

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 31 OF 2012

ULTIMATE SECURITY

TANZANIA LIMITED.....PLAINTIFF

VERSUS

TANZANIA RAILWAYS LIMITED.....DEFENDANT

JUDGMENT

Mansoor, J:

Date of Judgment- 4TH SEPTEMBER 2015

The Plaintiff's claim against the Defendant is for the sum of THz 1,455,948,416.02 being the balance as at 13th March 2012 due from the Defendant to the Plaintiff in respect of Guards Services provided by the Plaintiff to the Defendant

inclusive of interests charges arising from delayed payments. The Plaintiff alleges that they entered into an agreement with the Defendant on 30th July 2009 for provision of guard/security services, and the Plaintiff has availed the security guards to the Defendant. It is alleged by the Plaintiff in its plaint that the Defendant has neglected or failed to honour the payments for the services. The Plaintiff has filed in Court a statement of accounts outlining the Defendant's indebtedness and the unpaid invoices.

To the above claims, the Defendants filed a written statement of defence, and a counterclaim. In their written statement of defence, the Defendants disputed the amount of claim, and also disputed the period of the contract stating that the Plaintiff's contract ended on 29th February 2012. The Defendants claims that the unpaid balance as at the end on the contract, i.e. on 29th February 2012 was THz 1,369,270,399.01. In their defence, the Defendant annexed a letter dated 7th February 2012, and marked as annexure D3 to the written statement of defence, this letter is from the



Defendant, accepting the debt of THz 592,565,898.41 as at August 2011, this letter provides as follows:

PAYMENT PLANS FOR OUTSTANDING BALANCE

We acknowledge receipt of your letter ref. JFY/JFY/082511-283LET dated 26th August 2011 on clearance of outstanding balance of THz 592,565,898.41 in your favour. In the absence of any analysis based on invoice numbers, we are unable to know whether recent payments have been taken into account. We request you to provide such details to facilitate reconciliation. Our balance slightly differs with yours.”

Taking due consideration of the results of the reconciliation as stated above, TRL will endeavour to clear the outstanding balance by 30th November, 2011 from our own source of funds. We therefore kindly request you to extend the contract.”

Yours sincerely



Eng. K.M Kisamfu
Ag Managing director

Also in a letter dated 24th February 2012, (this letter is annexed to the written statement of defence as Annexure D2), the Defendants are writing to the Plaintiff accepting the termination of the agreement and asking the Plaintiff to remove all the guards from the Defendants premises on 1st March 2012, and handing over. This letter also acknowledges the outstanding debt and has said that the government has a provision of THz 795,220,083 to be paid to the Plaintiff, and promised to settle the amount as soon as possible. They also asked the Plaintiff in this letter to submit the final invoices for reconciliation.

The Defendant also annexed a report and marked as Annexure D1 to the written statement of defence, showing and acknowledging the outstanding amount of indebtedness of THz 1,369,270,399.01 as at February 2012. This is pleaded in paragraph 3 of the Defendant's written statement of defence.



In the Defendant's counter claim, the Defendant is claiming against the Plaintiff compensation for the stolen/lost property at Moshi station during the month of September 2011 amounting to THz 286,737,084, and also they claim compensation for the stolen/lost property at the Dar es Salaam Chief Supplies office on 12th July 2011 and 11 December 2011 amounting to US\$ 277,166.

The total amount in the counterclaim, as per the Consent Decree of 5th November 2012 is THz 815,880,710, thus the Court had on 5th November 2012, entered a Preliminary Decree of THz 639,067,715.00 in favour of the Plaintiff, and this amount was paid by the Defendant in satisfaction of the Preliminary Decree. Therefore out of the acknowledged amount of THz 1,369,270,399.01, the amount of THz 639,067,715.00 was already paid. The disputed claim is now THz 815,880,710.00, as in the counter claim.



The Preliminary Decree entered by the Court on 5th November 2012, resolved issues No. 1 and 2 of the issues framed by the Court, and determined in its entirety the claims by the Plaintiff in its plaint. There is no dispute as to whether there was an agreement between the parties, and there was no dispute that the outstanding unpaid invoices as at February 2012 was THz 1369,270,399.01. The issues that remained to be determined by this Court are those issues arisen from the counterclaim, i.e. whether materials were stolen at Moshi and Dar es Salaam Supplies Offices, what was the costs of the materials stolen, and who is responsible for the stolen materials, and what is the amount of compensation, if any, the Defendant is entitled for the stolen materials.

1. Whether the materials were stolen at Moshi and Dar es Salaam Supplies Offices:

The Defendant claims that there was theft occurred in Moshi during the month of September 2011, and the value of the stolen goods amounts to THz 286,737,084. To prove this the



Defendants exhibited annexure D4 and D5 to the counterclaim. Annexure D4, a letter from the Defendant to the Plaintiff dated 27th February 2012, asking for compensation of stolen property at CXR-BCB Moshi amounting to THz 285,737,084, and supplies office at Dar es Salaam valued at US\$ 277,156. This letter gave the description, quantity and cost in THz of the materials stolen at CXR-BCB Moshi on 5th September 2011. This letter explains that there was an inspection carried out on 8/09/2011, and the staff of the Plaintiff were involved. Annexure D5 to the counterclaim, a letter from the Defendant to the Principal Protection Office, dated 08/09/2011, explains, and confirms the theft having occurred, it states as follows:

“nimepokea taarifa ya tukio la wizi tarehe 05/09/2011 kutoka kwa msimamizi wa CXR Moshi ndugu Mshanga.

Tumekwenda kwenye tukio hilo tukiongozana na viongozi wa polisi Moshi pamoja na viongozi wa ULTIMATE SECURITY



Moshi na Arusha. Baada ya kufika tulikuta kweli behewa limevunjwa na mali za shirika zimeibiwa.”

The Plaintiff denies the claim for compensation for the stolen goods saying that there is no proof that all the listed items in annexure D4 referred herein above have been stolen but they are actually either still in possession of the Defendant or were removed by RITES. They also deny to accept liability of the lost/stolen goods saying that the staff of the Defendant were negligent, leading to theft in Moshi as well as in Dar es Salaam. The Plaintiff however accepts that they were involved during the inspection carried out in 7th September 2011 but they deny to have acknowledged that the list of the goods stolen were as that shown in annexure D3. They claim that the list was prepared by the Defendant after the inspection. The Plaintiff says the value of the stolen items at Moshi was only THz 23, 326,000, and that this is the amount that was reported to the police, and the amount shown in the court case, as well as the letter to the police from the Defendant listing the missing items and the value is shown to be of THz

H

23,326,000 only. The Plaintiff produced in Court Exh P9, which is a letter dated 30th November 2011 from the Defendant to the Head of Police, Railway Post, Moshi, giving the value of the items stolen to be THz 23,326,000. This letter was written by Eng. A.M Ngaliga, District Mechanical Engineer of the Defendant. Detective Corporal Franco Mwafongo was recalled as a witness to specifically testify on this letter. He actually testified that he worked as a police at Moshi Railway post since 2008 to 2014, and he acknowledged that Exhibit P9 is a report of theft occurred at CRX Area Moshi, and that he went to inspect the scene of crime, and that there was no breaking, but it was the staff of the Defendant using the master key, who were suspected to be involved in stealing. He however confirmed that there was theft occurred. This police officer recognised this letter and confirmed that the value of the stolen item in Moshi were THz 23,326,000.

Regarding the stolen items in Dar es Salaam Supplies Office, the Plaintiff denies that all the items listed were actually stolen. They say some of the items were removed by the former

4

management of the company i.e. RITES, before handing them back to the Defendant, and the value of the missing items is as confirmed in the joint report of July 2011, which is US\$ 184,698. The Plaintiff claims that the missing items were taken back to India by RITES. The Plaintiff argues that they cannot be held responsible for the theft that occurred before the items were entrusted to them. They seem to agree that they were entrusted to guard the locomotives during the period from 12 July 2011 to 11 December 2011, and the estimated value of the loss is US\$ 92,458, and that they cannot be held responsible for the theft that occurred before they were entrusted to guard the locomotives, and that the Report of 11 July 2011 was for the period before the locomotive were entrusted to them. The Plaintiff denies that the locomotives do not belong to the Defendant and so they cannot have any claim over them.

From the above, it is confirmed that there were materials stolen at Moshi and Dar es Salaam, Supplies Offices.

4

2. What was the cost of the materials stolen?

The Defendant claims that the materials stolen at Moshi on 5th November 2011 is THz 286,737,084 as evidenced in Annexure D4 and D5 to the counterclaim. The Defendants claims that the value of the items stolen at Dar es Salaam supplies office is US\$ 277,166.

For the theft of materials at CXR BCB Moshi on 5th September 2011, I shall refer to a letter by the Defendant to the Principal Protection Officer – Moshi dated 08/09/2011. This letter was tendered by the Defendant and admitted as Exh D1 collective. In this letter the Protection Assistant Moshi Mr A.B Kazungu is writing to the Principal Protection Office, Dar es Salaam, stating that after being notified of the theft that occurred on 5th September 2011 at CXR Moshi, he checked with the Head of CXR Mr A Mshanga and that Mr Mshanga did not know of the list of items that were actually stolen. Paragraph 3 of this letter reads as follows;

11

“baada ya kucheki naye, Kiongozi wa CXR ndugu A Mshanga kuwa ngazi tatu za aluminium adder (3) zimeibiwa. Kwa kuwa behewa hilo limeonyesha lilikuwa na vitu vingi- baada ya kumuhoji msimamizi huyo ndugu A Mshanga alisema kuwa yeye baadhi ya vitu vya CXR havijui.....hivyo nakushauri kama kiongozi wangu wasiliana na DMEMoshi- Tanga atumie mafundi wa CXR wanaofahamu vifaa hivyo ili tupate uhakika.”

On 25th October 2011, Mr J M P Syaizyagi, the Chief Design Draughtsman of the Defendant is writing to the Chief of Finance of the Defendant, giving the cost of machinery and equipment stolen at CXR BCB at Moshi to be THz 285,737,084, and the letter dated 27th February 2012 from the Defendant to the Plaintiff (Exh D3 collective), giving the value of the stolen items in Moshi to be THz 285,737,084 states at the second page immediately after the list that the report of 8th September 2011 of which the staff of the Plaintiff were involved is attached. The only report of 8th September 2011 attached to the letter of 27th February 2012, is the letter dated 08 September 2011 from Mr A B Kazungu Protection Assistant



Moshi addressed to the Principal Protection Office, Dar es Salaam, which I have quoted above, basically stating that Mr A Mshanga, the head of CRX Moshi did not know the items which were stolen on 5th September 2011. In this I'm inclined to believe Exh P9 dated 30th November 2011 tendered by the Plaintiff and verified by Detective Corporal Franco Mwafongo, written by Engineer A. M Ngalinga District Mechanical Engineer of the Defendant that the value of the stolen items in Moshi is THz 23,326,000. It should be noted that Detective Corporal Franco Mwafongo was present during the inspection carried out at CXR-BCB Moshi as his name also appears in the letter written by Mr A. B Kazungu Protection Assistant Moshi addressed to the Principal Protection Office, Dar es Salaam. The others who were involved in the inspection and verification of the items lost were, as mentioned in the letter written by Mr A. B Kazungu Protection Assistant Moshi addressed to the Principal Protection Office, Dar es Salaam, on 08th September 2011; and they are:

- Head of Police Moshi- S/SGT Amiri

[Handwritten signature]

- RP- Franco SGT
- A Mshanga- Head of CXR Moshi
- Awadh Ahmed –Ultimate Security
- Philipo Daniel- Ultimate Security, and
- Amos Kazungu. PO Moshi.

Regarding the theft at Dar es Salaam, it is confirmed that there was theft occurred on or between 12th July 2011 and 11 December 2011 during which period the Plaintiff were entrusted with guarding the premises of the Defendant as shown in the Agreement dated 30th July 2009. It is also confirmed that there was a joint Inspection Report carried out on 12/07/2011, confirming that the locomotives have been jointly inspected on 11 and 12 July 2011 (Exh D2 collective), and that this report was signed jointly by Mr C.M Sahani the Ultimate Security Representative, Mr L.M Makoye Principal Protection Officer, TRL, Mr Y.S.I Shija TRL Representative, Mr A E Munishi, Chief Supplies Manager TRL, and Mr Prem Chandra, Project Manager RITES Morogoro. Again there is a letter dated 8th February 2012 from the Chief Supplies



Manager, Supplies Department of the Defendant to the Managing Director of the Defendant (Exh D3 collective), which confirms that there was a joint inspection carried out on 21st January 2012, and that the representatives from Ultimate Security were also present. This letter made reference to a letter from RITES Limited dated January 30, 2012 (also Exh D3 collective) confirming that cost details of the materials stolen from the RITES locomotives between 12.07.2011 and 21 January 2012 was US\$ 92,458, and details of materials found stolen from locomotives at the time of first joint inspection on 11 and 12 July 2011 was USD 184,698. Hence the total cost of the material stolen is USD 277,156.00

The defence by the Plaintiff that they were not entrusted with guarding of the materials found stolen during the first joint inspection has no substance, as the Plaintiff do not deny that during the period the items were stolen , they were obliged by the Agreement to safeguard the properties of the Defendant. Besides, the Plaintiff have not produced any evidence to substantiate that as to which period they were entrusted to



guard the locomotives, and that they were not obliged under the Security Agreement to guard the Defendant's premises during the period of February to –March 2011, and that they were only entrusted to guard the locomotives after the joint inspection report of 12 July 2011, as submitted in their closing submissions.

Thus the cost of the items stolen at Moshi is THz 23,326,000, and the total costs of the item stolen at Dar es Salaam, Supplies Office is USD 277,166.00

3. Who was responsible for the stolen materials

The Agreement entered between the parties imposes a duty upon the Plaintiff to guard and provide security services to the Defendant's property and ensure that the Defendant property including the machines and equipment around and inside the offices are guarded or protected from theft. Clause 3.1 of the Agreement reads, and I quote:



- 3.1 ii) *the Guards stationed in or about the said areas shall guard or protect the properties from or against theft, burglary, vandalism, looting, arson, damage or such undesirable acts;*
- iii) *The Guards shall provide security around and inside the offices and facilities;*
- iv) *the Company shall provide security services on full time basis i.e. 24 hours/only 12 hours day shift/only 12 hours night shift or as per the Clients request;*
- v) *the Company shall provide the guards with equipment's and facilities and shall enable the same to provide adequate security to TRL offices, workshops, Yards, Facilities, Work stations, God owns etc. within the scope of the contract and people working in these places, and shall adequately*

A

supervise the said guards to ensure provision of the Services.

The evidence presented by the Defendant indicated that the items claimed to have been stolen existed, and they were actually stolen. There are enough reports both by the police and the reports verified by the Plaintiff during joint inspection reports confirming that indeed theft has occurred, goods were stolen, and value of the goods was given. The reports did show the kind, type or make of the goods that were been stolen. The Defendant has discharged its duties of proving its claim on the balance of probabilities, and it is not in dispute that the Plaintiff were put in charge of security under the Security Agreement.

It is true that Ultimate Security is a security company and undertook or agreed to guard the Defendant's premises at a fee and it has been proved that Ultimate Security was unable to perform its duties under the agreement or it was negligent when performing its duties resulting to losses on the part of

A

the Defendant. Therefore, in answer to issue number three, it is Ultimate Security Limited who are responsible for guarding and protecting the items stolen, and that they either failed to perform their duties, or they were negligent in performing their duties, as a result, the Defendant suffers loss.

**4. Whether the Defendant is entitled to
compensation/indemnification**

Clause 4 of the Security Agreement between the Parties herein provide for indemnification, it provides as follows:

- 4.1 “the Company will be liable to a maximum of THz 50,000,000 or for 70% of value of loss whichever is less (over and above any compensation, the Client might receive on an insurance policy) in respect of any one claim or series of claims arising from the same event, for loss or damage to the client goods (other than indirect or consequential loss) caused by negligent or intentional acts of the Company, or its servants acting within the course of the employment,



except where the loss or damage howsoever caused has been contributed by the negligent or willful act or omission of the client, his servants or contractors.....”

4.2 Subject to the Clause 4.1 herein above, the Client shall be indemnified on the insurance policies against the losses to the Clients properties caused by the negligence or by willful default by the Company or its employees while performing their duties within the bounds of this contract.....”

4.3 The Company is obliged to process the claim for the loss of the Clients’ properties from the Insurance company in order that the client is paid for proceeds of insurance claim not covered by the Company as it is contained under clause 4.1 hereinabove.”



In any case the responsibility of Ultimate Security for the loss, destruction or theft of its client's goods/property as provided in clause 3 of the agreement reproduced herein above is clear. Clause 4 of the Agreement obliged the Plaintiff to compensate the Defendant either THz 50,000,000 or 70% of the value of loss, whichever is less and this is over and above any compensation the Defendant will receive from the Insurance Company. Under Clause 4.3 of the Agreement, the Plaintiff is obliged to process the claim for the loss from the insurance company. Thus the Plaintiff is required to process immediately with its insurance company for the loss suffered by the Defendant amounting to THz 23,326,000 and USD 277,186, and over and above the insurance indemnification, the Plaintiff is required to pay the Defendant either THz 50,000,000 or 70% of the total loss suffered by the Defendant, whichever is less, as provided in clause 4.1 of the Security Agreement. The amount of THz 50,000,000 or 70% of the total loss suffered by the Defendant, whichever is less may be offset with the unpaid balance of the invoices i.e. THz 1,369,270,399.01 (minus THz 639,067,715). The amount in USD should be calculated at the

21

rate when the loss actually occurred i.e. the rate applicable on 11 and 12 July 2011.


5. To what reliefs are the parties entitled:

1. The Plaintiff shall process with its insurance company and indemnify the Defendant of the loss suffered amounting to THz 23,326,000 and USD 277,186.
2. The Plaintiff shall pay compensation to the Defendant, over and above the indemnification to be paid by the insurance company, amounting to either THz 50,000,000 or 70% of the total loss suffered by the Defendant and the amount may be offset with outstanding unpaid invoices.
3. No interest shall be paid to either of the parties.
4. Cost of this suit shall be borne by the Plaintiff.

It is so ordered.



DATED at DAR ES SALAAM this 04TH day of September, 2015


MANSOOR
JUDGE
04th Sept, 2015

