THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 869 - 2004

PETROCITY ENTERPRISES (U) LTD :: PLAINTIFF

VERSUS

SECURITY GROUP (U) LTD :: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

JUDGMENT:

The plaintiff, Petrocity Enterprises (U) Limited brought this case against the defendant Security group (U) Limited for the recovery of Ug.Shs.26,558,430/= (twenty six million five hundred fifty eight thousand four hundred and thirty shillings) for stolen fuel, general damages, interest and costs for the suit.

The brief facts of the case are that the plaintiff contracted the defendant to provide security guard services for the plaintiff's premises at Kyengera Depot, where the plaintiff has an Oil and fuel Terminal/Depot. The plaintiff averred that in the course of their dealings, the guards provided by the defendant began colluding with other people to siphon/ steal and convert Petrol from the pipeline at the depot during the night. The plaintiff detected shortages and immediately informed the defendant about the unlawful acts of the defendant's servants and also sent a complete statement of the shortages to the defendant. The plaintiff averred that the shortages occurred during the nights between 1st July 2004 and 21st August 2004. It is the plaintiff's case that on or about the

night of 21st August 2004, the defendant's employees, namely Rwego George, Kabagambe Davis, Onyae George William and Akuma Michael were caught red-handed with jerricans together with third parties busy siphoning/stealing fuel and were handed over to the police. The plaintiff further averred that the total shortages incurred from 1st July to 21st August 2004 due to the siphoning of fuel was 20,550 litres having a value of Ug.Shs.35,909,070/= (thirty five million nine hundred nine thousand and seventy shillings) which the defendant has neglected to pay and as a consequence the plaintiff's business has suffered loss and damage. It is the plaintiff's case therefore that the acts and or omissions of the defendant's employees were unlawful and amounted to breach of contract by the defendant.

The defendant in its defence however denied any liability. It is the defendant's case that sometime in November, 2003 the plaintiff ordered and contracted for security guarding services from the defendant, whereupon Service Order Contracts were executed in respect of the plaintiff's fuel depot located at Kyengera. In February, 2004 the plaintiff ordered for more security guards from the defendant and executed another Service Order Contract to guard the said fuel depot. It is the defendant's contention that the security services where rendered diligently and professionally for over eight months until sometime in July, 2004 when the plaintiff started operations at the depot and held a meeting with the defendant's Operations manager on or about 28th July 2004 wherein a number of issues were discussed. However at no one point was the allegation of theft or siphoning of fuel by the defendant's employees ever brought up by the plaintiff. The defendant contended that from the 1st day of July 2004 up to the 21st day of August 2004 no theft or siphoning of fuel had ever been reported by the plaintiff to the defendant and that the defendant's employees who guarded the plaintiff's depot denied any allegation of theft or siphoning of the plaintiff's fuel. The defendant further averred that on or about the night of 21st August 2004, the plaintiff engaged unidentified security personnel who arrested 3 persons in a saloon car on Masaka- kampala Road with 13 jerricans of fuel, beat them up and brought them to the plaintiff's depot where they met the defendant's four guards duly executing their guarding work whom they falsely accused of stealing and selling to the suspected thieves fuel from the plaintiff's depot. The defendant therefore contended that it did not breach the contract and is not vicariously or otherwise liable for the alleged amounts and values of fuel losses by the plaintiff.

The defendant brought a counter claim against the plaintiff for the payment of a liquidated debt of Ug.Shs.11,658,888/= (Eleven million six hundred fifty eight thousand eight hundred and eighty

eight shillings) as the outstanding security bills, general damages for breach of contract, interests and costs of the counterclaim.

At the scheduling conference the following issues where framed;

1. Whether the persons who signed the service order contracts had authority to do so.
2. Whether the guards employed by the Defendant were caught red-handed stealing fuel at the Plaintiff's Fuel depot/terminal on 21st August 2004 thereby breaching the contract.
3. Whether the Defendant is vicariously liable to pay for the lost fuel worth Ug.Shs.35,909,070/=.
4. Whether the defendant is entitled to the amount claimed in the counter claim.
5. What remedies are available to the parties?

Counsel G.N. Kandeebe appeared for the plaintiff while Counsel Magellan Kazibwe appeared for the defendant. The plaintiff called four witnesses namely; Yasin Lemeriga (PW1) a Measurements and Metrologist of Uganda National Bureau of Standards with the International Metrology Laboratory, John Kamande (PW2) General Manager of the plaintiff company, Phenny Mwesigwa (PW3), the Chairman Board of Directors of Petrocity Enterprises (U) Ltd, Lt. Luyima Julius (PW4) of Rapid Response Unit formally VCCU. For the defendant, Mr. Robert Nturanabo (DW1) the Operations Manager of Security Group (U) Ltd and Okello Francis (DW2) a student at kyambogo University testified.

The parties agreed to file written submissions against an agreed time line but the defendant company did not in their wisdom file any submissions. In that regard, court will therefore rely on the evidence on record to determine the case.

I will now proceed to deal with the issues in the order in which they are framed.

Issue No. 1: **Whether the persons who signed the service order contracts had authority to do so.**

Counsel for the plaintiff submitted that the plaintiff maintained that there was no written agreement between the parties for guard services but on the contrary there was an oral contract. Counsel for the plaintiff made reference to the testimony of Nturanabo the operations manager of the defendant

who testified that he negotiated a formal contract with the Managing Director of the plaintiff company, Mr. Parakesh who was based in Mombasa. Counsel for the plaintiff however submitted that the plaintiff has had only one Managing Director, Mr. Harish Asodia, since incorporation and that Mr. Parakesh has never been a director of the plaintiff company. Counsel for the plaintiff further submitted that the evidence of Mr. Nturanabo cannot be truthful because if he had indeed negotiated the contract, surveyed the locus and deployed the first guards as he claimed, then he wondered why he did not go on to sign the said contract and have it witnessed both of which had not been done. On the other hand, it was the testimony of Mr. Kamande the general manager of the plaintiff that the contracts between the plaintiff company and the defendant were oral and that he did not know the alleged officer who is said to have signed for the plaintiff. As to the Service Order Contracts, Counsel for the plaintiff submitted that the capacity in which Mr. Okello, signed the said service order contracts (Exhibits D1, D2 and D3) on behalf of the plaintiff is not indicated and furthermore the said documents were not witnessed. It was counsel for the plaintiff's submission that the testimony of Mr. Nturanabo and Mr. Okello as to who authorized the signing of the Service Order contract offends the rule against parole evidence to the effect that oral evidence to add or subtract from a written document is not admissible. Counsel for the plaintiff submitted that the authority of the signatory ought to be apparent on the face of the document. Counsel for the plaintiff therefore submitted that there was no written contract that was executed by the parties and that none of the alleged signatories had authority to enter into the contract. It was therefore counsel for the plaintiff's submission that the purported exhibits D1- D3 are not contracts that can bind either party.

Reviewing the evidence adduced on behalf of the of the defendant company, Mr. Nturanabo testified that in 2003 he was called by Mr. Parakesh, the Managing Director of the plaintiff company who was residing in Mombasa and was instructed to meet Mr. Okello Francis who was an accountant, of the plaintiff. Mr. Nturanabo testified that he met Mr. Okello at Communication House who sent him to Petrocity depot located on Masaka Road near Kyengera. Mr. Nturanabo surveyed the place then went back to Communications House and met Francis Okello. It was Mr. Nturanabo testimony that he informed Mr. Okello that one guard would be required during the day and one at night, and then they both signed a service order contract. Mr. Nturanabo testified that as per the company policy in security, they could not begin a service unless a service order is signed, and it is on record because if this was not done, it would be a ghost assignment which is not

known. It was Mr. Okello's testimony that he was an accountant of the plaintiff company and that he signed the Service Order Contracts on the instruction of Mr. Asodia the Managing director.

I have addressed myself to the submissions of Counsel for the plaintiff and the evidence before court on this matter. It would appear that there is no dispute that there existed a contract between the plaintiff and the defendant. However what is contentious is whether this contract was reduced into writing, signed and witnessed by authorized persons.

A company as an artificial legal entity must of necessity act through the medium of its human officers or agents. However not every act by them will necessarily bind the company though they may be regarded as its organs. For a company to be bound by the acts of its officials will depend on whether the act is within the capacity of the company and whether the officials have acted within the scope of their employment or authority.

According to **Gower's Principles of Modern Company Law 4th Edition at page 181;**

> *"An agent who enters into a transaction on behalf of his principal binds the principal only if he acted within either (i) the actual scope of the authority conferred upon him prior to the transaction or by subsequent ratification or (ii) the apparent (or ostensible) scope of his authority."*

It is clear from the evidence that there are two types of contested written contracts. The first is a "Service Contract/ agreement" between the parties to provide guard services to protect premises and property (Exhibit P7) dated 9th December 2003. The second type is a group of contracts referred to as "Service Order Contracts" (Exhibits D1-3) also for the provision of guard services.

The first type of contract (Exhibit P7) one can see that is elaborately drafted and dated 9th December 2003. It is however only signed by one Lawrence Harcourt (with the designation General Manager) on behalf of the defendant company; the plaintiffs did not sign it. That in my view makes the contract executory but not executed by the parties and therefore ineffective.

The second group of contracts (Exhibits D1-3) called service order contracts are signed by both parties and with Mr. Okello signing on behalf of the plaintiffs. It is the case for the plaintiffs that Mr. Okello did not have the power to sign and bind the plaintiffs regarding that contract. These groups of contracts appear to me to have a multipurpose because their format also looks like an

invoice for services. It is not disputed that the defendant did provide the guarding services to the plaintiff. To my mind the service order contract best describes how this service was contracted and billed for. I am not persuaded that Mr. Okello an accountant with the defendant did not have authority to sign this format of contract with the plaintiff. Even if he did not have the express authority to sign given his position in the plaintiff company and nature of the format in which the service order contracts were made (which also appear to be invoices at the same time) it is reasonable to find and I accordingly do so, that Mr. Okello had the apparent or ostensible authority to sign the contracts. I therefore find the second set of service order contracts as valid and binding.

Issue No. 2: **Whether the guards employed by the Defendant were caught red-handed stealing fuel at the Plaintiff's Fuel depot/terminal on 21st August 2004 thereby breaching the contract.**

It was counsel for the plaintiff's submission that Mr. phenny Mwesigwa testified that after becoming suspicious of the trend of abnormal fuel shortages, he engaged the services of a branch of the State security services know as "VCCU" and headed by Lt. Luyima Julius to monitor the out side part of the depot and also to investigate the fuel shortages. Lt. Luyima Julius testified that after receiving instructions from Mr. Phenny Mwesigwa**,** he informed his bosses at the office and he got more officers to assist him. On 21st August 2004 they made an ambush to try to arrest the people who were allegedly stealing the fuel. It was Lt. Luyima testimony that at about 12:30am in the morning, he saw a vehicle entering the depot and that the guards opened for it. He then saw empty jerricans being removed from the vehicle and that the said people started siphoning fuel. Lt. Luyima further testified that around 2am, the said intruders finished their act, and they parked the jerricans in the vehicle, the guards opened the gate and the vehicle went away. It was Lt. Luyima testimony that at first, they could not impound the vehicle because the guards were armed and were involved in this act. Lt. Luyima testified that they waited for the vehicle to get out of the gate and that as it had just joined the main road they stopped them, checked the vehicle and discovered that it was carrying jerricans full of fuel. Lt. Luyima testified that the men who were caught with the jerricans of fuel were arrested and that at about 6:30am they returned to the fuel depot with a police officer from Kyengera police post to arrest the guards before they would leave their place of work.

Counsel for the plaintiff submitted that the defendant company was employed by the plaintiff to secure the plaintiff property. Counsel for the plaintiff further submitted that a security guard is supposed to keep safe the property of the client but not to connive with thieves or to deep his hand in the till to take away the property himself without the consent of the client in the dead of the night when the client is away. It was counsel for the plaintiff's submission therefore that by the act of the guards, the plaintiff had generally proved all the particulars of breach pleaded by the plaintiff in the plaint.

For the defendant, Mr. Nturanabo testified that he got a report from the defendant's control room that thieves were intercepted along Masaka Road with jerricans of fuel and that they had been taken to Nateete police station. Mr. Nturanabo testified that he instructed the investigation officer of the defendant to handle the matter. It was Mr. Nturanabo testimony that he visited the depot on the 24th of August 2004 together with the defendant's area supervisor Mr. Okori Fred, the day after the security guards had been arrested. Mr. Nturanabo testified that there were no signs of theft because they moved around and along every pipe to ascertain where these people could have got the fuel from but that they did not see any sign of fuel that poured out as it was reported. He further testified that they checked joint by joint of the pipes and according to him, these were the normal leakages which they had been experiencing right from the time of or when the depot started receiving fuel.

The issues as framed for determination by the parties refers to whether the guards were caught "red handed" stealing the fuel. Reviewing the evidence before court it appears to me that the real issue here is whether or not the fuel was stolen and if so whether this was with the help of the guards employed by the defendant. This is the real issue in controversy which I shall address within the meaning of **Order 15 Rule 5(1) of the Civil Procedure Rules SI 71-1** which provides that;

> *"The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matter in controversy between the parties shall be so made or framed*."

Mr. John Kamande testified that they would dip the fuel tanks and take measurements in the evenings before they go home after closure of business and they would also involve the security

officers to accompany them in dipping the tanks. Mr. Kamande further testified that in the mornings they would dip again before start of business together with the security guards and that is when they would see the huge losses of product when the tanks were not supposed to lose because they had not started doing any business. It was also the testimony of Mr. Yasin Lemeriga an expert from the Uganda National Bureau of Standards that when he carried out measurements on the main fuel pipes he found that there were no leakages or possibility of evaporation of the fuel. Basing on this evidence and on a standard of balance of probability, I find that the evidence given by Lt. Luyima is credible that fuel was stolen by thieves with the help of the guards employed by the defendant. This evidence was not shaken during cross examination. The evidence of Mr. Lemeriga an expert also shows no other credible explanation for the said loss. The answer to this issue therefore is yes. As to whether the defendant company breached the contract, the evidence on record shows that the plaintiff hired the defendant to provide security services to protect their property at the depot. The act of the defendant's employees of conniving with the thieves to steal fuel from the plaintiff's depot during the course of their employment is to my mind, the clearest evidence of breach of contract.

Issue No. 3: **Whether the Defendant is vicariously liable to pay for the lost fuel worth Ug.Shs.35,909,070/=.**

Counsel for the plaintiff submitted that the vicarious liability in this suit is founded on the breach of the contract by the defendant. Counsel for the plaintiff therefore submitted that because of the acts of the defendant's employees, the plaintiff suffered loss and that the defendant is liable to pay the amount claimed to compensate the loss.

Mr. Nturanabo testified that under the contract, the liability of Security Group was limited to Ushs.800,000/= and this is only if the defendant's staff have been found negligent while on duty that the defendant would pay to the client the total sum of Ushs.800,000/=.

According to Black's law dictionary 7th edition at page 927 Vicarious liability is defined as;
"Liability that a supervisory party, (such as an employer), bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties."

Since I have found under issue 2 that the defendants' employees were involved in the theft of the fuel during the course of their employment, the defendant company would therefore be responsible for the acts of its employees.

With regard to limitation of liability of the defendant, Clause 4 of the Service Order Contracts (Exhibit D.1, D.2 and D.3) and the Contract agreement (Exhibit P.7) provides that;

> *"The company undertakes no liability for any loss or damage to property or person whatsoever or bodily injury sustained by the client or his/its servants or agents whatsoever or howsoever caused by its employees whilst performing their duties within the scope of their employment provided always that any liability of the company hereunder shall not exceed in the aggregate the sum of Ug.Shs.800,000/= (Eight hundred thousand shillings only) provided further that any liability of the company or its servants or agents to the client hereunder shall not on any ground or on any cause whatever or under any circumstances extend to any consequential or indirect loss sustained by the client or its servants or agents, however arising.""*

This is clearly a limitation of liability clause. It is now necessary to establish its legal effect. According to **Cheshire, Fifoot & Furmston's Law of Contract 14th Edition at page 174**;

> *"If a document is to be regarded as an intergral part of the contract, it must next be seen if it has, or has not, been signed by the party against whom the excluding or limiting term is pleaded. If it is unsigned, the question will be whether reasonable notice of the term has been given."*

Black law dictionary 7th edition at page 1087 defines notice to mean;

> *"A legal notification required by law or agreement or imparted by operation of law as a result of some fact (such as recording of an instrument) definite legal cognizance actual or constructive of an existing right or title.*
> *A person has notice of a fact or condition if that person*
>
> 1. *has received a notice of it*
> 2. *has actual knowledge of it*

3. *has reason to know about it*
4. *knows about a related fact*
5. *Is considered as having been able to ascertain it by checking an official filling or rewarding."*

A party to a contract can only seek the protection of an excluding or limiting clause if adequate notice of it was brought to the attention of the other party. A review of the service order contract shows that provision is made on both sides of the said document for both parties to sign. The flip or back side of the contract contains the contractual small print which has item 4 as the limitation of liability clause. This flip/backside has a provision for signature which none of the parties has signed. In such a situation the limitation of liability clause is ineffective as against a claim of vicarious liability. I also accept the evidence in exhibit P3 which are statements from the plaintiff showing that fuel worth Ug,Shs,35,909,070/= was lost by the plaintiff due to fuel theft. It is my finding therefore the defendant is vicariously liable to pay for the lost fuel worth Ug.Shs.35,909,070/=.

Issue No. 4: **Whether the defendant is entitled to the amount claimed in the counter claim.**

The plaintiff admitted that at the time of termination of the contract, they owed to the defendant an outstanding amount of Ug.shs.11,658,888/= (eleven million six hundred fifty eight thousand eight hundred and eighty eight shillings) as claimed by the defendant in the counterclaim. Counsel for the plaintiff prayed that this amount be set off from the Ug.Shs.35,909,070/= to leave Ug.Shs.24,250,182/= as the money claimed by the plaintiff. The court will therefore take note that it is an admitted fact that at the termination of the contract Ug.shs.11,658,888/= was the outstanding sum owed by the plaintiff to the defendant for the services provided.

Issue No. 5: **What remedies are available to the parties.**

Based on my findings above, both the plaintiff and counterclaimant are entitled to remedies under their various claims.

The plaintiff has prayed for the payment of Ug.Shs.26,558,430/= (twenty six million five hundred fifty eight thousand four hundred and thirty shillings), general damages, interest and costs for the suit.

In light of my findings above I award the plaintiff the sum of Ug.Shs.26,558,430/= (twenty six million five hundred fifty eight thousand four hundred and thirty shillings) being the balance on the value of fuel lost.

The plaintiff also prayed for a sum of Ug.Shs.15,000,000/= (fifteen million shillings) as general damages for breach of contract.

It is trite law that general damages are a pecuniary compensation given on proof of a wrong or breach. In the case of **Dr. Denis Lwamafa v Attorney General H.C.C.S No. 79 of 1983** Court held that the plaintiff who suffered damage due to wrongful act of the defendant must be put in the position he would have been had he not suffered the wrong. In this case Counsel for the plaintiff did not address Court as to quantum save to say that Ug.Shs.15,000,000/= would be reasonable

In that case, I in my discretion award Ug.Shs.5,000,000/= (five million Uganda shillings) as general damages.

The plaintiff also prays for interest on the amount at a rate of 24% per annum and on the general damages from date of judgment until payment in full and costs for the suit.

In Harbutt's Plasticine Ltd .v. Wyne Tank & Pump Co. Ltd [1970] 1 QB 447 lord Denning held that,

> *"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."*

It is a firmly established principle that an award of interest is made at the discretion of court. It is clear that the plaintiff company ought to be compensated by an award of interest for the loss thereby occasioned to it by the defendant. I therefore award interest on the principle amount at rate of 21% per annum from the date of filing until payment in full. I also award the plaintiff 8% per

annum on the general damages from date of judgment until payment in full**.** I also award them costs of the main suit.

As to the counterclaim based on the same principles applied to the plaintiff, I award the counterclaimant/ defendant the admitted sum of Ug.shs.11,658,888/= with interest at 21% per annum from the date of filing the counterclaim until payment in full. No submissions were made as to the claim for general damages so I in my discretion award the counterclaimant Ug.Shs.2,200,000/= as general damages with interest at 8% per annum from the date of judgment until payment in full.

I also award the counterclaimant/defendant the costs of the counterclaim.

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Geoffrey Kiryabwire

JUDGE

Date ……

27/04/2010

9:40am

Judgment read and signed in open court in the presence of;

- Kazibwe for Defendant

In court

- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: ……