORDS:

Contract - to supply security services - contract expired - without it being renewed - defendant gave assurances that the contract will be renewed - whether the defendant breached the contract in failing to renew the contract - claimed dismissed - as under the terms of contract defendant was entitled to terminate the contact.

APPEARANCES:

Counsel for the Plaintiffs: V Clodumar
Counsel for the Defendant: D Aingimea

JUDGMENT

INTRODUCTION

1. The plaintiffs and defendant entered a written contract for the provision of security services to the defendant who was also carrying on the business of supplying security services to its customers.

2. The contract was concluded on 1 October 2014 and was signed by the parties on or about 24 November 2014 with the commencement date of 1 December 2014. There was one week of transition period during which the plaintiffs received briefings from the defendant.
3. The term of the contract was contained in Schedule 1:

Schedule 1

Item 1	Commencement Date: (clause 1.1)	01 December 2014
Item 2	Initial Term (clause 1.1)	The contract is for an initial period of two (2) [3 was a typing error and it should read 2] months and upon written agreement shall continue through to 31 st October 2015.
Item 3	Further Term (clause 1.1)	Six (6) months extendable to a maximum of twelve (12) months.

4. In the definition section (clause 1.1) contains the following definition:
 - a) **Further Term** means the period referred to in Item 3 of Schedule 1;
 - b) **Initial Term** means the period referred to in Item 2 of Schedule 1.
5. In Clause 2 it is stated:

TERM

2.1 Term

The agreement commences on the Commencement Date and continues in full force and effect until expiry of the Initial Term, subject to:

- a) Any earlier termination of this agreement; and
- b) Any extension under clause 2.2.

2.2 Extension of Term

- a) Wilson Security may, on two occasions, elect to extend this agreement for the Further Term by giving notice to the Contractor not less than 30 days before the Term (including, as applicable a Further Term) expires.
- b) On Wilson Security giving notice under clause 2.2(a), the Term is extended for the Further Term.

6. The Initial Term came to an end on 1 February 2015 and the contract was not extended to a Further Term.

CLAIM

7. The plaintiffs filed this claim seeking special damages in the sum of \$169,800, general damages and interest thereon at the rate of 8%.
8. The defendant denies that the plaintiffs are entitled to claim any damages as the Initial Term came to an end and the contract was not extended in accordance with the provisions of clause 2.2 (mentioned above).
9. The plaintiffs allege that at the time that the contract was entered Ronald Barton who signed on behalf of the defendant mentioned that subject to the probation period of two months the contract would be extended for the maximum period of ten months; and relying on this the plaintiffs incurred expenses which were:
 - a) Recruited an additional 50 security officers over the course of December 2014, increasing the number of personnel to 82;
 - b) Entered into a long-term contract for transport with Modify Rental and Pick-N-Save Rental for a total of four vehicles with one of the vehicles from Modify Rental on a lease-purchase agreement;
 - c) Danard Dongobir terminated the long-term leases of two blocks in Location owned by him for use by Elite Protective Services as an administration office;
 - d) The blocks required renovation to convert them from living quarters into offices at the cost of \$4,000. The rental rate was \$800 per month per block (or units).
10. The Contract was terminated on 1 February 2015 by a letter from Shaun Hogan, the Acting General Manager Offshore Operations which states as follows:

Please be advised that Wilson Security is not renewing our security service contract which began 1st December 2014 with an initial contract period to the 1st February, 2015. Your employees will be required to work for your company on all shifts up to and including the last shift on the 1st February 2015.

From that date your employees will transition to Wilson Security under a temporary arrangement and will be paid by Wilson Security direct, and we kindly ask that you work with Wilson Security for the following 10 days in order to finalise any outstanding personnel transition arrangements and final payments to Elite will be based on services provided.

I would like to thank you for your work and efforts during our contract phase, and we are thankful of the professional relationship we now have together. Should the need for further services be required we will certainly consider Elite Security Services in the future, and again thanks for you and your teams effort over the last couple of months.

EMAILS

11. The plaintiffs wanted to rely on other emails prior to the termination of the contract on 1 February 2015 annexed to the affidavit of David Aingimea and the defendant objected to that on the basis that those emails were not properly adduced in evidence.
12. On 18 September 2015 Mr David Aingimea filed an affidavit on behalf of the defendant with the title 'AFFADAVIT OF DAVID AINGIMEA-DISCOVERY' and annexed thereto annexures 1 to 5. Mr Aingimea states that the affidavit was in response to an order of the Court made on 20 August 2015. I have perused the file and have not been able to locate any orders, although an application for discovery was made.
13. It seems that Mr Aingimea's affidavit was meant to be filed pursuant to Order 21 Rule 3 of the Civil Procedure Rules which reads:
 - 3(1) A list of documents made in compliance with an order under Rule 1 must be in Form No. 17 of Appendix A, and must enumerate the documents in a convenient, order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified.
 - (2) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege.
 - (3) An affidavit made as aforesaid verifying a list of documents must be in Form No. 18 of Appendix A.
14. Order 21 Rule 3 makes no provisions for the documents to be annexed to the affidavit. It only states that the documents must be enumerated in a convenient order and as shortly as possible. It is Mr Clodumar's contention that since the documents have been annexed to the affidavit of Mr David Aingimea it forms part of the record and therefore Court can view it and use it without the need for him to adduce formal evidence. Mr Aingimea disagrees with that contention and submits that the annexures cannot be used by the Court in the trial and that proper evidence must be adduced.
15. Since the annexures were annexed to the affidavit they form part of the Court record and therefore can be used by the plaintiffs as part of its case and the Court can view and use the documents (emails) in the determination of this matter.

16. The plaintiff Bless Dabuae stated that he worked closely with his counterpart of the defendant company and Ben Leslie praised them for their efforts, for the efficient and diligent work that their company was performing and stated that it reduced the number of incidents that the defendant company had to attend to.
17. The plaintiff further states that there were no significant issues until the end of January 2015 and refers to the following emails which are:
- On 29 January 2015 at 11.57am Lionel Aingimea replied to Anthony Kneipp directing him to proceed with the option of re-tender of the services;
 - On 29 January 2015 at 3.27pm Kerrin Connolly, security manager for Wilson Security at Nauru Regional Processing Centre sent an email to Ben Lesslie, Grant Moffitt, Craig Hintz, Brent Wall and Ronald Barton seeking guidance and thoughts on “unusual circumstance where we are almost being forced to terminate a provider and re-tender”.
18. The plaintiffs had a meeting with Ronald Barton and Brent Wall on 4 February 2015. Ronald Barton was questioned as to why there was a sudden change of heart and he answered that this was because of “political” pressure.

CONSIDERATION

19. Clause 22.1 provides:

This agreement may be terminated by Wilson Security:

- a) at any time by giving 10 Business Days’ notice to the Contractor;
or
- b) with notice if:
 - i) the Contractor breaches this agreement and, in Wilson Security’s reasonable opinion, the breach:
 - (a) cannot be remedied; or
 - (b) can be remedied, but the Contractor does not remedy it within 5 Business Days after Wilson Security gives the Contractor notice of the breach;
 - ii) there is a failure by the Contractor to meet the KPIs over [3] successive months;
 - iii) the Contractor enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;

- iv) the Contractor ceases, or threatens to cease, to carry on business;
- v) a receiver, receiver and manager, administrator, trustee or similar official is appointed over any of the Contractor's assets or undertakings, an application or order is made for the winding up or dissolution of the Contractor, or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the Contractor, except for the purpose of an amalgamation or reconstruction which has Wilson Security's consent; or
- vi) The Contractor fails to take out or maintain the insurances required under clause 14.

20. Clause 22 relates to breaches of contract by the contractor and when the defendant believes the breach cannot be remedied. There is no breach by the contractor, so Clause 22 is not applicable.

21. The defendant submits that there is no unlawful termination of the contract as alleged by the plaintiffs and that the agreement came to a natural end on 1 February 2015. Clause 2 is very clear in that this agreement commences on the commencement date and continues in full force until the expiry of the initial term subject to an earlier termination or an extension under Clause 2.2 (mentioned above). There has been no termination and if there was a termination then Clause 22 would have been applicable; nor has the defendant elected to extend pursuant to (Clause 2.2), so the initial term came to an end on 1 February 2015.

22. In *Nauru Security Services Inc v Nauru Rehabilitation Corporation*¹, von Doussa J considered a similar factual scenario in which the contract included an option for a possible extension of the term:

[29] I consider it is made clear by clauses 4.2 and 4.3 that what clause 4 contemplates is that towards the end of the Initial Term, the parties will discuss whether they wish to renew the contract, but that there is no right in either party to force the other into a renewal. The so called option is in reality no more than an expression of their future willingness to consider reaching a new agreement. Clause 4 imposes no obligation on either party to agree to renew the contract.

...

[36] On 28 May 2012 the legal position was, as the defendant contends: The original contract had run its full term and came to an end that day.

23. In the circumstances notwithstanding the earlier assurances given by the defendant's employees to the plaintiffs that the contact will be renewed; and

¹ [2012] NRSC 15.

notwithstanding the political interferences, the legal position was that the contract came to an end. And under the terms of the contract the defendant was not obliged to renew it.

CONCLUSION

24. The plaintiffs have failed to establish their claim and that claim is dismissed. The plaintiffs shall pay the defendant's costs.

DATED this 9th day of June 2017



Mohammed Shafullah Khan
Judge

