IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.129/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZAMBIA INFORMATION AND

COMMUNICATIONS TECHNOLOGY AUTHORITY **APPELLANT**

AND

RAZONE ENTERPRISES **RESPONDENT**

Coram: Hamaundu, Wood and Musonda, JJS.

On 5th October, 2016 and 29th December, 2016

For the Appellant: *Mr. Benaiah Mpange Mupenda, Legal Counsel and Mrs. Mary Chisha, Legal Officer*

For the Respondent: *No Appearance*

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Case referred to:

1. *Hadley V Baxendale (1854) 9 Exch 341*

This is an appeal and cross-appeal against a decision of the High Court awarding the respondent damages and interest for breach of contract.

The facts relating to this appeal and cross-appeal are as follows. On or about 21st September, 2012, the appellant issued Tender Number ZICTA/ORD/20/12 under three lots and invited bids for the supply, delivery and installation of Street Naming Signs and House Number Plaques for the National Addressing and Postcode Project. The respondent's bid was successful. The parties then entered into a contract dated 14th November, 2012 for the street signs valued at K130, 200.00. The appellant subsequently requested revised samples with specific changes which now included the Zambian Coat of Arms. The respondent acceded to the request with an upward adjustment to the price to reflect the change. The new price was now K347, 217.75.

By letter dated 12th February, 2013 the appellant terminated the contract dated 14th November, 2012 in whole for convenience pursuant to clause 35.3(A) of the contract.

By letter dated 14th February,2013, the respondent expressed disquiet over the termination and indicated that since it had been promised that it would be shortlisted for the second selective tender based on the revised specifications, it would hold on to the materials meant for use under the terminated contract. On 7th March, 2013,

the respondent notified the appellant that it had rented space where 165 poles for the cancelled tender had been kept. This letter was followed by a letter dated 12th March, 2013 claiming the sum of K50,152.83 from the appellant for expenses arising out of the terminated contract.

On 28th March, 2013, the appellant informed the respondent that it had cancelled the second tender for the supply, delivery and installation of street naming signs for the national addressing project. The respondent, as a result, sued the appellant for damages for breach of contract.

The learned trial judge dismissed the argument in the court below that the contract had not been breached and took a dim view of the appellant's reliance on termination for convenience when the contract provided for an equitable adjustment in case of any changes caused by an increase or decrease in the cost or the time required for the respondent's performance of any provisions under the contract. She also dismissed the argument that the 165 poles were not fit for the purpose for which they were required and equally dismissed the requirement that the poles were to be sourced from South Africa as

just a superficial cosmetic requirement which did not invalidate the fact that the poles were reasonably fit for the purpose. She accepted the respondent's evidence that the contract had been breached and entered judgment in favour of the respondent for damages for breach of contract in the sum of K130, 000.00 being the original or initial contract price; damages for the cost of the materials, storage, incidental costs arising from the breached written contract of 14th November, 2012 and subsequent Tender Number ZICTA/SP/05/13; damages for storage charges at K950.00 per month from 19th November, 2012 and costs arising from the breached contract of 14th November, 2012 and terminated tender. The appellant has now appealed to this court.

Five grounds of appeal have been advanced in support of this appeal. The first ground of appeal is that the learned trial judge erred in law and in fact by holding that the appellant unlawfully terminated a duly executed contract dated 14th November, 2012 and therefore awarded the respondent damages for breach of contract in the sum of K130, 000.00 being the contract sum.

The contract executed between the parties provided that the appellant could terminate the whole contract for convenience. Clause 35.3 specifically stated as follows:

> *"35.3 Termination for Convenience.*
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> *The purchaser, by notice sent to the Supplier, may terminate the Contract, in whole or in part, at any time for its convenience. The notice of termination shall specify that termination is for the Purchaser's convenience, the extent to which performance of the Supplier under the Contract is terminated, and the date upon which such termination becomes effective.*
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> *Notwithstanding (a) above, termination shall not prejudice or affect any right of action or remedy that had already accrued to the supplier at the time of the termination."*

Although clause 35.3 was inserted for the benefit of the appellant, the parties agreed to it. The correspondence in the record of appeal shows that the appellant informed the respondent of its option to terminate the whole contract for convenience and this was accepted by the respondent. It is not in dispute that the price escalated from K130, 200.00 to K347, 217.75 after the appellant had requested the respondent to insert the Coat of Arms in its design.

This cannot however be the basis for invoking Clause 33.2 of the contract which provided for an equitable adjustment, as the parties had agreed to terminate the whole contract for convenience. Clause 33.2 reads as follows:

> *"If any such change causes an increase or decrease in the cost of or the time required for the supplier's performance of any provisions under the Contract, an equitable adjustment shall be made in the Contract Price or in the Delivery/Completion Schedule, or both and the Contract shall accordingly be amended."*

The respondent was notified of the need to insert the Coat of Arms before the contract was terminated for convenience by the appellant. Even assuming that Clause 33.2 was invoked earlier than Clause 35.3, it cannot be argued that an increase of K217, 017.75 on the original price is, in the given circumstances, equitable. The contract clearly provided for termination for convenience and since the parties could not agree on the revised quotation, there was no other way they could continue under the contract. We therefore agree with counsel for the appellant that the learned trial judge erred in law and in fact when she held that the appellant had unlawfully

terminated the contract and awarded the respondent damages in the sum of K130, 000.00. The learned trial judge further applied the wrong principle in awarding the whole contract price as damages without taking into consideration the fact that the respondent would, if successful, have only been entitled to the loss arising out of the potential profit it would have made from the contract had it been performed. In *Hadley V Baxendale*[1], the court of exchequer held that: *"...Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e according to the usual course of things, from such breach of contract itself..."*The respondent appears to have been aware that it was not entitled to the full value of the contract in the event that it was terminated. In its letter of 12th March, 2013, it mentioned a figure of K50, 152.83 as expenses which was far below what the court below awarded as damages. This figure was repeated in a letter of demand dated 8th April, 2013 written by the respondent's advocates to the appellant. As the judgment stands, the respondent has been awarded the full value of the contract inclusive of profit without even having pleaded it. In addition, the learned trial judge awarded the respondent compensation for the cancelled Tender Number ZICTA/SP/05/13. No

justifiable reason was given for this award. The record of appeal shows that the tender was cancelled by the appellant before it was awarded. The appellant was at liberty to cancel the tender before it was awarded to any bidder as it was in any event a mere invitation to treat which could not give rise to a claim for damages for breach of contract. We must therefore interfere with this aspect of the judgment and set it aside.

The second ground of appeal is against the learned trial judge's holding that the respondent was entitled to compensation/repayment for the cost of materials, storage and all incidental costs arising from the breached written contract of 14th November, 2012. Having found that there was no breach of contract, it follows that this ground of appeal must also succeed. Although the respondent has shown that it incurred expenses such as buying poles, paint, and thinners, the appellant is not liable as the items bought were in breach of the respondent's undertaking in its tender documents that it would source the 165 street poles from South Africa. Even the claim for storage charges cannot succeed for the same reason. We agree with the argument that had the respondent bought the goods from South

Africa, there would have been no need to drill and weld the poles. There would also have been no need to buy paint and paint brushes.

The third ground is that the learned trial judge erred both in law and in fact by holding that the respondent was entitled to compensation for the steel poles at K950.00 per month from 19th November, 2012 including incidental costs arising from breached contract dated 14th November 2012 and the cancelled Tender Number ZICTA/SP/05/13.

Counsel has argued that the respondent is not entitled to this claim. We agree. The storage expenses being claimed were incurred by the respondent in breach of the contract as the poles were not obtained from South Africa in accordance with the respondent's own undertaking in the bid document. The tender was awarded on the understanding that the respondent would abide by its undertakings as stipulated in the bid document which it filled in and specifically stated that the poles would be sourced from South Africa. We allow the third ground of appeal.

The fourth ground is that the learned judge misdirected herself both in law and in fact by holding that the steel poles, although purchased in breach of the terms of the contract dated 14th November, 2012 corresponded with the description of those requested for by the appellant in the contract, were fit for the purpose for which they were being purchased and were in accordance with the bidder's instructions.

It is not in dispute that the respondent obtained the 165 steel poles locally. This was contrary to what it had stipulated in the bid document. The bid document formed the basis of the contract which the parties eventually executed. The origin of the steel poles was a material condition which the respondent breached. The finding by the learned trial judge that the steel poles corresponded with the description and were therefore fit for the purpose for which they were being purchased ignored the fact that the parties had specifically agreed and were bound by the agreement on where the steel poles were to be sourced from. We therefore agree with the appellant's argument that it was a misdirection on the part of the learned trial judge both in law and in fact to hold that the 165 steel poles which

were sourced locally corresponded with the description of those requested by the appellant and were fit for the purpose for which they were being purchased. This ground must therefore succeed.

The fifth ground is that the learned trial judge misdirected herself both in law and in fact by holding that the appellant should not have terminated the contract for convenience, but ought to have made a reasonable adjustment to the contract in order to accommodate the respondent's revised quotation.

Although Clause 33.2 of the contract made provision for an equitable adjustment to the contract to provide for either an increase or decrease, we have stated earlier that an increase of K 217, 017.75 on a contract of K130,200.00 cannot be said to be an equitable or reasonable adjustment. As such, the appellant was perfectly entitled to invoke the clause to terminate the contract for convenience as agreed by the parties. There is merit in the fifth ground of appeal and it succeeds as well.

In view of what we have said in respect of the five grounds of appeal, nothing much will be gained by addressing the heads of

argument raised in the cross appeal even though we agree with the respondent that the correct contract price is K130,200.00 and not K130,000.00. The difference is *de minimis* and does not help the respondent at all. All of the respondent's heads of argument in respect of the cross appeal have no merit for the reasons stated in the main appeal. The net result is that this appeal is allowed and the judgment of the lower court is set aside. The cross appeal is dismissed for lack of merit. Costs to the appellant both here and in the court below to be agreed or taxed in default of agreement.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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A. M. WOOD
SUPREME COURT JUDGE

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M. MUSONDA, SC
SUPREME COURT JUDGE