

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
HCT - 00 - CC - CS - 340 - 2009

THUNDERBOLT TECHNICAL SERVICES LIMITED.....PLAINTIFF

VERSUS

1. APEDU JOSEPH
2. KK SECURITY (U) LIMITED} DEFENDANTS

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff company filed this suit against the defendants Apedu Joseph and KK Security (u) Limited, jointly and severally for special damages, general damages and exemplary damages arising from breach of contract, interest and costs.

The plaintiff's claim is that on 8th November 2007, it entered into a contract with the second defendant for the provision of security services at the plaintiff's business premises at Bweyogerere Namulondo road. The plaintiff avers that on 6th April 2009, the first defendant while in the course of employment, connived with other persons, broke into the plaintiff's offices and converted office equipment and cash, abandoning his uniform and company identification card at the scene. The plaintiff avers that as a result of the defendant's actions, the plaintiff lost tools and equipment worth Ushs. 17,657,980/=, materials and tools from the store worth Ushs. 64,234,500/= and Ushs. 70,000/= being cash from the safe. Furthermore, that the plaintiff's representatives reported the matter to Kiira Police Station and criminal charges were filed against the first defendant. The plaintiff further avers that it demanded compensation from the second defendant, who admitted liability of only Ushs. 500,000/=. The plaintiff avers that the second defendant was negligent, in failing to supervise and control the first defendant while on duty. Furthermore, that the first defendant was negligent in failing to observe skill, care and trustworthiness in the course of executing his duties, and therefore, as a result, the second defendant is vicariously liable for the acts of the first defendant who is its servant. The plaintiff further averred that the acts of the defendants amounted to fundamental breach of contract.

In reply, the second defendant in their defence denied fundamental breach of contract and negligence, and contended that it is not liable to make any compensation whatsoever to the plaintiff, save for what is provided under the contract. Furthermore, that the defendant advised the plaintiff to take out the necessary insurance cover, which the plaintiff did not do.

The issues agreed to by the parties for trial were as follows;

- 1. Whether there was breach of contract.**
- 2. Whether the limitation liability clause in the contract is applicable and enforceable.**

3. Whether the second defendant is vicariously liable for the criminal acts of the second defendant.

4. What are the remedies available to the parties.

At the hearing, the plaintiff was represented by Mr. Olwenyi while the second defendant was represented by Mr. Byaruhanga. The first defendant was not represented by counsel, and did not appear in court. The plaintiff called three witnesses; Christopher Mayende, the Procurement Manager (PW1), Godes Twinamatsiko, a Detective Constable attached to Kira Division Station, Namugongo (PW2) and Saul Senkubuge, the Acting Managing Director (PW3). The second defendant called two witnesses; Clement Wanyamba, a Field Officer (DW1) and Samson Karugaba, the Deputy Operation Manager and investigator (DW2). The plaintiff and second defendants filed written submissions.

Issue one; whether there was breach of contract.

Based on the testimonies given during the trial the contract to provide security services dated 8th November 2007, between the plaintiff and the second defendant is not in dispute. Furthermore, it is also agreed that on 7th April 2009 in the wee hours of the morning, the premises of the plaintiff were broken into. The plaintiff's witnesses testified that the premises of the plaintiff were broken into by the first defendant together with certain unnamed persons and goods and money were lost. Godes Twinamatsiko (a police officer) testified that the first defendant, while in Police custody stated that he had been put into the theft deal by some individuals and they willfully broke into the plaintiff's premises.

Counsel for the plaintiff submitted that the defendants breached the contract when they failed to provide the necessary security that was the essence of the contract.

In reply, counsel for the second defendant submitted that the obligations of the second defendant under the contract were to provide one night guard and one day guard, to guard the building of the plaintiff. Furthermore, that these obligations were discharged when the second defendant deployed the first defendant on 7th April 2009, to guard the premises of the plaintiff.

I have carefully considered the evidence and the submissions of both counsels in respect of this issue for which I am grateful.

Both Clement Wanyamba, a Field Officer and Samson Karugaba, the Deputy Operation Manager and investigator, who testified for the defendant, agreed that on the night the premises of the plaintiff were broken into, the first defendant had been deployed as a guard at the said premises.

According to WORDS AND PHRASES LEGALLY DEFINED Vol. 1 at pg 187, breach of contract occurs where that which is complained of is a breach of the duty arising out of the obligations undertaken by the contract. (SEE **JAVIS V MAY, DAVIES, SMITH, VANDERVELL & CO.** [1936] 1 KB 399 at 404,405 CA Per Greer LJ).

I find that the act of breaking into the plaintiff's premises and taking away items belonging to the plaintiff, while the first defendant had been deployed to guard the premises of the plaintiff, amounts to failure on the part of the first and second defendants to provide security services as stipulated under the contract and therefore, there was breach of contract by the first and second defendants. I therefore answer the first issue in the affirmative.

Issue three; whether the second defendant is vicariously liable for the criminal acts of the first defendant.

Counsel for the plaintiff submitted that for the doctrine of vicarious liability to apply, there must be three essential ingredients; there must be a relationship of employer and employee, the tort must be committed by the employee and, in the course of the employee's employment. Counsel relied on the cases of **VINCENT OKELLO V AG** (CS No. 4 of 1992) and **PHOTO PRODUCTIONS LTD V SECURICOR TRANSPORT LIMITED** [1978] ALL ER 146 (CA). I agree with this submission, as being the proper position of the law.

Counsel for the plaintiff further submitted that in the present case, the first defendant was an employee of the second defendant, and committed the theft while in the scope of his employment, and therefore, the second defendant is vicariously liable for the acts of the first defendant.

In reply, counsel for the defendant submitted that there is no evidence to show that it is the first defendant who stole the goods of the plaintiff. Furthermore, that an act done in the course of employment must be an authorized act or an act connected with an authorized act. Counsel in this regard relied on the case of **HILTON V THOMAS BURTON (RHODES) LTD & ANOR** [1961] 1 ALL ER 74.

I have considered the evidence and the submissions in respect of this issue.

It is not in dispute that the first defendant was in the employment of the second defendant. The only question to be determined by the court is whether the acts of the first defendant can be said to have been done in the course of his employment.

All the witnesses testified that on 7th April 2007, the plaintiff's premises were broken into, and that the next morning, the first defendant's uniform and company Identification card, were found at the scene. Samson Karugaba an investigator with the second defendant further testified that the second defendant company tried to look for the first defendant after the alleged theft but he could not be seen, until the first defendant was later found in a place called Duduyi, where he had been arrested. The second defendant's witnesses testified that they could not determine whether it was the first defendant who indeed committed the theft.

I find that the act of abandoning his uniform, and identification which were found at the premises the next morning after the theft had occurred, and the consequent disappearance by the first defendant is suspicious, and is conduct not consistent with innocence.

In addition to this, for the principle of vicarious liability to apply, the acts of the employee must be done in the course of his employment. Clause 1 of the contract recognizes this and states that the second defendant will be liable for loss only if it is proven that the loss was caused by the sole negligence of its employees acting within the course of their employment. The same clause however states that they shall not be liable for the any deliberate wrongful act committed by any employee of the second defendant company.

For vicarious liability to attach it is immaterial, on the legal authorities, whether the acts of the employee were done contrary to the orders of the employer or whether they are wanton, negligent or criminally for his own benefit, the defendant will be held liable (SEE **MUWONGE V AG** [1967] EA 18).

I therefore find that the second defendant is liable for the acts of the first defendant because, they amounted to breach of his duty to guard the plaintiff's premises on the night he was deployed to guard the same, and therefore the second defendant is vicariously liable.

Issue two; whether the limitation of liability clause in the contract is applicable and enforceable.

Counsel for the plaintiff submitted that the defendant can not rely on the limitation of liability clause under the contract because the defendant fundamentally breached the contract. Counsel relied on the cases of **KARSALES (HARROW) LTD V WALLIS** [1956] 2 ALL ER 866 and **PHOTO PRODUCTIONS LTD. V SECURICOR TRANSPORT LTD.** [1978] ALL ER 146 (CA), for the proposition of law that a party who has fundamentally breached the contract can not rely on an exclusion clause.

Furthermore, counsel for the plaintiff submitted that the limitation of liability clause is unreasonable in light of the fact that it is the second defendant's own guard who was involved in the breach of security.

In reply, counsel for the second defendant submitted that under clause 5 of the contract, the liability of the second defendant was limited to the amount of Ushs. 550,000/= for the consequences of any incident involving theft, and therefore, the liability of the defendant by virtue of this clause is limited to Ushs. 550,000/=.

Counsel for the second defendant further submitted that by the principle of freedom of contract, the plaintiff is bound by the limitation of liability clause. Counsel relied on Jessel MR in the case of **PRINTING AND NUMERICAL REGISTERING COMPANY V SIMPSON** (1875) LR 19 Eq 462 at 465.

In addition, counsel for the second defendant submitted that the plaintiff was bound by the clause, by virtue of having signed the contract, in the absence of proof of fraud or misrepresentation. Counsel relied on the cases of **L'ESTRANGE V GRACOUB** [1934] ALL ER 16 and **MC CUTCHEON V DAVID MAC BRAYNE LTD.** [1964] 1 ALL ER 437 for this proposition.

Counsel for the second defendant further submitted that the plaintiff was expected to take out insurance cover and therefore, any other compensation beyond the suit contract would have been obtained through insurance, but the plaintiff to their detriment did not take out the any insurance.

I have carefully considered the evidence and the submissions of both counsels for which I am grateful.

I have carefully perused the contract dated 8th November 2007, marked Exhibit P1, and the limitation of liability clause, referred to by both parties, under the contract. I find that there are several clauses, limiting the liability of the second defendant under the contract and in particular clauses 5 and 7 are of relevance to this issue.

Under clause 5 it is provided that,

“General provisions as to the amount of liability: If pursuant to the provisions set out herein any liability on the part of the company shall arise (whether under the express or implied terms of this contract, or at common law, or in any other way) to the customer for any loss or damage of whatever nature arising out of or connected with the provisions of, or purported provision of, or failure in provision of the service

covered by this contract such liability shall be limited to the payment by the company by way of damages of a sum:

...(c) Not exceeding a maximum of Uganda shillings Five hundred and Fifty Thousand (550,000/=) for the consequences of any incident (other than those provided for by paragraphs (a) and (b) of this Condition) involving fire, theft or any other cause of liability on the Company under the terms hereof. And further provided that the total liability of the company shall not in any circumstances exceed the sum of Uganda Shillings Five Hundred and Fifty Thousand (Ushs 550,000/=) in respect of all and any incidents arising during any consecutive period of 12 months.”

Clause 7 also provides that

“...Terms defining and limiting liability to apply in all and any circumstances

(c) ...shall protect the company and its servants or agents in all circumstances, whether this contract, or any term expressed or implied in it however fundamental, be broken or repudiated whatever the consequences of any breach of contract or repudiation, and howsoever great may be the damage suffered by the customer, or the consequences following from any negligence or breach of contract or other wrongful act whatever on the part of the company its servants or agents...”

The provisions of the contract above, limit the liability of the second defendant, to Ushs. 550,000/= in case of theft. Furthermore, the second defendant’s liability is limited to the above stated sum, even for cases of fundamental breach. The questions to be determined by the court under this issue are two; first, whether there was fundamental breach of contract by the defendants. Secondly whether the second defendant, can rely on the limitation of liability clause.

To my mind the contract was for the provision of guard services to avoid inter alia theft at the defendant’s premises but the same persons who were to provide the required protection failed in their obligations to the extent that an employee of the second defendant abandoned his duty post. Clearly this is not just a mere breach of contract I find that it is a fundamental breach of contract.

The next question for determination is whether the defendants can rely on the limitation liability clause, to limit their liability under the contract. Counsel for the plaintiff cited several authorities for the proposition that a party who is guilty of fundamental breach can not rely on an exclusion clause. Counsel referred to the cases of **KARSALES (HARROW) LTD V WALLIS** [1956] 2 ALL ER 866 and **PHOTO PRODUCTIONS LTD V SECURICOR TRANSPORT LTD** [1978] ALL ER 146 (CA).

I however note that the position of the law as stated in those cases, has been largely overturned or limited by the House of Lords decision in the case of **SUISSE ATLANTIQUE SOCIÉTÉ D’ARMEMENT MARITIME SA V NV ROTTERDAMSCH E KOLEN CENTRALE** [1966] 2 ALL ER 61, where Viscount Dilhorne found as follows;

“In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental

*term. Such a rule of law would involve a restriction on freedom of contract, and in the older cases I can find no trace of it. In each case not only have the terms and scope of the exempting clause to be considered but also the contract as a whole. In the cases that I have cited above, I think that, on construction of the contract as a whole, it is apparent that the exempting clauses were not intended to give exemption from the consequences of the fundamental breach. Any provision that does so must be expressed in clear and unambiguous terms: see *Cunard SS Co Ltd v Buerger* ([1926] All ER Rep 103 at p 108; [1927] AC 1 at p13), per Lord Parmoor and *London & North Western Ry Co v Neilson* ([1922] All ER Rep 395 at p 400; [1922] 2 AC 263 at p 272), per Lord Dunedin. It must be apparent that such is its purpose and intention.”*

This position of the law is also stated in the case of **PHOTO PRODUCTIONS LTD V SECURICOR TRANSPORT LTD** [1980] 1 ALL ER 556 (HL) at 558 to 560 , by Lord Wilberforce.

The above cases state that when dealing with exemption clauses the entire contract has to be looked at as a whole, and where the clause is completely clear and adequate to cover the defendant’s position, and such is its intention, then the clause applies. I find that on the true construction of these limitation liability clauses in this case, they expressly cover the second defendant from liability for theft, and fundamental breach.

Furthermore, the contract under clause 7 (b) provided that any additional liability beyond that in the contract could be recovered by way of insurance cover taken separately by the customer. The defendant’s witnesses both testified that they made proposals to the plaintiff to insure their premises but this was not done by the plaintiff. Christopher Mayende for the plaintiff company confirmed that the company premises were not insured.

On the whole, I find that the limitation of liability clauses were clear and brought to the attention of the plaintiff at the time of the signing of the contract. In such circumstances a prudent person would have to insure their premises against such risk, I find therefore that the limitation of liability clause is applicable and enforceable.

Issue four: What are the remedies available to the parties?

Having found that the plaintiff was bound by the limitation of liability clause under the contract, I further find as a result that the plaintiff is entitled to the sum of Ushs. 550,000/= as the compensation from the second defendant for acts of theft, as stipulated under the contract. This limitation of liability can only go to limit the award of special damages.

With regard to general damages, it is trite law that general damages are compensatory in nature, and are intended to make good to the sufferer as far as money can do so, the loses he or she suffered as the natural result of the wrong done to him.(SEE **OKELLO JAMES V AG** (HCCS NO. 574 OF 2003). I have also found that the breaking into of the plaintiff’s premises amounted to fundamental breach of the security contract by the first and second defendant. Due to this fundamental breach of contract by the defendants, I find that this is an appropriate case for the award of general damages. Counsel for the plaintiff did not adduce sufficient evidence of the loss that was a foreseeable consequence of this

breach. That notwithstanding I will award general damages of Ushs. 15,000,000/= as the theft put the plaintiff in considerable hardship by reason of loss of valuable property.

The plaintiff also prayed for exemplary damages. According to HALSBURY'S LAWS OF ENGLAND, 4th ED Vol. 12(1) at par 811, aggravated damages are awarded over and above the normal damages, by taking into account the defendant's motives and conduct. Such damages may be 'exemplary damages' which are punitive and not intended to compensate the plaintiff for any loss, but rather to punish the defendant. Furthermore, Lord Devlin in the case of **ROOKS V BARNARD** [1964] AC 1129 found that the object of awarding exemplary damages is to punish or deter the defendant.

Taking into account that it was not proved before this court that it is the first defendant who actually broke into the premises and stole the items belonging to the plaintiff, I find that the award of exemplary damages is not justified.

I award interest to the plaintiff at 21%p.a. on special damages from the date of filing the plaint until payment in full and 10%p.a. on general damages from the date of judgment until payment in full.

I award costs of the suit to the plaintiff.

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Geoffrey Kiryabwire

JUDGE

Date: 20/08/2012

20/08/12

10:45

Judgment read and signed in Court in the presence of:

- Olwenyi for Plaintiff

In Court

- None of the parties

- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 20/08/2012