

**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)**

2011/HK/07

B E T W E E N:

**PANORAMA ALARM SYSTEM & SECURITY
SERVICES LIMITED**

PLAINTIFF

AND

**DAR FARMS & TRANSPORT LIMITED
DEFENDANT**

**Before Justice Mrs. Judy Z. Mulongoti on the 20th day
of January, 2012**

**For the Plaintiff : Mr. C. Chanda and Mr. C. Kaela
of**

Katongo & Company

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

Company

JUDGMENT

CASES REFERRED TO:

1. *RATING VALUATION CONSORTIUM & DW ZYAMBO & ASSOCIATES
(suing as a firm) VS, THE LUSAKA CITY COUNCIL & ZAMBIA NATIONAL
TENDER BOARD (2004) ZR 109*
2. *MUSHEMI MUSHEMI VS. THE PEOPLE(1982) ZR 71*

3. *PERRY VS. SUFFIELDD'S LIMITED*(1916) 2 CH.D 189,192
4. *DAVIES VS. SWEET* (1962) 2QB 300
5. *WILSON MASAUSO ZULU VS. AVONDALE HOUSING PROJECT LIMITED*
(1982) ZR 172
6. *KHALID MOHAMED VS. THE ATTORNEY GENERAL* (1982) ZR
7. *DAVIS JOKIE KASOTE VS. THE PEOPLE* (1977) ZR 75
8. *HANAK VS. GREEN* (1958) 2QB 23
9. *BROGDEN VS. METROPOLITAN RAILWAY COMPANY* (1877) 2 APP. CAS
666
10. *SMITH VS. HUGHES* (1871) LR 6QB 597
11. *GALAUNIA FARMS LIMITED VS. NATIONAL MILLING*

By a writ of summons and statement of claim filed in the District Registry at Kitwe, the plaintiff is seeking an order for damages and refund of K27,905,117.44 which the defendant has neglected to pay.

According to the plaintiff, there was a guard service contract entered between the parties for the provision of security services which the defendant dispute. The plaintiff thus seeks a declaratory order that a guard service contract subsisted between the parties and refund of K27,905.117.44 withheld by the defendant. The amount was actually deducted by the defendant from invoices submitted for payment.

The writ of summons was later amended to include a claim of K3,428,065.44 for unpaid invoices of guard services

rendered. The plaintiff is also seeking damages for breach of contract.

For its part, the defendant filed a Defence and Counterclaim in which it averred that the standard formal contract it received from the defendant was unacceptable and it refused to sign it. The defendant was consequently informed of its refusal to sign.

The defendant further averred that the plaintiff proceeded to provide security service on some agreement which was independent of the unsigned contract. The defendant denied owing the plaintiff any monies and averred that a meeting was held with the plaintiff's S. McCully, where it was agreed that due to thefts occasioned or by the involvement or negligence of the plaintiff's employees, the cost of stolen goods be recovered through deductions. Thus there was no outstanding amount as claimed as the same had been set off against the stolen and negligently lost property through the acts of the plaintiff.

The defendant counterclaims from the plaintiff the sum of K27,986,000.00 being the value of the goods stolen.

In support of its case, the plaintiff called three witnesses. **PW1 FLORENCE NKAKA LWARA** testified that

as an Accountant in the plaintiff's employ, she was responsible for preparing invoices, payments, paying VAT to Zambia Revenue Authority etc. She informed the Court that the plaintiff offered security services in the form of guards, rapid response alarm, electric fences and cashing in transit.

According to PW1 from April 2010 to December 2010, the plaintiff provided security services at the defendant's premises in Lusaka and Kitwe per page 4 of the Plaintiff's Bundle of Documents. The services provided in Kitwe were one guard for daytime and one guard plus a dog for the evening. For Lusaka, it was one corporal in the day and a guard plus a dog in the night. The services in Kitwe were Two Million Kwacha per month and Six Million Kwacha per month for Lusaka.

The Court heard that contract forms were sent to the defendant for signing but these were never signed. PW1 inquired from the defendant's financial controller as to why the contracts were not signed and she was informed that it was because the liabilities were low.

When the plaintiff invoiced the defendant for services provided, it deducted some monies claiming it was due to thefts. It was PW1's testimony that only one invoice was paid in full. PW1 said she was aware of the deductions

through the payment vouchers as exhibited in the Defendant's Bundle of Documents, pages 11 to 15. She said the amounts deducted amounted to K27,751,000.00.

PW1 also testified that apart from the monies deducted, there was also monies owing from unpaid invoices for services provided. She said pages 5 and 6 of the Plaintiff's Supplementary Bundle of Documents showed invoices that had not been settled.

In cross examination, PW1 testified that the contract on page 4 of the plaintiff's Bundle of Documents and the one at page 24 of the Defendant's Bundle of Documents were the same contract that was sent to the defendant except the dates and amounts were different. She also testified that the one at page 24 also had a Panorama stamp and it was signed by S. Mccully unlike the one at page 4.

Under further cross examination, PW1 testified that she did protest the deductions on account of thefts by demanding for a Police Report. She also testified that the plaintiff accepted payments with deductions.

PW2 FRANK S. MCCULLY, the Plaintiff's Managing Director testified that, in April 2010, the plaintiff started

security services for the defendant. The contract was for the plaintiff to supply guard services at the defendant's premises in Kitwe and Lusaka.

PW2 testified that by July 2010, no payment had been received from the defendant. This prompted the plaintiff to communicate to the defendant in writing. After this communication, some payment was received though not in full. This forced the plaintiff to terminate the contract on 1st January 2011. PW2 identified the standard contract the plaintiff sent to the defendant exhibited on page 24 of the Defendant's Bundle of Documents. He also identified the standard contract at page 4 of the Plaintiff's Bundle of Documents. The said contract was issued after the defendant split the first contract into two, with King Quality Limited.

It was PW2's testimony that the letter at page 16 of the defendant's Bundle of Documents was authored by him after he learnt that the defendant was not paying for the security services and had not signed the contract. Again in December, PW2 wrote the letter at page 17 addressed to the Managing Director for the defendant for payment. PW2 denied the assertions by the defendant that it withheld payment as a result of thefts due to the plaintiff's negligence. He contended that if the plaintiff was negligent,

it would honour its commitment. He said some of the guards were interviewed by police but none was convicted by the Courts. PW2 also testified that the plaintiff did recommend to the defendant to increase the number of guards at its premises in Kitwe but this was not heeded.

PW2 also testified that the plaintiff's maximum liability, if proven negligent was 1,000 United States Dollar.

In cross examination, PW2 testified that when approached by a client, the first document the plaintiff prepares is a quotation. He confirmed that the quotation in the Defendant's Bundle of documents was signed by the plaintiff and the defendant. Further that the defendant's signature signified acceptance of the terms.

PW2 confirmed that in August and beyond, the plaintiff received payment with 50% deductions and did not object. He admitted that there was a meeting in July between the plaintiff and the defendant which he did not attend.

When further cross examined, he admitted that before the July meeting, there were no payments and payments only resumed in August with 50% deductions.

When re-examined, PW2 testified that he became aware of the 50% deductions in December.

PW3 STEVEN JAMES MCCULLY, the plaintiff's Lusaka Director, testified that the plaintiff started providing guards to the defendant in April 2010 and ended in January 2011. According to PW3, he was called to quote for security services by the defendant's Managing Director a Mr. Vangelatos. He quoted for 11 guards which was reduced to about 4 which were provided.

It was PW3's testimony that the plaintiff handed the defendant a contract on 31st March 2010 but the defendant never signed and asked PW3 to increase the liability which he could not. PW3 called the Kitwe Director to see if the liability could be changed but this was rejected.

According to PW3, the contract was for five guards in the day and six at night all for the defendant but this was reduced because there were two companies involved ie the defendant and its sister company, King Quality Limited. A separate contract was then prepared for King Quality. The plaintiff provided security guards to both companies. Later PW3 held meetings with Mr. Vangelatos who complained about thefts and handed him a list of stolen items.

Regarding the Amended Defence and Counterclaim, PW3 testified that he never agreed to the deductions of the value of the stolen items.

In cross examination, PW3 testified that even though the plaintiff started providing security services to the defendant in April, the first payment was in August, 2010. He confirmed that payments started in August less 50% after his meeting with the defendant's Managing Director. He also admitted that the duty of the plaintiff was to protect clients' properties from thefts. He admitted that there were thefts on 2nd April but did not accept that it was the guards who stole.

The defendant called one witness Mr. **ANMAPPAN ARJUNAN** hereafter DW, its Financial Director. DW testified that in early March 2010, the defendant approached the plaintiff for security services and rapid alarm system for its operations in Kitwe and Lusaka.

The plaintiff visited both sites and assessed the number of guards needed for each location. For Kitwe, the plaintiff recommended two guards but the defendant suggested one since the premises were not operational. It was eventually agreed that the plaintiff provides one guard for day and one

dog handler for the night. The plaintiff started providing security services to the defendant on 1st April 2010.

According to DW, the quotation which the plaintiff sent to the defendant stated the number of guards and the amount payable every month. A standard contract which stated all the terms and conditions was sent later but the defendant refused to sign because the conditions were unacceptable. The defendant even informed PW3. It was DW's testimony that immediately the plaintiff started guarding the premises, thefts occurred in April, 2010. The defendant contacted the plaintiff about the thefts alleging that their guards were involved. The defendant also demanded for compensation for the lost properties and refused to pay for the security services until it was compensated.

It was DW's testimony that in July 2010, PW3 wrote to the defendant threatening to withdraw the services. A meeting was held between PW2 and the defendant's Managing Director to discuss the non payment of security services and the thefts. It was resolved that the defendant should pay in full but only 50% in order to cover the stolen items. Consequently, the defendant made the first payment in August 2010 less 50% for thefts. It continued paying in that manner without any objection from the plaintiff until

December, 2010 when it received a letter of termination within 48 hours.

DW contended that the defendant never received the contract at page 4 of the Plaintiff's Bundle of Documents but instead received the one at page 24 of the Defendant's Bundle of Documents.

He testified that the total value of the goods stolen was K27,986,000.00.

In cross examination, DW testified that the thefts were reported to the Police and the plaintiffs guards were still suspects because the cases have not been concluded. He confirmed that the after site visits, the plaintiff had recommended two guards but the defendant negotiated for one. After the thefts, the parties reverted to the original two guards. He also confirmed that the defendant had experienced thefts even with other security companies. In a nutshell, that was the case for the defendant.

The plaintiff's counsel has submitted that there was a valid contract for guard services between the parties herein. According to learned counsel, a quotation was sent by the plaintiff to the defendant stating the number of guards and the price thereof. The quotation was accepted by the

defendant and a contract followed which the defendant refused to sign.

Mr. Kaela argues that there was a binding contract, he cited the case of **RATING VALUATION CONSORTIUM & DW ZYAMBO & ASSOCIATES (suing as a firm) VS, THE LUSAKA CITY COUNCIL & ZAMBIA NATIONAL TENDER BOARD (1)**

wherein the Supreme Court held inter alia that

“the approach 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”.

Further that **“it is generally and legally accepted that parties can reach a provisional agreement and then agree to set it out in a formal document later. Such an agreement is legally binding”.**

Regarding the withheld sum of K27,905,117.44, the plaintiff's counsel submitted that the allegation by the defendant that the plaintiff agreed to the deductions was categorically denied by PW3.

Mr. Kaela argued that he who alleges must prove. He cited the case of **MUSHEMI MUSHEMI VS. THE PEOPLE (2)** where the Supreme Court held that **"The credibility of a witness be held in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witnesses. The judgment of the trial Court failed with such conflicting evidence should show on the face of it, only a witness who has been seriously contradicted by others is believed in preference of those others"**.

According to Mr. Kaela, this being the case, the defence of set off, cannot stand as the deductions were not done by mutual consent of the parties.

Regarding the counter claim, the plaintiff's counsel argued that the defendant had failed to prove its case. Mr. Kaela contends that the defendant has failed to prove that the plaintiff was responsible for the thefts due to negligence of its guards. He has drawn my attention to pages 202 and 203 of **WINFIELD & JOLOWICZ ON TORT** 16th Edition and

argued that a criminal conviction is regarded as proof of negligence.

On behalf of the defendant, Mr Sianondo submitted that the bringing of a standard contract after the acceptance of a quotation was without effect as the defendant refused to sign it. He cited the case of **PERRY VS. SUFFIELD'S LIMITED(3)** as authority per Lord Lozens Hardly M.R.

“When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both parties get rid of the contract already arrived at”

According to counsel, the position was restated in the case of **DAVIES VS. SWEET (4)**. **He argues** that at the time a quotation was sent by the plaintiff and the defendant accepted the rate in the contract, a valid and complete contract was entered between the parties. Thus the said contract could not be gotten rid of or indeed varied without the consent of the parties.

In relation to the thefts, the defendant's counsel's submission is that the thefts were well known to the plaintiffs. PW3's testimony was also clear that the plaintiff was interested to help Police recover the stolen items. He

urged the Court to note DW's testimony that the same day the plaintiff's guards were deployed, they embarked on a theft spree clearly in breach of their duty to protect the assets. According to learned counsel, even if hundreds of guards were deployed, it would not help because the same guards were stealing.

He argues that the plaintiff's claim for K27,905,117.44 must be contrasted against K27,986,000.00 which constitutes the amount of stolen goods, after which K80,882.06 remains to the credit of the defendant. The defendant denied owing K3,428,065.44 and that K2,087,865.44 has already been settled by the defendant.

Mr. Sianondo further submitted that the sum of K835,200.00 had not been paid because the plaintiff did not provide a quotation for the same. He argues that the burden of proof that the work was done lies on the plaintiff. The cases of **WILSON MASAUO ZULU VS. AVONDALE HOUSING PROJECT LIMITED (5)** and **KHALID MOHAMED VS. THE ATTORNEY GENERAL (6)** as authorities.

Mr. Sianondo also urged the Court to consider the plaintiff's Reply and Defence in which the total amount claimed is K22,473,000.00 as opposed to K27,905,117.44 in the statement of claim as this amounted to a conflict. The

case of **DAVIS JOKIE KASOTE VS. THE PEOPLE (7)** was cited as authority.

Learned counsel also argued that the defendant had a right to set off as it did because the debt herein was mutual. He urged the Court to consider the later pleading ie the Reply and Defence to Counter Claim.

The case of **HANAK VS. GREEN (8)** and the authors BULIEN AND LEAKE AND JACOB'S PRECEDENTS OF PLEADINGS 15th Edition Volume 1 page 351 were cited in aid of this proposition.

After compendiously analyzing the evidence and the submissions, the issues for my determination are:

1. *Whether there was a legally binding contract between the parties and if so what are its terms or conditions?*
2. *Whether the defendant is contractually empowered in its actions of withholding part of the payment for services received*
3. *Was there an offer and acceptance thereof? Was there a counter offer?*
4. *Is the defendant bound by estoppel to pay in full for the services rendered?*

It is not in dispute that the parties entered into an agreement for security guard services. It is also a fact that the standard contract for guard services was never signed by the defendant. This notwithstanding, the defendant let the plaintiff's provide guard services from April 2010 to December 2010. The defendant paid for these services except it made partial payments in some instances by withholding the value or prices of its goods stolen whilst the plaintiff's guards were on duty. Hence this dispute in which the plaintiff wants the defendant to pay in full. The defendant on the other hand has refused to so.

The pertinent question that begs an answer is: Is the standard contract with its terms and conditions are binding on the defendant? The defendant contends that the contract and its conditions are not binding on it because it never signed it. It is Mr. Sianondo's submission that the quotation the plaintiff issued is what binds the defendant not the contract. Learned counsel argued that the quotation was accepted by the defendant thereby creating a contract which could not be changed or gotten rid of by the standard contract.

The plaintiff contends that the defendant was bound by the contract and should pay in full accordingly.

In the case of **BROGDEN VS. METROPOLITAN RAILWAY COMPANY (9)**, 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 was a contract between the parties herein which is binding on them. It is immaterial that the same was not signed by the defendant. The conduct of the parties herein shows they acted in accordance with the terms of the

contract and the defendant is therefore liable. The defendant's action of withholding part of the money due to the plaintiff is tantamount to it dictating what the terms of the contract should be, namely that the plaintiff should be liable to pay 100% the value of goods stolen which was never agreed nor was it a term of the contract.

These monies the defendant withheld do not even amount to a debt to entitle it to the defence of set off. I thus do not agree with Mr. Sianondo that there was a mutual debt between the parties herein. I also do not agree that the quotation which did not even have any terms and conditions attached to it formed the contract. Accordingly, I find that the standard contract between the plaintiff and the defendant is binding on them despite the defendant not signing it.

The dispute herein arose after the defendant withheld the full price of items stolen during the time the plaintiff's guards were on duty. The plaintiff contended that this was wrong because the standard contract was clear that its liability shall not exceed 1000 United States Dollars.

DW did testify that the defendant was not happy with this term hence its refusal to sign the contract. However, even though the defendant refused to sign, it accepted the

plaintiff's services and even paid for them hence my finding that it is bound to the contract.

It is my considered view that the defendant is also bound by estoppel.

In **SMITH VS. HUGHES (10)**, 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 fortified by **GALAUNIA FARMS LIMITED VS. NATIONAL MILLING (11)** per Silomba J (as he then was) **"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.

On this account therefore, the counter claim can not succeed. On the facts and evidence before me, it is clear that the defendant had no contractual right to withhold part of the payment in the manner that it did.

PW3 did acknowledge that at a meeting with the defendant's Managing Director, the issue of thefts was discussed. The plaintiff pledged to assist the Police with investigations and recovery of the stolen goods. DW's testimony was that PW3, at that meeting which he partly attended admitted to the deductions. However, there is no proof of such an agreement which the plaintiff have vehemently denied. The fact that is very clear in this case is that the defendant is bound by its conduct of accepting the plaintiff's services. It can not now refuse to pay or substitute the contract with its own terms which are suitable to it only.

The defendant was well within its right to make a counter offer to the plaintiff by asking it to increase the liabilities, which it did attempt to do, but then it went ahead to accept the services in accordance with the contract it refused to sign.

It is also patent that the defendant have not shown how negligent the guards were nor their involvement in the thefts. He who alleges must prove as Mr. Sianondo has aptly

submitted. This notwithstanding the point to note is that the defendant was not empowered by the contract to withhold payments. The counterclaim is thus unsuccessful.

In relation to Mr. Sianondo's submission that the amount deducted was K22,473,000.00 which is in the plaintiff's Reply, this issue was dealt with at trial as the record would show. However, it is noteworthy that PW1 and DW's testimony was that the total amount of deductions was K27,751,000. The plaintiff's Statement of Claim and Amended Writ of summons show the amount deducted was K27,905,117.00. Quite clearly, these amounts are different. I therefore order that the matter regarding how much was deducted be assessed by the Deputy Director.

Regarding the claim for K3,428,065.44, I note that PW1's testimony in chief was that the total of unpaid invoices was K2,923,065 consisting the invoices at pages 5 and 6 of the Plaintiff's Supplementary Bundle of Documents. It was her testimony that the invoice at page 5 was for an Intruder Alarm valued at K2,087,865.44. The invoice was dated 15th August, 2010. The invoice at page 6 was for maintenance of an electric fence valued at K835,200.00 and was dated 29th April, 2010.

When cross examined, PW1 testified that page 5 of the Defendant's Supplementary Bundle of Documents showed that the invoice at page 5 of the Plaintiff's Supplementary Bundle was paid and that according to the Defendant's Statement of Account, that amount was debited.

In relation to the invoice at page 6, PW1 testified in cross examination that there was no quotation relating to it and that according to page 5 of the Defendant's Supplementary Bundle, it would be paid upon proof of job being done.

There was no evidence led regarding the other invoices in the Plaintiff's Supplementary Bundle to show that the amount of unpaid invoices was totaling K3,428,065.44.

I therefore concur with Mr. Sianondo that this claim was not substantiated at trial. Further that the defendant has paid for K2,087,865.44 out of that amount. It is encumbered upon the plaintiff to prove that the works worth that amount was done. The authorities of **WILSON MASAUSO ZULU VS. AVONDALE HOUSING PROJECT LIMITED**, supra and **KHALID MOHAMED VS. ATTORNEY GENERAL** supra, cited by Mr. Sianondo on this point are very good law and I totally agree with him. Consequently, the claim for K3,428,065.44 is unsuccessful.

Equally unsuccessful is the claim for damages for breach of contract. As noted already, it is encumbered upon the plaintiff to prove the damages as a result of the breach. In his submissions, Mr. Kaela simply stated that the plaintiff is entitled to damages for breach of contract, without proving the same. Neither was the claim substantiated at trial.

In sum, the plaintiff's claim for refund of monies deducted is successful and these be paid with interest at average short term bank deposit rate from the date of issuance of the writ up to date of judgment and thereafter at Bank of Zambia lending rate till date of payment. The claim for K3,428,065.44 is unsuccessful and so is the defendant's counterclaim.

Costs of and incidental to this action, to be borne by the defendant and taxed in default of agreement. Leave to appeal is granted.

