

**THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2016/HPC/0017



BETWEEN:

BABA DRILLING & EXPLORATION LIMITED

PLAINTIFF

And

HM TRUCKING LIMITED

DEFENDANT

Before : Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka this 25th day of August, 2016

For the Plaintiff : Mr. S. Mambwe, of Messrs Mambwe, Siwila & Lisimba
Advocates
For the Defendant : Mr. R. Mainza, of Messrs Mainza & Company

JUDGMENT

CASES REFERRED TO:

1. *Khalid Mohammed v Attorney General (1982) ZR 49*

OTHER WORKS REFERRED TO:

1. *Phipson and Elliot Manual of the Law of evidence, Eleventh Edition*
2. *Evidence, Text and Materials, Sweet and Maxwell, 2006, Second Edition*

The Plaintiff's claim is for the sum of K423,512.00 together with interest, being the value of drilling works done at the Defendant's insistence and for which cheque payments made between May and September, 2015 returned unpaid. The Plaintiff also claiming further or other relief and costs.

According to the Statement of Claim, in November 2011, December 2012 and September 2013, the Plaintiff drilled boreholes at the Defendant's insistence valued at K608,512.00 but the Defendant only paid K185,000.00 for the drilling works, leaving the balance of K423,512.00 un paid. Later after much persuasion, the Defendant issued cheques for K100,000.00 each dated 30th May, 2015; 30th June, 2015; 30th September, 2015 and 25th October, 2015, which upon presentation for payment at the bank were returned unpaid with the remarks "*cheque stopped.*"

In its Defence, the Defendant admitted that the Plaintiff drilled the boreholes valued at K608,512.00 and that the Defendant paid the K185,000.00 for the drilling works but denied being liable for the K423,512.00 balance because a good number of boreholes had far below the estimated yield and that some boreholes were totally dry. The Defendant also pleaded that instructions were issued by the Defendant to the Bank to stop payment of the cheques in issue upon learning that the yield in a good number of boreholes drilled by the Plaintiff was far below the estimated yield and that some boreholes were totally dry.

The evidence of the only witness for the Plaintiff, Manoj Kumar, a Director, was that the Plaintiff did drilling works at the Defendant's farm in Shimabala, Kafue at the insistence of the Defendant and a summary of the invoices was sent to the Defendant on 9th September, 2013 including for works done in November, 2011 to September, 2013. The summary is at page 9 of the Plaintiff's Bundle of Documents. The value of the works was K608,512.00 out of which the Defendant paid only K185,000.00 leaving a balance of K423,512.00. The Defendant later issued cheques for K100,000.00 each totaling K400,000.00 which were Bank deposited on 24th November, 2015 but the cheques were returned unpaid with the

remarks" *cheque stopped.*"The unpaid cheques are at page 5 and 6 of the Plaintiff's Bundle of Documents.

In cross examination, the witness stated that although the Plaintiff gave the Defendant a quotation for the borehole drilling works in 2011, the Plaintiff did not retain a copy and the same was not before this Court.

The witness further stated that the borehole drilling works contract was not about successful drilling or unsuccessful drilling but about work done, only that a dry borehole is much cheaper than a successful one.

The witness admitted that some of the boreholes were dry and others successfully done. For successful boreholes, a drilling test is done and shown to the client who would agree for the casing to be done and in this case, the Defendant was on site for instructions.

The witness also stated that he was not aware that the cheques in issue were stopped for payment on account that the Defendant was not satisfied with the performance of the yields.

The Defendant's witness was Magan Bhaj Jagubhai Patel, the Defendant's Chief Executive Officer. His evidence was that prior to the commencement of the drilling works, the Plaintiff did not submit any quotation to the Defendant on the cost of drilling each borehole. He further stated that on 28th January, 2015, the Defendant complained to the Plaintiff about the far below estimate of the yield attained and subsequently, the Defendant through him stopped the cheque payments when the Plaintiff failed to rectify the problem. He referred to the only letter in the Defendant's Bundle of Documents.

The witness also told the Court that the Defendant was fully aware at the time of issuing the cheques that some of the boreholes were dry.

The witness also stated that the Defendant had never agreed to pay for boreholes whose yield was below 10 litres per second and dry boreholes at the rates indicated in the proforma invoice dated 9th September, 2013 at pages 7 and 8 of the Plaintiff's Bundle of Documents.

In cross examination, the Defendant's witness stated that the cheques in issue were for the works that the Plaintiff did at the Defendant's farm and the amount of K400,000.00 was based on a proforma invoice. The witness further stated that he wrote the 28th January, 2015 letter to complain that some boreholes were dry but went ahead and issued the cheques.

The witness also agreed that the amount stated in the statement dated 9th September, 2013 was the same amount the Defendant was trying to clear with the issued cheques.

The witness was referred to paragraph 4 of the Defence where it was pleaded that the cheques were stopped "*upon learning that the yield in a good number of boreholes drilled by the Plaintiff were far below the estimated yield and that some boreholes were dry*" and asked if the statement was incorrect in view of his earlier evidence on record that the Defendant was fully aware that some of the boreholes were dry at the time of issuing the cheques totaling K400,000.00 to which the witness answered that the statement as pleaded was not correct.

In re-examination, the witness changed his position with respect to paragraph 4 of the Defence and instead stated that the statement as pleaded was correct.

Both Learned Counsel - for the Plaintiff and the Defendant - filed Skeleton Arguments and list of Authorities and in addition filed written submissions on behalf of the respective parties. I have taken into account all these in coming to this Judgment.

From the record, it is not in dispute and I find as a fact that the Plaintiff did drilling works for the Defendant at the insistence of the Defendant at Shimabala farm in Kafue. The drilling yielded some below estimate yields of 15 litres per second, some dry boreholes and some successful boreholes. The total value of all the boreholes drilled, whether below estimate, dry or successful was K608,512.00. The values for the successful boreholes were higher than the values for the dry and below estimate boreholes. The Plaintiff issued a summary invoice dated 9th September, 2013 reflecting the total amount of K423,512.00 as balance on the value of the drilling works. The Defendant issued cheques of K100,000.00 each totaling K400,000.00 to clear the amount for the drilling works on the summary invoice of 9th September, 2013. The said cheques totaling K400,000.00 were not paid out by the Bank because the Defendant issued instructions to stop payment.

Further, although in paragraph 9 of his witness statement, DW1 stated that the Defendant never agreed to pay for boreholes whose yield was below 10 litres per second, the line of questioning by way of cross-examination of PW1 by the Defendant's Advocates and the evidence of PW1 all pointed to my finding that the parties were in agreement on the estimate yield having been 15 litres per second.

The questions that fall to be determined are:

- 1. Whether the amount of K423,510.00 being cleared by the Plaintiff is part of the true value of the drilling works***

done by the Plaintiff at the circumstance of the Defendant.

2. Whether the Defendant was justified in stopping the cheque payments totalling K400,000.00 to the Plaintiff.

On the first question, as I see it, the Defendant is not denying that the K423,510.00 was not part of the drilling works done by the Plaintiff and at a total value of K608,512.00. Instead, the Defendant's assertion is that the K423,510.00 comprises amounts for drilling works that yielded below estimate and dry boreholes for which the Defendant strongly maintains it cannot pay for.

On the second question, on whether the Defendant was justified in stopping the cheque payments totaling K400,000-00 to the Plaintiff, the starting point in my view is to acknowledge that the drawer of a cheque may perfectly be in order to stop its payment by the drawee (the Bank) to the payee. However, once the drawer does so and the payee commences an action against the drawer as a result, it is for the drawer to satisfy the Court as a trier of fact that the reason for stopping the cheque payment was valid. For instance, the drawer may show that payment to the payee has instead been effected by another mode or that there has been failure of the consideration.

Therefore, while I agree with the submission of Learned Counsel for the Defendant that the burden to prove the claims and on a preponderance of probability in civil matters rests with the Plaintiff, citing the case of ***Khalid Mohammed v Attorney General*** and the Learned Authors of ***Phipson and Elliot Manual of the Law of Evidence*** at page 72," it does not in all cases end at that. Thus, Steve Uglow, the Learned Author of ***Evidence : Text and Materials*** at pages 103 – 104 put it as follows:

“In civil proceedings, the allocation of the evidential burden runs with that of the legal burden. Normally, defences aimed at defeating a claim need to be proved by the party asserting them. For example, where a party to a contract alleges that it is voidable for duress, the burden of proving the necessary facts falls on the party alleging them.”

Similarly, in an action such as the one before this Court, the Defendant as drawer of the cheques stopped for payment has the evidential burden to adduce enough evidence to satisfy the Court on the validity of the reason for stopping the cheque payments.

In this cause, and as already alluded to (and by way of emphasis) , the Defendant’s reason for stopping the four cheque payments to the Plaintiff for K100,000.00 each and dated 30th May, 2015; 30th June, 2015; 30th September, 2015 and 25th October, 2015 was because earlier, on 28th January, 2015, DW1 on behalf of the Defendant had in writing communicated to the Plaintiff that despite the Defendant fitting correct pumps to the boreholes, the yield was far below that estimated but the Plaintiff failed to rectify the problem. Thus, according to DW1, the Defendant is not obliged to pay for boreholes whose water yield was far below the estimated yield and for boreholes which were totally dry. In legal format, the Defendant’s assertion is that the Plaintiff did not wholly discharge its contractual obligations with the Defendant to be entitled to the amount being claimed.

Now, has the Defendant adduced enough evidence to satisfy this Court that the reason given for stopping the subject cheque payments was valid?

The answer is, the Defendant has not because first, DW1 in his evidence admitted that the cheques stopped for payment totaling K400,000.00 were intended to clear the balance of K423,512.00 in the summary of invoice dated 9th September, 2013 appearing at page 9 of the Plaintiff's Bundle of Documents. Secondly, that in spite of the letter dated 28th January, 2015 in the Defendant's Bundle of Documents in which the Defendant was complaining about the dry boreholes (there is no evidence that this letter was ever received by the Plaintiff), the Defendant still went ahead to issue the subject cheques dated 30th May, 2015; 30th June, 2015; 30th September, 2015 and 25th October, 2015. Thirdly, at the time of issuing the subject cheques, the Defendant, and I find as a fact, as admitted by DW1 in cross-examination, was already aware that some of the drilled boreholes were below the estimated yield of 15 litres per second while others were dry boreholes. Lastly, there are no necessary facts from the evidence of DW1 that the parties contractually agreed that the Defendant would not pay for drilled boreholes whose yield was below 15 litres per second estimate and for dry boreholes.

Further, on the question of credibility, I find PW1's version that the Plaintiff was not aware why the subject cheque payments were stopped as being more credible than that of DW1 that the cheque payments were stopped after writing to the Plaintiff and the Plaintiff failing to rectify the problem of less than estimate yielding boreholes and dry boreholes. In cross-examination, DW1 conceded that the averment in paragraph 4 of the defence that the cheques were stopped "*upon learning that the yield in a good number of boreholes drilled by the Plaintiff were far below the estimated yield and that some boreholes were dry*" was not correct but in re-examination, he changed

his evidence and stated that the averment was correct. (My finding has been that the Defendant was already aware of the below estimate drilled boreholes and dry boreholes at the time of issuing the subject cheques).

In ending, on the totality of the evidence before me, the Plaintiff has proved its case on a balance of probability and I accordingly enter Judgment in favour of the Plaintiff in the claimed sum of K423,512.00 with interest at the average of the short term deposit rate from the date of the action up to the date of Judgment and thereafter at the current Commercial Bank lending rates as determined by the Bank of Zambia from time to time until full and final payment. The Plaintiff shall also have its costs to be taxed in default of agreement.

Dated at Lusaka this 25th day of August2016



Honourable Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE