THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS
BEFORE H.E. JUSTICE NASSIR AL NASSER

BETWEEN

LINUX

Claimant

and

LIZETH

Defendant

Hearing : **18 July 2022**
Judgment : **27 July 2022**

JUDGMENT OF H.E. JUSTICE NASSIR AL NASSER

UPON a Hearing having been listed before H.E Justice Nassir Al Nasser on 18 July 2022, with the Claimant and the Defendant's representatives in attendance

AND UPON reading the submissions and evidence filed and recorded on the Court file

IT IS HEREBY ORDERED THAT:

1. The Claimant's claim shall be dismissed.

2. There shall be no order as to costs.

Issued by:
Ayesha Bin Kalban
SCT Judge and Registrar
Date of Issue: 27 July 2022
At: 4pm

THE REASONS

Parties

1. The Claimant is Linux (the "Claimant"), a company registered and located in Dubai, UAE.

2. The Defendant is Lizeth (the "Defendant"), a company registered and located in Dubai, UAE.

Background and Procedural History

3. The underlying dispute arises over a Software Development Agreement dated 15 March 2021signed by the Claimant and the Defendant (the "Agreement"). The parties also signed a Non-Disclosure Agreement (the "NDA") on 16 February 2021.

4. On 14 June 2022, the Claimant filed a claim seeking payments owed to the Claimant by the Defendant in the amount of AED 132,500 it in light of the Defendant's alleged breach of contract.

5. On 20 June 2022, the Defendant filed an Acknowledgment of Service setting out its intention to defend the entirety of the Claim.

6. The parties met for a Consultation with SCT Judge Hayley Norton on 24 June 2022 but were unable to reach a settlement.

7. In line with the rules and procedures of the SCT, this matter was referred to me for determination, pursuant to a Hearing held on 18 July 2022, at which the Claimant and the Defendant's representatives were in attendance.

Claim

8. The Claimant submits that the parties entered into a Software Development Agreement dated 15 March 2021signed by the Claimant and the Defendant (the "Agreement"). the parties also signed a Non-Disclosure Agreement (the "NDA") on 16 February 2021 for services related to developing an e-commerce and restaurant management platform ("Platform").

9. The Claimant made a payment of AED 32,500 towards consideration of the above-mentioned services.

10. The Claimant submits that the Defendant delivered a copy of a platform available for sale by a third-party developer instead of developing an original platform from scratch as was promised to the Claimant. The Claimant therefore takes the position that the Defendant breached the Agreement by delivering services that fail to meet the Claimant's requirements.

11. The Claimant submits that the Defendant's breach of the Agreement and delivery of the copied platform caused the Claimant loss of vendors, partnerships and income amounting to substantial loss.

12. The Claimant also submits that the Defendant put the Claimant at risk of third-party claims for damages by delivering a copied platform which violates the copyrights of the third-party developer. Furthermore, the Claimant adds that the Defendant delivered the copied platform without purchasing a valid license for the same from the third-party developer, thereby affecting the security of the delivered platform and of the Claimant's data which is a violation of various UAE and international Laws.

13. Therefore, the Claimant filed a claim in the DIFC SCT seeking an order:

a. Obligating the Defendant to refund the amount of AED 32,500 and damages of AED 100,000 for breach of the Agreement and the NDA.

b. Obligating the Defendant to pay legal costs, expert fees and attorney fees.

c. Providing any other relief which the tribunal may deem fit and proper in favour of the Claimant.

Defence

14. The Defendant submits that it had dedicated a team for the development of a customised software for the Claimant by integrating two modules of e-commerce and restaurant management.

15. The Defendant submits that it clearly informed the Claimant that it had a few readily available software solutions which are common for the industry in which the Claimant operates and submits that the Claimant was aware of the availability of said softwares, as evidenced by a WhatsApp chat dated 16 February 2021. The Claimant, for reasons unknown to the Defendant, asked the Defendant within one month of the Agreement, to handover whatever material was ready with the Defendant. The Defendant then proceeded to hand over the partially completed software to the Claimant, which was a beta version of the developed software based on a licensed software, in addition to all data and information requested by the Claimant. The Defendant submits it did not request further payment from that point, and no communication was made between the parties with the exception of uploading the software and its link on the Claimant's website which, the Defendant submits, was completed as requested.

16. The Defendant submits that it delivered a software solution developed from an existing licensed software with the Defendant after integrating it with the Claimant's requirement within one month of the date of the Agreement. This deliverable was only one part of total 6 planned tasks, as against the total contractual period of 2 years of project cycle.. The Defendant submits that the Claimant requested the immediate delivery of finished or unfinished product, which the Defendant proceeded to do. The Defendant continues that the Claimant then proceeded to hand over the unfinished product to another software developer, in breach of the Agreement. The Defendant takes the position that it is owed payment in light of the resources it allocated for the project agreed by the parties..

17. The clause 2, sub-section 4 reads as follows:

> ," The Client shall provide to the Developer written notice of its finding that the Software conforms to the Specifications within 3 days of the Delivery Date (the "Acceptance Date") unless it finds that the Software does not conform to the Specifications as described in Section 2(A) herein".

18. The Defendant relies on the above clause in taking the view that the Claimant's claim must be dismissed in light of the fact that the Claimant was aware that the product was unfinished and required further testing and development.

19. The Defendant submits that the use of a third-party developed software - for which the Defendant has a license and an understanding to use - was not prohibited under the Agreement. The Defendant states that there is no condition in the Agreement to develop an altogether new software from the scratch and the Claimant has made an invalid submission in this regard. The Defendant submits that the Claimant has breached the Agreement by asking the Defendant to hand over the incomplete project as it was to the Claimant, and thus submits that the Defendant is entitled to damages for loss of anticipated profit and committed expenditure on the team which was committed for this project. The Defendant relies on an Expert Technical Report dated 28 August 2021 which reinforces that a third-party software has been used for developing the trial software for which the Defendant had a license and understanding with the said third party to use the software as a base to develop any further customised software, and thus submits that the Claimant cannot object to the use of third-party software to develop the software in question.

20. The Defendant submits that it has not breached the Agreement and it is the claimant who breached the agreement. The Defendant submits that the Claimant's allegation of loss of vendors, partnerships and income amounting to substantial loss supported by a copy of a Loss Event Report dated 30 June 2021 is totally denied. The Defendant submits that the Claimant's allegation that it is at risk for third-party claims being filed against it for violation of copyrights belonging to the third-party developer is unfounded and there is no evidence on record for such loss, and submits that damages cannot be assessed by the Court without evidence of such loss being incurred.

21. The Defendant summarises the above by submitting that:

a. The Claimant's claim is founded on false and unfounded allegations.

b. The Claimant has failed to evidence any breach of the Agreement.

c. The Defendant is eligible for compensation for a breach of Agreement on the part of the Claimant.

Discussion

22. The parties are non-DIFC registered companies who opted-in to the Jurisdiction of the DIFC as per clause 10 of the Agreement which provides the following: "This Agreement shall be governed by the laws of the Dubai International Financial Centre and DIFC Courts ("DIFC"). If any dispute, claim, controversy or difference between the parties arises out of or in connection with this Agreement, including any question regarding its existence, validity, interpretation or termination ("dispute"), then a notice of dispute shall be served by one party on the other party, and the parties shall use their best endeavours to resolve the dispute. If the parties do not resolve the dispute on amicable terms within the period of thirty (30) days from the date of deemed receipt of the Notice of Dispute in accordance with clause 18, then the parties agree that the Courts of the Dubai International Financial Centre shall have exclusive jurisdiction to finally determine the dispute".

23. There are three main issues to be discussed to reach a conclusion on the dispute between the parties. The issues are as following:

a. Whether the Defendant breached the Agreement;

b. Whether the Defendant breached the NDA; and

c. Whether the Claimant is entitled to damages.

Breach of the Agreement

24. The Claimant submits that the Defendant breached the Agreement by delivering a copy of a platform available for sale by a third-party developer instead of developing an original platform from scratch as was promised to the Claimant. The Claimant submits that the Defendant therefore, breached the Agreement by delivering services that do not meet the Claimant's requirement.

25. The Claimant also submits that the Defendant failed to provide the Claimant with the license of the third-party upon delivering the software which amounts to a breach and might put the Claimant at risk of copyright claims with the third-party.

26. The Claimant further submits that the Defendant was in breach of clause 7.2 of the Agreement which provides the following: "for any paid library, developer will take permission from the client. In case of any premium or paid library, client will provide the license and bear the service costs".

27. The Defendant in response provides that there was no condition in the contract to develop an altogether new software from the scratch. The Defendant submits that it had clearly informed that it was in possession of a few readily available software solutions suitable to the Claimant's industry.

28. The Defendant delivered a software solution developed from an existing licensed software with the Defendant after integrating it with the requirement of the Claimant within one month of the date of the Agreement. This deliverable was only one part of total 6 planned tasks

29. The Claimant failed to provide evidence that it had provided the Defendant with a written notice that the software conforms to the specification within 3 days of the delivery date as set out in Clause 2 of the Agreement. I am of the view that this means the Claimant accepted the handover of the product that was ready at that time. Therefore, I find that there is no breach of the Agreement as alleged by the Claimant.

Breach of the NDA

30. Clause 5 and 6 of the NDA provide the following:

Clause 5:

"Neither Party will, without prior approval of the other party, make any public announcement of or otherwise disclose the existence or the terms of this Agreement."

Clause 6:

"this Agreement contains the entire agreement between the Parties and in no way creates an obligation for either party to disclose information to the other party or to enter into any other agreement. this agreement is valid for 50 years after the signing date."

31. The Claimant submits that the Defendant have clause 5 and 6 of the NDA by disclosing confidential information pertaining to the nature of the Project to the third-party developer, for obtaining the submitted non-objection certificate.

32. The Claimant upon filing the claim argued that the Defendant by using a Third-party software put the claimant at risk of a potential copyright claim from the Third-party. Therefore, upon the Defendant submitting that the third-party software is purchased by the Defendant and the Claimant can use the software, the Court directed the Defendant provide a non-objection certificate which would indemnify the Claimant from any claims arising out of the use of the software. As this was done under my directions, I find that there has been no breach of the NDA.

33. Furthermore, the Claimant provides that the Defendant further breached the NDA by placing the platform delivered to the Claimant on a public link, thereby jeopardising the database of the Project as well as placing the Claimant's confidential information at risk of being accessed by any third party. Furthermore, the Claimant submits that the Defendant sent an email on 30 April 2021, wherein it offered to prepare and submit a demonstration video to the Claimant, despite having previously claimed to have deleted the Claimant's confidential information post the handover and termination of the Agreement.

34. As per the WhatsApp conversation submitted by the parties, the Claimant and the Defendant were discussing the demonstration to make it clear for the Claimant in relation to the functions of the software. Therefore, I am not sure how this amounts to a breach of the NDA when the Claimant at the WhatsApp conversation was discussing, requesting and seeking the Defendant's help.

35. In relation to the platform delivered on a public link, the evidence provided does not show any database except an empty page on the Claimant's website.

36. Therefore, I find that the Defendant did not breach the NDA.

Damages

37. The Claimant failed to convince the Court of any breach and failed to provide sufficient evidence to establish a breach. Since no breach has been found, the Claimant is not entitled to damages in the sum of AED 100,000 as claimed.

Conclusion

38. In light of the aforementioned, the Claimant's claim shall be dismissed.

39. There shall be no order as to costs.