IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.046/2012**
HOLDEN AT LUSAKA **SCZ/8/054/2012**
(CIVIL JURISDICTION)

BETWEEN:

KING QUALITY MEAT PRODUCTS LIMITED **APPELLANT**

AND

PANORAMA ALARM SYSTEM SECURITY SERVICES LIMITED **RESPONDENT**

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

For the Appellants : Mr C. Sianondo, Messrs Malambo & Co
For the Respondent : Mr K. Nsofu and Mr C. Kayela, Messrs Katongo & Co

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JUDGMENT

Hamaundu, JS delivered the Judgment of the Court:

Cases referred to:

1. **Brogden v Metropolitan Railway Company [1877] 2 App. Cas. 666**
2. **Rating Valuation Consortium and D W Zyambo & Associates v Lusaka City Council [2004] ZR 109**
3. **Smith v Hughes [1871] LR 6QB 597**
4. **Galaunia Farms Limited v National Milling [2002] ZR 135 (H.C).**
5. **Attorney General v Achiume (1983) ZR 1**
6. **Mususu Kalenga Building and Another v Richman's Money Lenders Enterprises (1999) ZR 27**
7. **Mazoka & Ors v Mwanawasa & Ors (2005) ZR 138**
8. **A.M.I. Zambia Limited v Peggy Chibuye (1999) ZR 50**
9. **Ace Audit Expertise (Z) Limited v Africa Feeds Limited (2009) 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 by both the appellant and the respondent against the judgment of the High Court. As regards the appellant, the appeal is in respect of the trial court's holding that the respondent's standard contract was binding on the appellant and the trial court's implementation of the limitation clause in that contract after finding that the respondent's guards misconducted themselves. As regards the respondent, the appeal is in respect of the holding by the trial court that the respondent's guards were negligent.

The facts leading to this appeal are these:

The appellant was under common management with its sister company Dar Farms Limited, which, incidentally, is also an appellant against the respondent on the same facts in cause No. SCZ/8/053/2012, also known as Appeal No. 47 of 2012. In April, 2012, the common management of the two sister companies engaged the respondent to provide security guard services at premises belonging to the two companies. In the case of the appellant company, the premises were in Lusaka and Kafue. In the case of Dar Farms Limited, the premises were in Kitwe. The engagement was

preceded by a quotation for the services which the respondent gave to the management. The management having agreed with the quotation, the respondent started providing security services at the premises in Lusaka, Kafue and Kitwe from 1st April, 2010. Subsequently, the respondent sent to the appellant for signature a standard contract. The appellant refused to sign the standard contract on the ground that it wanted some clauses to be changed. In particular, the appellant felt that the limitation clause provided very little in the form of compensation for the respondent's negligence. The respondent refused to change the clause. The appellant still did not sign the standard contract. However, the respondent continued providing security guard services. There was evidence that between 1st April, 2010 and 6th April, 2010 a number of items such as wheel axles, rims, hubs and tyre fitting machines were stolen from the premises of Dar Farms Limited in Kitwe. The matter was reported to the police who issued a report. There was evidence again, in respect of the alleged theft, that the respondent's guard is alleged to have confessed to a colleague that he had taken part in the theft. That evidence was in the form of a report which the respondent's Director of operations gave to the appellant's manager by way of a letter dated 26th April, 2010. There was evidence, also,

that thieves broke into the appellant's meat plant in Lusaka and stole meat and casings worth K30,000,000 (old currency) between 21st and 22nd June, 2010. The matter was reported to the police who issued a police report stating that some suspects had been apprehended while another suspect, an employee of the respondent, was still on the run. There was also evidence that the appellant reported the theft of 140 metres of copper cable for electricity at its Kafue plant on 28th December, 2010; and that, upon the discovery of that theft, the respondent's security guard left the premises, never to return.

The respondent was issuing bills for the services that it provided. The management of the two companies, for its part, paid the bills, but would make some deductions towards the value of the items that the companies had lost as a result of the thefts. Dissatisfied with that arrangement, the respondent terminated the relationship in December, 2010. When management for the companies protested that the respondent had not given notice for the termination, the respondent extended the provision of security services for one month. Hence, the relationship ended in January, 2011.

The respondent sued the two sister companies separately. In both cases, the respondent sought; (i) a declaration that the standard

contract which it sent to the appellant was binding on the parties and (ii) damages for breach of contract. In this particular case, the respondent claimed a sum of K28,492,800 (old currency) as the sum which the appellant's management had unilaterally withheld to cover for the value of the item lost.

The appellant's defence was to contend that there existed an oral contract only; and not the standard contract which it had refused to sign. The appellant contended also that it withheld the value of the items that were stolen as a set off against the bills, and that this position had been agreed to by both parties. Consequently, the appellant counter-claimed a sum of K167,851,000 as the value of the items stolen. It also counter-claimed damages.

The learned trial judge reduced the issues that arose for determination to the following questions:

(i) Whether the contract on page 2 of the appellants bundle was legally binding;

(ii) Whether the appellant was bound by estoppel to pay in full for the guard services provided by the respondent; and,

(iii) Whether the respondent's guards were negligent in executing their duties to the appellant.

The learned trial judge answered the first question in the affirmative on the following grounds: That, although the appellant's counter-proposal to the term limiting liability was rejected by the respondent, it still continued to accept the respondent's security guard services, for which the appellant paid over a period of nine months. In the learned judge's view, the appellant, by that conduct, accepted the terms as contained in the standard contract and was estopped from denying that it accepted the terms of the standard contract. The learned judge relied on a couple of authorities on the subject of estoppel in arriving at that conclusion, such as; **Brogden v Metropolitan Railway Company**[1], **Rating Valuation Consortium and D W Zyambo & Associates v Lusaka City Council**[2], **Smith v Hughes**[3], **and Galaunia Farms Limited v National Milling**[4].

Having resolved the first question, the learned trial judge held that the appellant was liable to pay the defendant in full. By that holding, the court below granted the respondent's declaratory claim and the claim for refund of the money withheld. The learned judge, however, dismissed the claim for damages for breach of contract on the ground that it had not been substantiated.

With regard to the counter-claim, the learned judge found that there had been acknowledgment from one of the respondent's witnesses that once it was proved that the loss arose out of the respondent's negligence, then it would pay for the loss, subject to the clause in the contract which limited compensation to US$1000. In this case, the learned judge found that the loss occasioned to the appellant was due to the negligence or misconduct of the respondent's guards. The court entered judgment for the appellant on its counter-claim, but limited compensation to US$1000.

The appellant's grounds of appeal are as follows:

1. **The court below erred both in law and in fact in holding that the standard contract was binding on the parties despite the evidence to the effect that the standard contract was not signed; and more so that the standard contract came after the parties had already concluded a binding contract based on the quotation.**
2. **The court below erred both in law and in fact when, having found that the respondent's guards mis-conducted themselves, it gave effect to the limitation clause in the standard contract.**

The respondent cross-appealed on the following two grounds:

1. **The learned judge erred in law and in fact when she upheld the appellant's counter claim based on the trial court's finding of facts when there was no evidence to support that the respondent was negligent.**
2. **The learned trial judge erred in law and in fact in awarding the appellant's claim for negligence when the appellant did not adduce**

any evidence which led to the finding that the respondent was negligent nor did the appellant set out particulars of negligence in the pleadings in the court below, neither did they raise or prove otherwise at trial.

As we have said at the beginning, this matter arises out of the same set of facts as the matter between the appellant's sister company, Dar Farming Limited, and the respondent. We have held in that matter that the court below was on firm ground when it held that the standard contract was binding on the parties. We have provided the grounds for our decision in that matter; which are essentially that the court below found as a fact that the parties had contemplated signing a written contract and that this was backed by the appellant's conduct in continuing to accept guard services on the terms contained in the written contract. We find it unnecessary, therefore, to deal with the appellant's first ground of appeal herein. We can only say that it has no merit. That leaves only the appellant's ground relating to damages.

The respondent's cross-appeal is also on the issue of damages. The appellant's position is that it has no grievance with the finding by the court below of misconduct on the part of the respondent's guards, but it is aggrieved by the quantum of damages awarded, namely, the equivalent in kwacha of US$1000 as provided in the

standard contract. The respondent, on the other hand, is aggrieved by the finding of misconduct itself. In this regard, its position is two-fold: first, it is the respondent's contention that it was wrong for the court below to make that finding when the appellant did not even set out the particulars of negligence in its pleadings. Secondly, it is the respondent's contention that the appellant did not even have evidence to support the finding of negligence.

The appeals on this issue will be dealt with together. Consequently, it is convenient to deal with the contention in the cross-appeal first.

The arguments on behalf of the respondent on the cross-appeal were these: That the appellant in the court below did not plead any particulars of negligence on the part of the respondent's guards but only claimed a self-assessed quantum in the sum of K167,000,000. That the only evidence that the appellant had adduced before the court was a police report issued by Zone 17 police post and a statement which the appellant's employee had made to the police when reporting the alleged thefts. That, negligence on the part of the respondent's guards could not be inferred from the contents of these two documents. That, in the circumstances, the finding by the court below was made either in the absence of relevant evidence or on a

misapprehension of the facts. We were referred to the case of **Attorney General v Achiume**[5] in support of the last argument.

Responding to those arguments, the appellant argued that, infact, evidence of negligence was revealed in the testimony of the respondent's witnesses in cross-examination and also in the testimony of the appellant's sole witness.

The appellant also argued that in any event, the issue regarding the particulars of negligence was never raised at the trial and that, consequently, it could not be raised now. We were referred to the case of **Mususu Kalenga Building and Another v Richman's Money Lenders Enterprises**[6] for that argument.

We have considered the foregoing arguments.

Regarding the finding of negligence, the court below relied on the respondent's witness who outlined the procedure regarding claims for losses resulting from the actions or negligence of the respondent's guards. That witness said that when claims for losses were received, the police would be informed and a docket would be opened. The witness said that once it was proved that the respondent was negligent, then it would pay for the loss in accordance with the contract, which limited the liability to US$1000. On the strength of that testimony, the court below examined the contents of the police

report that was on record and found that according to that report, the suspects who stole meat casings were in police custody while the guard who had been on duty on the material night was on the run. Another police report which the court below examined stated that the cables went missing when the guard had left his station. From that conduct, the court below concluded that the respondent's guards were either negligent or misconducted themselves; and that the respondent was, consequently, liable.

On examination of the documents on record, we find that there was indeed sufficient evidence upon which the court came to the conclusion that the respondent's guards either misconducted themselves or were negligent. The police reports were compiled by an independent investigative wing- the Zambia Police Service. And these are the reports which, for example, stated that ever since the theft of the meat casings, the respondent's guard was on the run; meaning that the police were looking for him. The respondent did not adduce any evidence to rebut that imputation. Surely, what other evidence did the court below need in order to come to the conclusion that it arrived at? We, therefore, do not agree with the respondent's argument that there was no evidence to support the lower court's conclusion.

The serious question in the respondent's cross-appeal, though, lies in the respondent's argument that the appellant had not set out any particulars of negligence in its pleadings. The appellant has, of-course, countered this argument with the submission that the evidence of theft and negligence was led by the appellant and yet the respondent did not object to its introduction. According to the appellant, the trial court was consequently, entitled to consider it. The authority relied on for the appellant's argument was the case of **Mazoka & Ors v Mwanawasa & Ors**[7].

We agree with the respondent that the appellant did not plead its case for negligence in the classical style whereby the conduct or omissions which amount to negligence are set out as particulars. However, the appellant's defence and counter-claim did contain averments on negligence and theft. In the defence against the respondent's claim, for example, the appellant averred that it was entitled to a set-off of all amounts representing the value of the properties which were either stolen or lost through the respondent's negligence. Again, in the counter-claim, the appellant averred that it was claiming the value of all the goods lost due to the negligence of the respondent and the direct involvement of its guards in the theft of those goods. In **Mazoka & Ors v Mwanawasa & Ors**[7], we held:

> **"The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties"**

In the same case, we also held as follows:

> **"In a case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues."**

To start with, the averments in the appellant's pleadings clearly alleged involvement of the respondent's guards in the thefts at the premises; the averments alternatively alleged negligence on the part of the respondent's guards. Clearly, although the appellant did not set out particulars of negligence, the averments in pleadings did give the respondent fair notice of that aspect of the appellant's claim. Secondly, the appellant did adduce evidence regarding the alleged theft and negligence of the respondent's guards. That evidence was not objected to by the respondent. So, the court was not precluded from considering it. And when the court did consider the evidence, it found that evidence to be of such weight as to warrant attaching

liability on the respondent in accordance with the terms in the standard contract.

For the foregoing reasons, we find no merit in the respondent's cross-appeal.

That brings us to the appellant's appeal. As we have explained, the appellant's grievance is only with regard to the limiting of the damages to US$1000. The appellant's argument here was simply that a limitation clause cannot cover wrongful acts or misconduct. In this case, the appellant submitted that since there was ample evidence to show that the respondent's guards were directly involved in the theft of the goods, the respondent could not bring into aid the limitation clause in order to limit its liability. For that argument, we were referred to the case of **A.M.I. Zambia Limited v Peggy Chibuye**[8] and the case of **Ace Audit Expertise (Z) Limited v Africa Feeds Limited**[9].

The position of the respondent on this issue was that there was no evidence on record to support the trial court's conclusion that the respondent's guards either misconducted themselves or were negligent with regard to the thefts that occurred.

We have already held that there was evidence to support the trial court's finding regarding the involvement of the respondent's guards in the thefts. So what we only need to consider now is whether the appellant's proposition is correct. Indeed, in **A.M.I. Zambia Limited v Peggy Chibuye**[8], although the appeal was resolved on the question whether or not an exemption clause had been brought to the attention of the respondent, we, nevertheless, in passing, said that on the facts in that case we did not see how the appellant could have had exemption from its own wrongdoing by the misconduct of its own staff. Again, in **Ace Audit Expertise (Z) Limited v Africa Feeds Limited**, we held:

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

The two decisions above are clear. Therefore, we hold the view that the appellant is on firm ground in its argument that the court below erred when it limited the damages or compensation to the amount specified in the limitation clause. This is because it was clearly established at the trial that the respondent's guards were involved in the thefts. On that ground, the appellant's appeal has merits. We set aside the judgment of the court below in so far as it

holds that the damages should be limited to the amount in the limitation clause. Instead, we order that the damages on the counter-claim be assessed by the Deputy Register. With regard to costs, each party will bear their own costs of this appeal.

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H. Chibomba

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE