**IN THE SUPREME COURT OF ZAMBIA APPEAL NO.047/2012**
**HOLDEN AT LUSAKA**
*(CIVIL JURISDICTION)*



BETWEEN:

**DAR FARMS AND TRANSPORT LIMITED** **APPELLANT**

AND

**PANORAMA ALARM SYSTEM AND SECURITY SERVICES** **RESPONDENT**

**CORAM: Chibomba, Musonda and Hamaundu, JJS**
On 4th December, 2012 and 31st August, 2018

For the Appellant : Mr C. Sianondo, Messrs Malambo & Co

For the Respondent: Mr K. Nsofu, Messrs Katongo & Co

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# JUDGMENT

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**Hamaundu, JS** delivered the Judgment of the court.

Cases referred to:

1. **Brogden v Metropolitan Railway Company (1877) 2 App. Cas 666**
2. **Perry v Suffield Limited (1916) 2 Ch.D 189,**
3. **Davies v Sweet (1962) 2 QB 300**
4. **Federal Commerce and Navigation Limited v Molena Alpha Inc. and others,The Nanfri, The Benfri, The Lorfri (1978) 3 All E.R 1066, 1078**
5. **A.M.I Zambia Limited v Peggy Chibuye [1999] ZR 50**
6. **Ace Audit Express (Z) Limited v Africa Feeds Limited [2009] ZR 1**
7. **Attorney-General v Achiume [1983] ZR 1**

When we heard this appeal, we sat with Mr Justice P. Musonda. Mr Justice Musonda has since retired. Therefore, this judgment is by majority.

This is an appeal against a judgment of the High Court which awarded the respondent damages for breach of contract.

The background to this appeal is this: In 2010, the respondent entered into some form of arrangement with two sister companies who were under common management, namely: Dar Farms and Transport Limited (the appellant herein) and King Quality Meat Products Limited. The arrangement was for the provision of security services at the plants belonging to the two companies in Lusaka, Kafue and Kitwe.

In March, 2010 the respondent sent to the management of the two companies a formal written contract. The management did not sign that contract. Nevertheless, the respondent continued to provide security services at the premises of the two companies and sent its bills to management, who paid them. However, management would deduct from the bills, the value of any items that were stolen from the premises of either company on the alleged involvement or negligence of the respondent's guards.

The persistent deductions prompted the respondent to terminate the provision of security guard services at the premises of the two companies on 3rd December, 2010. Management responded that the period of notice was very short and threatened legal action against the respondent. The respondent extended the period of notice to January, 2011. Hence, the relationship ended at the end of January, 2011. The respondent, then, commenced two separate actions against the two sister companies.

In the action against Dar Fars Limited (the appellant), which is the subject of this appeal, the respondent sought damages for breach of the formal written contract which the appellant did not sign. The respondent also sought a refund of the sum of K27,905,117.44(old currency) which was said to have been deducted from the respondent's bills by Management.

The appellant, on the other hand, counter-claimed a sum of K27,986,000 being the value of the goods allegedly stolen as a result of the negligence and direct involvement of the respondent's guards and damages in general.

In the action against King Quality Meat Products Limited, the respondent sought damages for breach of the same written contract.

The respondent also sought a refund of the sum of K28,492,800 which was said to have been deducted from the bills.

In that case, King Quality Meat Products Limited counter-claimed the sum of K167,851,000, being the value of property and meat stolen as a result of the negligence and direct involvement of the respondent's guards; and also damages.

The two actions proceeded separately. In this action the respondent presented oral testimony through three witnesses, namely; its Accountant, its Managing Director and another of its Directors. The gist of the combined testimony was that the respondent started providing security guard services at the appellant's premises on 1st April, 2010, at a monthly charge of K6,538,920.00. That the services comprised three guards at night and two guards during the day. That the appellant started deducting some amounts of money from the invoices sent, claiming that some thefts had taken place at its premises. That the deductions amounted to K27,751,000. That, there were also some unpaid invoices amounting to K2,923,065.44. That, there was no evidence to prove negligence or involvement in thefts on the part of its guards, although they were interrogated by the police. That, had the guard's been

either negligent or involved in the thefts, the respondent would have honoured its obligations under the contract and paid for the loss. And that, in any event, its liability under the contract was limited to US$1000.

The appellant presented its testimony through one witness, namely, its Financial Controller. The gist of the testimony was that, indeed, in March, 2010 the parties agreed that the respondent should provide security guard services at the appellant's premises. The respondent started providing the services on 1st April, 2010 based on the initial quotation. The respondent subsequently sent its standard contract to the appellant. The appellant found the conditions unacceptable and refused to sign the contract. The appellant told the respondent to change some clauses. The respondent refused to do so. In the same month of April, the thefts started. The appellant informed the respondent that the guards were involved in the thefts and that until it was compensated for the stolen property, it would not pay for the services. In July, 2010 the respondent threatened to withdraw services because of the appellants refusal to sign the contract and to pay the bills on account of the alleged thefts. A meeting was arranged between the two parties at which the

respondent brought a statement of the outstanding bills while the appellant was asked to provide a list of the stolen property. It was agreed that in order to recover the loss of the stolen property, the appellant would only be paying 50% of the bills. The appellant started paying in August, 2010. The payment was 50% of the bill. And the appellant continued paying 50% of the bill until December, 2010 when the respondent sent a letter terminating the provision of services.

The trial court found the following facts to be undisputed;

(i) **that the parties entered into an agreement for security guard services.**

(ii) **that the appellant did not sign the respondent's standard contract.**

(iii) **that the appellant nevertheless allowed the respondent to provide guard services at its premises, from April, 2010 up to December, 2010.**

(iv) **that the appellant paid for the services, except in some instances where the payment was partial because the appellant withheld the value of the stolen property.**

On those facts, the first question that the trial court sought to resolve was whether the standard contract, with its terms and conditions, was binding on the appellant. The court reviewed the conduct of the parties, namely; that the appellant confirmed receiving

the standard contract; that the appellant attempted to make a counter offer by negotiating for higher liability, which the respondent refused; and that, nevertheless, the appellant went ahead and accepted the respondent's security guard services for almost nine months. It came to the conclusion that the appellant was bound by the standard contract and the terms thereof by virtue of its conduct. In support of that holding, the court relied on the case of **Brogden v Metropolitan Railway Company**[1], and also on other cases on the issue of estoppel. The trial court concluded that in the circumstances, the appellant was not justified to withhold the value of the stolen goods from the bills as there was no term that allowed it to do so under the standard contract.

The trial court then held that the appellant was liable to pay in full for the services it received from the respondent. On that ground, and in addition to the fact that in the court's view, the appellant had not shown that the respondent's guards were either negligent in their duties or were involved in the thefts with regard to the thefts on premises at Kitwe, the court dismissed the appellant's counter-claim.

In the course of evaluating the validity of the appellant's counter-claim, the court also stated that the money which the appellant had

withheld did not amount to a debt so as to entitle the appellant to a set-off. The court ordered that the sums deducted be assessed since there was a discrepancy between what was claimed on the writ of summons and the figure mentioned by either party in their testimony.

The trial court dismissed the respondent's claim for unpaid invoices on the ground that it was not substantiated.

The appellant challenges the judgment of the court below on three grounds; namely;

(i) **that the court below erred both in law and fact when it held that the standard contract was not signed by the appellant when the parties had already concluded a binding contract based on the quotation;**

(ii) **that the court below erred in law and fact when it held that the appellant was not entitled to set-off the amount of the stolen property against the amount due to the respondent; and**

(iii) **that the court below erred both in law and in fact when it dismissed the appellant's counter-claim on the ground that the appellant had not shown the negligence of the respondent's guards or their involvement in the thefts.**

The parties filed written heads of argument on which the appeal was argued.

The appellant's arguments in the first ground of appeal are anchored on the quotation which the respondent issued. According to the appellant, the quotation had all the elements and terms which are required for a binding contract. The appellant submitted that the standard contract was brought after the parties had already agreed on the quotation which they had signed. Consequently, the appellant argued, the refusal by the appellant to sign the standard contract did not in any way diminish the validity of the concluded contract based on the quotation.

To buttress that argument, the appellant referred us to the case of **Perry v Suffield Limited** [2], particularly, a passage in Lord Cozens-hardy M.R.'s dictum at page 189 which states:

> **"When once it is shown that there is a complete contract, further negotiation between the parties cannot, without the consent of both parties get rid of the contract already arrived at."**

We were also referred to the case of **Davies v Sweet**[3] on the same subject.

In the second ground of appeal, the appellant raised issue with the trial court's holding that the money which the appellant withheld did not amount to a debt so as to entitle it to the defence of set off.

The appellant submitted that there was evidence on the trial court's record in the form of a letter generated by the respondent where it conceded that its employees were involved. The appellant referred us to a passage in Lord Denning's judgment in the case of **Federal Commerce and Navigation Limited v Molena Alpha Inc. The Nanfri, The Benfri, The Lorfri**[4].

The passage reads:

> **"We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?... this question must be asked in each case as it arises for decision; and then from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear; it is not every cross-claim which can be deducted. It is only claims that arise out of the same transaction or are so closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim"**

Relying on that dictum, the appellant submitted thus; the counter-claim on which a claim for set off was anchored arose from the same transaction, that is, the provision of security guard services; and the appellant suffered thefts and negligence at the hands of the

respondent's employees. With that submission, the appellant argued that it would be unjust to permit the respondent to obtain its relief without regard to what the respondent owes the appellant through the theft by its employees.

In the third ground of appeal, the appellant raises issue with the trial court's holding that the appellant had neither shown how negligent the respondent's guards were nor had it shown their involvement in the thefts. The appellant pointed out that there was on record a letter written by the respondent to the appellant's manager in which the respondent acknowledged the theft in April, 2010. The appellant argues that in addition, the respondent's witness admitted at trial, when referred to that letter, that a theft did occur and that an employee was involved. All this, according to the appellant, was ample evidence to demonstrate the negligence and theft by the respondent's employees.

The appellant then urged us to allow the appeal, but argued further that, if we do allow the appeal, we should ignore the limitation clause in the standard contract for two reasons: first, because the standard contract was not applicable to the parties and, secondly, because the limitation clause could not apply where the wrongdoing

was by the respondent or its employees. For the second reason, we were referred to our decision in the case of **A.M.I. Zambia Limited v Peggy Chibuye**[5] and the case of **Ace Audit Express (Z) Limited v Africa Feeds Limited**[6] .

At the hearing, Mr. Sianondo, learned counsel for the appellant, augmenting the written arguments in the third ground of appeal argued that the letter acknowledging the thefts was on record and yet, with all that evidence, the trial court dismissed the counter-claim. Counsel argued that the court below should have allowed the counter-claim.

In response, the respondent, in its written heads of argument on the first ground, referred to the conduct of the parties and re-iterated that the trial court found as a fact that the appellant knew that after the quotation, there would come the standard contract which embodied the terms and conditions of providing guard services; that the appellant received the standard contract and kept it in its custody; that the appellant accepted the respondent's services as stipulated in the standard contract; that the appellant received invoices for the services as stipulated in the standard contract and paid the agreed amount, although with deductions; that

although it refused to sign the contract, the appellant did not refuse the services; but continued to accept the said services for nine months, even after the respondent had refused to change some terms and conditions in the standard contract.

The appellant argued that it was from the foregoing conduct that the trial court held that the standard contract was binding on the parties. The respondent submitted that, infact, the quotation which the appellant has included in the record of appeal and on which it places reliance for its arguments, is for the supply of an intruder alarm system, which was requested for much later, and is not the quotation for the provision of guard services. The appellant argued that in any event, the appellant's argument that the contract between the parties was based on the quotation is misconceived because the conduct of the parties clearly showed that the standard contract was to follow the quotation. With those arguments, the respondent urged us to dismiss the first ground of appeal.

The respondent responded to the appellant's second and third grounds of appeal together. First, the appellant pointed out that the letter on which the appellant relies to prove that the respondent was negligent, namely, the letter written by the respondent to the

appellant on 26th April, 2010 regarding the items that were discovered stolen on the 16th April, 2010 was merely a narration of what the respondent's guard, Chilambwe, was told by another of the respondent's guards, Joshua Mweete. The respondent argued that these assertions were never verified and therefore, the letter itself did not amount to an admission. It was the respondent's further argument that the appellant opted for a cheaper service of one guard and a dog to carter for a big area which had no electricity, contrary to the respondent's recommendation upon assessing the area. That, that service was inadequate but the respondent could not be held responsible for the appellant's choice.

Secondly, the respondent submitted that there was no evidence to show that the respondent's guards were directly involved in the thefts. In support of that submission, the respondent argued thus; its letter to the appellant dated the 26th April, 2010 was a mere report of what happened; the police report on the issue was not conclusive as to who the culprits were and, in the same vein, neither was the statement of the appellant's driver claiming that some twelve litres of diesel was missing from the fuel tank of is truck; and that it was for the foregoing reason that the trial court found as a fact that there

was no evidence presented by the appellant to show how negligent the respondent was or how its guards were involved in the thefts. Citing the case of **Attorney-General v Achiume**[7], the appellant argued that the trial court's finding of fact on this issue was neither perverse nor made in the absence of any relevant evidence. It was argued further that the finding was not made upon a misapprehension of the facts; nor was it a finding which, on a proper view of the evidence, no trial court acting correctly could reasonably make. The appellant then urged us to dismiss the two grounds of appeal as well.

We have considered the arguments from both sides. There is no dispute that there was a contract for the provision of guard services. The dispute is with regard to the terms that governed the contract. The appellant contends that the terms applicable are those that can be deduced from the quotation which the respondent gave to the appellant. It is the respondent's contention, on the other hand, that the contract is governed by the terms contained in the standard contract. On behalf of the appellant, it has been argued that the trial court erred when it held that the contract was governed by the terms in the standard contract, a document which the appellant did not

sign. The case of **Perry v Suffield Limited**[2] which the appellant has referred to us in support of its argument holds.

> **"when once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at."**

That case refers to a contract that is complete. We do not see how that case is of assistance to the appellant because we do not think that a quotation for the cost of services can constitute a complete contract. Indeed, as the trial court observed, the quotation did not even have any terms and conditions attached to it. However, of great importance is the fact that the trial court found as a fact, on the evidence before it, that it was within the contemplation of the parties that after the quotation, a contract setting out the terms would follow. The trial court drew this fact from the testimonies of the appellant's sole witness and the respondent's third witness. That is a finding of fact which has not been attacked by the appellant on any of the rules set out in cases such as **Attorney General v Achiume**[7]. Therefore, on the strength of that finding of fact, the trial court was on firm ground in holding that the terms of the standard contract were binding on the parties; more so that the appellant

continued receiving guard services on those terms even though it did not sign the standard contract. We, accordingly, find no merit in the first ground of appeal.

In the second ground, the appellant faults the court below for rejecting its claim for a set-off with respect to the value of the stolen properties. In rejecting the defence of set off, the court below said the following:

> **"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"**

There was force in the reasoning of the court below because a set-off is set up in respect of debts or liquidated demands. The explanatory notes in **Order 18/17/3** of the **Rules of the Supreme Court** (White Book) provide:

> "Same parties, in same right— **set-off was only available in respect of debts or liquidated demands due between the same parties in the same right."**

It was established at the trial that the value of the goods which the appellant was withholding was not a debt acknowledged by the respondent. Instead, the court found that the value was being

withheld by the appellant in breach of contract. Since it was not a debt, the court below was on firm ground when it held that the appellant could not set it up as a defence of set-off. Perhaps we should add here that the appellant did not even plead the defence of set-off but, instead, pleaded a counter-claim. We, therefore, find no merit in the second ground.

In the third ground, the appellant faults the court below for dismissing the counter-claim on the ground that the appellant did not demonstrate how negligent the respondent's guards were or the extent of their involvement in the thefts.

We think that there is substance in the appellant's reliance of the respondent's letter of 26th April, 2010 as proving the involvement of the respondent's guards in the thefts. The court below should have attached greater weight than it did to that letter; in the same way that it did to the police report regarding the incidents of theft at the plants of the appellant's sister company King Quality Meat Products Limited. In the case involving the respondent and the appellant's sister company, the court was quick to accept the police report as proving the involvement of the respondent's guards in the thefts. Yet, the letter in this case, which the court ignored, contained a detailed

account of how the respondent carried out its own inquiries and discovered from one of its own guards that a colleague of his had stolen fifteen rims of wheels with his accomplices. The letter disclosed that the matter had been reported to the police who went in search of that particular guard but found him to have gone at large. The letter also disclosed that the respondent had also handed over to the police the other guard who had been present during the theft and that at the time that the letter was being written, that guard was still in police custody. We, therefore, agree with the appellant that in view of the contents of that letter, the court below erred when it held that the appellant had failed to show that the respondent's guards were involved in the thefts or that they were negligent. Consequently, the court erred in dismissing the counter claim.

It has been argued by the appellant that should we allow the appeal on the counter claim, the compensation should not be as provided by the limitation clause in the standard contract because the thefts were as a result of wrongdoing by the respondent's guards. Again, we agree with the appellant's argument on this issue. **In Ace Audit Expartise(Z) Limited v Africa Feeds Limited**[6], we held:

> **"A person cannot use an exemption or limitation clause in order to escape liability from his own wrong doing, or misconduct on the part of their employees".**

For the foregoing reason, the compensation cannot be limited to US$1000 as provided for in the standard contract. We will order that the value of the items stolen be assessed by the Deputy Registrar.

All in all, only the appellant's appeal on its counter claim has succeeded. Therefore, each party shall bear their own costs, both here and in the court below.

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H. Chibomba
**SUPREME COURT JUDGE**

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E. M. Hamaundu
**SUPREME COURT JUDGE**