

IN THE HIGH COURT FOR ZAMBIA

2011/HK/08

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(Civil Jurisdiction)

B E T W E E N:

**PANORAMA ALARM SYSTEM AND
SECURITY SERVICES**

PLAINTIFF

AND

**KING QUALITY MEAT PRODUCTS LIMITED
DEFENDANT**

**Before Mrs. Justice Judy Z. Mulongoti in Open Court on
the 27th day of January 2012**

**For the Plaintiff : Mr. C. Kaela of Katongo &
Company**

**For the Defendant : Mr. C. Sianondo of
Malambo &**

Company.

J U D G M E N T

CASES REFERRED TO:

1. *RATING VALUATION CONSORTIUM & DW ZYAMBO & ASSOCIATES VS. LUSAKA CITY COUNCIL & ZAMBIA NATIONAL TENDER BOARD* [2004] ZR 109
2. *MUSHEMI MUSHEMI VS. THE PEOPLE* [1982] ZR 71
3. *PERRY VS. SUFFIELD'S LIMITED* [1916] 2 Ch. D. 189

4. *DAVIES VS. SWEET* [1962] 2QB 300
5. *HANAK VS. GREEN* [1958] 2QB 23
6. *BROGDEN VS. METROPOLITAN RAILWAY COMPANY* [1877] 2 APP. CAS. 666
7. *SMITH VS. HUGHES* [1871] LR 6QB 597
8. *GALAUNIA FARMS LIMITED VS. NATIONAL MILLING* [2002] ZR 135 [HC]

The Plaintiff has sued the Defendant for refund of K28,492,800.00 which was withheld on a contract between them for provision of guards.

According to the Amended Writ of Summons, the Plaintiff's claim is for

- (i) A declaratory order that a guard service contract subsisted between the Plaintiff and the Defendant on terms and conditions espoused by the Plaintiff
- (ii) Damages for breach of contract
- (iii) Refund of the sum of K28,492,800.00 withheld by the Defendant.

In its statement of claim, the Plaintiff alleged that it prepared a standard formal contract which was sent to the Defendant for execution. The Defendant did acknowledge receipt of the contract but never returned it to the Plaintiff. Later it unilaterally commenced deductions from the monies due to the Plaintiff. Hence, the Plaintiff's claim for refund and damages for breach of contract.

For its part, the Defendant filed a defence and counter claim. It averred that the standard contract it received related to Dar Farms & Transport Limited not the Defendant. Although it admitted that there was an oral contract with the Plaintiff to offer security services to the Defendant.

The Defendant further averred that it was agreed that due to thefts occasioned by the involvement or negligence of the Plaintiff's employees, the costs of stolen goods be deducted from monies due to the Plaintiff. The Defendant had the right of set off.

According to the Defendant the value of goods stolen was K167,851,000.00 which it counter claims from the Plaintiff.

In support of its case, the Plaintiff called three witnesses.

PW1 **FORENCE NKAKA LWARA**, An Accountant with the Plaintiff informed the Court that the Plaintiff provides security services all over Zambia. She testified that the Plaintiff provided security guards at the Defendant's premises in Kafue and Lusaka from April 2010 to

December, 2010. The arrangement was one security guard for day and night in Kafue. For Lusaka, it was one corporal for day and a dog handler for the night.

The Plaintiff would send invoices to the Defendant when payments were due and these were initially paid for in full. Later the Defendant stopped paying in full and would send payments with deductions as pages 6 to 10 of the Plaintiff's Bundle of Documents would show.

The Court heard that these deductions were never agreed upon. PW1 also testified that some invoices were never paid for to-date. These were invoices exhibited on pages 2,34 and 5 of the Plaintiff's Supplementary Bundle of Documents. At page 2 was an invoice for rapid response at Mumbwa for K696,000.00, page 3 was a Credit Note for the Invoice at page 2 but due to duplication, there was a cancellation. The Credit Note is K348,000.00 and thus page 2 should be K348,000.00 not K696,000.00.

The Invoice at page 4 was for December 2010 rapid response for K348,000 and page 5 was an invoice for security services for December 2010 at K5,324,400.00.

According to PW1, these invoices were sent to the Defendant but it neglected to pay.

According to PW1, the total due to the Plaintiff including the deductions was over K28 Million.

When cross examined, PW1 testified that the contract on page 21 of the Defendant's Bundle was between the Plaintiff and Dar Farms Limited. She testified that paragraph 2 (iii) of the contract read rapid response for Dar Farms and King Quality at K348,000.00.

When referred to page 2 of the Plaintiff's Bundle, PW1 confirmed that the contracts were different because the one at page 2 did not have a Panorama Stamp like the one at page 21 of the Defendant's Bundle. She also confirmed there was no signed written contract between the Plaintiff and the Defendant. When she was asked to add the total deductions, PW1 said it came to K22,473,000.00.

PW1 also confirmed that the letters from police show that there were thefts at the Defendant's facilities guarded by the Plaintiff.

PW2 **FRANK MCCULLY** the Plaintiff's Managing Director testified that the Plaintiff entered into an agreement with the Defendant for security guards services in Lusaka and Kitwe. The contract was initiated under Dar Farms with a clause in that contract that included the Defendant.

PW2 testified that this contract was in writing stating the number of guards to be provided to Dar Farms and other services to the Defendant.

Although the Plaintiff was supplying security services to both Dar Farms and the Defendant, it invoiced Dar Farms. Later, the Defendant requested for separate invoices in its name. This prompted the Plaintiff to issue a second contract in the Defendant's name which was the same as for Dar Farms. PW2 identified the contract as the one at page 2. The Plaintiff then reduced the number of guards for Dar Farms and put them on the Defendant.

In June 2010, PW2 got to learn that the Defendant was not paying for services in full. He sent a missive to the Managing Director of Dar Farms who is also Managing Director for the Defendant over the same. There was no response and the Plaintiff made attempts to recover the monies deducted but all in vain.

PW2 sent another missive in November/December 2010 advising the Defendant that the contract would be terminated within 48 hours if payment was not made in full. Then the Defendant wrote to the Plaintiff advising that the contract stipulated that it gives 30 days notice before termination. PW2 obliged with this letter and intimated that this confirmed existence of a contract. PW2 responded to the Defendant's lawyers advising that any claims for liability had to be proved negligent.

Further that the claims should be in writing within 14 days and liability was limited to 1,000 United States Dollars. He testified in relation to the counterclaim and Amended Defence, that the Plaintiff had not been proved negligent but he admitted that he was aware of the thefts.

In cross examination, PW2 testified that the Defendant refused to sign the standard contract. When further cross examined, PW2 testified that the contract at page 21 of the Defendant's Bundle and the one at page 2 of the Plaintiff's Bundle were the same except the writing was different. He admitted that the contract at page 21 was between the Plaintiff and Dar Farms; and that he had no proof that the contract at page 2 was delivered to King Quality, the Defendant herein.

PW3 **STEVEN JAMES MCCULLY** the Plaintiff's Lusaka Director, testified that the Plaintiff was approached by Dar Farms to provide eleven security guards. A contract was signed between the two and the Plaintiff had to provide security to the Defendant as well. He said the contract at page 21 was between the Plaintiff, Dar Farms and the Defendant.

It was PW3's testimony that initially the Plaintiff thought it was dealing with one company ie Dar Farms but it later turned out to be two. PW3 then arranged for another contract to be signed with the Defendant.

The contract on page 2 of the Plaintiff's Bundle was sent to the Defendant but it refused to sign because the liabilities were low. The Plaintiff refused to increase the liabilities. Later, PW2 learnt of the deductions the Defendant was making on monies owed due to thefts. This forced the Plaintiff to institute these proceedings.

In relation to the counter claim PW3, testified that he never agreed to the deductions.

In cross examination, PW3 testified that the Defendant refused to sign the contract because the liabilities were low.

The Defendant called one witness **AMMAYAPPAM ARJUNAN** its Financial Controller, hereafter DW. DW testified that sometime in March 2010, the Defendant approached the Plaintiff to provide security services under rapid response for its operations in Lusaka and Kafue.

On 9th March 2010, the Plaintiff sent two quotations showing rate per month plus VAT, one for Lusaka operations and the other for Kafue. Two quotations were sent because VAT was fully claimable in Kafue and partially in Lusaka. The Defendant accepted the quotation and asked the Defendant to provide security services effective 1st April, 2010.

Later the Plaintiff sent a contract for Dar Farms and not for the Defendant. DW denied ever receiving the contract at page 2 of the Plaintiff's Bundle.

The Court heard that after two months, on 20th and 21st June, 2011, the Plaintiff's guards broke into the Defendant's factory and stole meat casings worth K30 Million. One of the guards was still on the run and the

others were in police custody. That several thefts occurred thereafter.

At the Kafue Plant, the guards stole 140 metres of Zesco cable and the matter was reported to the police as pages 2 and 3 of the Defendant's Bundle revealed. This culminated in a meeting between PW3 and the Managing Director for the Defendant at which it was agreed that the costs of stolen goods be recovered from monies due to the Plaintiff.

Later, the Plaintiff threatened to terminate the contract because of the deductions. Hence these proceedings. He told the Court that the Defendant is counter claiming K139,706,665.00 being the value of stolen items less the Plaintiff's claim..

In cross examination, DW testified that the two quotations the Plaintiff sent had not been exhibited in Court. He also confirmed that the quotation did not have any terms written on it. He also admitted that the Plaintiff did inform the Defendant that the terms and conditions of providing security services were in a contract.

He further testified that the contract at page 21 was for provision of five guards for Dar Farms but the Plaintiff

made a mistake thinking it was for two companies. He said he did not know if there was a mistake in the number of guards. He reiterated that the contract was for Dar Farms and it was a mistake to bring in the Defendant. He admitted that according to the letter on page 1 of the Defendant's Bundle, police investigations have not been concluded regarding the theft of meat casings. In a nutshell that was the case for the Defendant.

The Plaintiff's counsel has submitted that the Court should make a declaratory order that a guard services contract subsisted between the Plaintiff and the Defendant on the terms and conditions espoused by the Plaintiff. He urged the Court to follow the Supreme Court decision in **RATING VALUATION CONSORTIUM & DW ZYAMBO & ASSOCIATES VS. LUSAKA CITY COUNCIL & ZAMBIA NATIONAL TENDER BOARD (1)** that the approach of analyzing the process of reaching business relations in simplistic terms of offer and acceptance, gives rise to complications. What is required is for the Court to discern the clear intention of the parties to create a legally binding agreement.

Mr. Kaela has also submitted that the Defendant withheld K28,492,000.00 due to the Plaintiff. According to learned counsel, the Defendant ought to prove that the

Plaintiff sanctioned the deductions. He cited **MUSHEMI MUSHEMI VS.THE PEOPLE (2)**.

Regarding the counter claim, Mr. Kaela contends that the Defendant has failed to prove negligence. He quotes *WINFIELD & JOLOWICZ on Tort*, as authority that criminal conviction is regarded as proof of negligence.

On behalf of the Defendant, learned counsel, submits that the common thread that runs through the evidence of PW2, PW3 and DW is that the parties agreed on the quotation and services were supplied. Later, the standard contract was sent which the Defendant did not sign.

Mr. Sianondo submits that the contract was brought after a binding contract had been concluded. The case of **PERRY VS. SUFFIELD'S LIMITED (3)** and **DAVIES VS.SWEET (4)** were cited as authorities that once it is shown that there is a complete contract further negotiations between the parties can not, without the consent of both parties get rid of the contract already arrived at.

It is learned counsel's submission that at the time a quotation was sent by the Plaintiff to the Defendant which accepted it, a valid and complete contract was entered

between the parties. He argues that the Plaintiff should pay the Defendant the sum of K139,706,665.00 being the difference between K28,144,400.00 claimed by the Plaintiff and K167,851,000.00 claimed by the Defendant.

Accordingly, that the debt was a mutual debt and the Defendant had a right to set off in that manner. The case of **HANAK VS. GREEN (5)** was cited as authority.

After compendiously analysing the evidence and the submissions, the issues that arise for determination are:

- (i) Whether the contract on page 2 of the Defendant's Bundle is legally binding on it*
- (ii) Is the Defendant bound by estoppel to pay in full for the guard services provided by the Plaintiff?*
- (iii) Whether the Plaintiff's guards were negligent in executing their duties to the Defendant*

It is not in dispute that the Plaintiff and the Defendant entered into an agreement for security guard services. The Plaintiff sent a quotation to the Defendant which was accepted. Later, a contract was sent but the Defendant refused to sign because the Plaintiff's liability was low ie 1,000 United States Dollars.

It is also not in dispute that despite the contract not being signed, the Plaintiff provided security guards at the Defendant's premises in Kafue and Lusaka from April, 2010 to December, 2010.

Between June and July, the Defendant experienced some thefts. This prompted it to make partial payments to the Defendant by deducting 50% to cover the cost of stolen items. This is what led to these proceedings. The Plaintiff contends that it was wrong for the Defendant to deduct some monies because the standard contract was clear that its liability shall not exceed 1,000 United States Dollars. The Defendant insists that the contract is not binding on it because it never received it nor did it sign.

Is the standard contract with its terms and conditions binding on the Defendant? I tend to think so. It is noteworthy that the Defendant admits that the contract with the Plaintiff was within the Dar Farms contract. DW confirmed this and even testified that the Plaintiff had made a mistake. The evidence also reveals that invoices were sent to the Defendant in its name after it requested. According to PW2 and PW3, it was at this stage that the Plaintiff sent the contract at page 2 to the Defendant for execution. The Defendant refused to sign due to low

liabilities. I accept the Plaintiff's version of what transpired because it is corroborated by the documents on record.

In the case of **BROGDEN VS. METROPOLITAN RAILWAY COMPANY (6)**, Mr. Brodgen, the chief of a partnership of three, had supplied the Metropolitan Railway Company with coals for a number of years. Brodgen then suggested that a formal contract should be entered into between them for longer term coal supply. Each side's agents met and negotiated. Metropolitan's agents drew up some terms of agreement and sent them to Brodgen. Brodgen wrote in some parts which had been left blank and inserted an arbitrator who would decide upon differences which might arise. He wrote "*approved*" at the end and sent back the agreement documents. Metropolitan's agent filed the documents and did nothing more. For a while both acted according to the agreement document's terms. Then some serious disagreements arose, and Brodgen argued that there had been no formal contract actually established.

The House of Lords held that **"a contract had arisen by conduct and Brodgen had been in clear breach, so he must be liable."**

Going by this case, it is clear that in the case in casu, there is a binding contract. The conduct of the parties

reveals that they acted in accordance with the terms of the contract and the Defendant is therefore liable.

I do not agree that the quotation which has not even been exhibited in Court and which according to DW had no terms attached to it, formed the contract.

It is obvious to me that at the time the Plaintiff started providing security guard services to the Defendant in April 2010, it was aware of the contract together with the terms and conditions as the contract was within the one for Dar Farms. Later the contract for the Defendant was sent. The Defendant did not like the terms and attempted to make a counter offer by negotiating for an increase to the Plaintiff's liability which was limited to 1,000 United States Dollars but the Plaintiff refused. The Defendant then went ahead to accept the Plaintiff's security guard services for almost nine months and even paid for them.

Accordingly I find that the contract is binding on the parties. I am also fortified by the case of **RATING VALUATION CONSORTIUM & DW ZYAMBO & ASSOCIATES VS. LUSAKA CITY COUNCIL**, supra, as argued by Mr.Kaela.

It is my considered view that the defendant is also bound by estoppel. In **SMITH VS. HUGHES (7)**, per Blackburn J. **“if whatever a man’s real intention maybe, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”**

I am also persuaded by the case of **GALAUNIA FARMS LIMITED VS. NATIONAL MILLING (8)** in which the High Court observed that **“the basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular set of affairs another has taken to be settled or correct”**.

It follows therefore that the defendant is liable to pay in full for the services it received from the plaintiff in accordance with the contract. The claim for refund of monies deducted is thus successful. There is also the claim for unpaid invoices for K5,324,400.00 for security services for December, 2010. According to the Plaintiff, it provided security to the Defendant’s premises up to the end of December, 2010 in accordance with advice from the Defendant’s advocates as letter on page 1 of the Plaintiff’s

Bundle reveals. The letter at page 12 of the Defendant's Bundle also reveals that the contract between the parties was terminated on 31st December, 2010. The Defendant is thus liable to pay for security services for December 2010 at K5,324,400.00.

Regarding the unpaid invoices on pages 3 and 4 for K384,000.00, PW1 testified that these were for rapid response in Lusaka. The Defendant did not deny these claims, accordingly it must pay. Thus the claim for K28,492,000.00 is successful.

The claim for damages for breach of contract was not substantiated at trial. There was no evidence adduced to prove this claim. It is therefore unsuccessful.

Regarding the counter claim, it is noteworthy that PW2 testified that when claims of losses are received, the Plaintiff informs the police and a docket is opened. Once it is proved that the Plaintiff was negligent then it will pay in accordance with the contract which limits its liability to 1,000 United States Dollars.

PW1 did testify in cross examination that the letter from the police at page 1 of the Defendant's Bundle reveals that the suspects that stole the meat casings valued at K30

Million were in police custody and that the Plaintiff's guard who was on duty was on the run.

In relation to the cables, PW1 testified in cross examination that the Police Report on page 2 of the Defendant's Bundle shows that the guard left the point of guarding and cables worth K137,851.065.00 went missing

I have perused both letters from the police. The question that begs an answer is: *Were the guards negligent? Can I infer that the guard on the run was negligent including the one who left the point of guarding?* I tend to think so.

I note that that the security guard who left his point of guarding after being questioned about the power cut, left on the pretext of going to collect a charger. He never returned. The other one is still on the run. On the balance of probability, I find that the two guards were negligent or misconducted themselves for which the Plaintiff is liable.

I am therefore inclined to allow the counter claim. The Plaintiff is thus liable in accordance with the contract ie to pay 1,000 United States Dollars.

In sum, the Plaintiff is successful in its claim for K28,492,000.00 for monies deducted by the Defendant and for unpaid invoices. I order the same to be paid with interest

at short term deposit rate from date of issuance of the writ till date of Judgment and thereafter at Bank of Zambia lending rate till full payment.

The counter claim is equally is successful and the Plaintiff is liable in accordance with the contract.

Each party to bear own costs. Leave to appeal is granted.

Delivered at Kitwe this.....day of.....2012

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Judy Z. Mulongoti
JUDGE