



IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NUMBER 73 OF 2016

LIDO ELECTRICALSCLAIMANT

VERSUS

MALAWI POSTS CORPORATION.....DEFENDANT

CORAM: HON. JUSTICE J. KATSALA
P. Nkhono SC, of counsel for the claimant
J. Masumbu & C Machika, of counsel for the defendant
A. Nyirongo, Court Clerk
C. B. Mutinti, Court Reporter

JUDGMENT

The claimant commenced this action seeking the payment of the sum of K48,940,138.48 being the value of building materials supplied to the defendant at the defendant's own request through two Local Purchase Orders (LPOs) issued in favour of the claimant. The claimant also claims compound interest on the said sum, debt collection charges in the sum of K7,341,020.77 and costs of the action. The defendant denies the claim and contends that such goods, if ordered, were ordered without its knowledge and consent or fraudulently and in breach of the Public Procurement Act and the Corrupt Practices Act.

It is the claimant's case that on or around 17 December 2015 the defendant issued to it two LPOs numbers 3739 and 3740 for the purchase of building materials for the maintenance of warehouses for the sums of

K42,096,776.89 and K11,325,540.63, respectively. The claimant proceeded to deliver the building materials to the defendant and invoiced accordingly. However, the defendant has failed or refused to pay for the goods.

The defendant's case is that it has never dealt with the claimant in any way. The alleged LPOs were fraudulently delivered to the claimant by a fraudster without the defendant's authority and conferred no rights on the claimant. Further, it is the defendant's contention that the alleged contract or transaction was/would be illegal as it would have offended the provisions of the Public Procurement Act and the Corrupt Practices Act having been concluded without the approval of the Office of Director of Public Procurement. It is also averred that when the fraud was discovered the police recovered the goods but the claimant has for no reason refused to take them back. It is further contended that the claimant cannot maintain this action because it was negligent in the manner it conducted the transaction in that it did not verify the authenticity of the LPOs with the defendant's senior management, verify the existence of the requisite approval from the Office of Director of Public Procurement.

There are two main issues for the Court to determine in this action. First, whether there was a valid contract between the parties herein for the supply of the goods as alleged, and secondly, whether Mr Chingwalu was an agent of the defendant with authority, actual or ostensible, from the defendant to transact with the claimant in the manner that is alleged by the claimant.

The burden of proof lies on the claimant to prove its case on the balance of probabilities which is the appropriate standard in civil matters. It is up to the claimant to prove that it entered into the alleged contract with the defendant and that such contract is valid.

The case of *Chidanti Malunga v. Fintec consultants and another* [2008] MLR (Com) 243 summarizes the basic requirements of a contract. At 249 Dr Mtambo, J states as follows: -

"For there to be a valid contract one of the essentials is that there must be an agreement. The agreement is made up of offer and acceptance. An offer is an expression of willingness by one person the offeror to enter into a relationship with another person the offeree with an intention that the relationship shall be binding on the offeror as soon as the offer is accepted by the offeree. An acceptance is a final and

unqualified assent to all the terms of an offer. It must not treat the negotiations as still underway otherwise it fails as valid acceptance.”

The claimant’s witness, Kandakute Mhango (CWI), told the Court that he spoke with one Charles Chingwalu, the defendant’s Stores Clerk, on whether there were goods that the defendant needed which the claimant could supply. Mr Chingwalu came to the claimant’s office to check what goods the defendant might be interested in. Eventually, Chingwalu sent an email to the witness’ supervisor, one Munir Sama, detailing the goods that the defendant wanted from the claimant. CW1 then prepared a quotation for those goods which was collected by Chingwalu. However, CW1 failed to produce the email that Chingwalu is alleged to have sent requesting for the quotation. His explanation is that Sunir Sama is no longer in the employ of the claimant. He produced in evidence copies of four quotations numbers 9504 for K6,174,477.87, 9505 for K5,151,062.76 both dated 27 October 2015, and numbers 9506 for K25,596,064.31 and 9507 for K16,500,712.60 dated 28 October 2015. CW1 further stated that on 17 December 2015, Chingwalu brought two LPOs numbers 3739 and 3740 issued by the defendant for “purchase of building materials for maintenance of warehouses” for K36,134,572.44 and for “purchase of building materials for renovation of MPC buildings” for K11,325,542.63, respectively. Later on Chingwalu showed him a warehouse in Limbe along the Zomba Road near Petroda Filling Station which had a Malawi Telecommunications Limited (MTL) sign post, where the goods were to be delivered. He claims that Chingwalu told him that previously the defendant and MTL were one organization hence the sign post. CWI delivered the goods in about 12 instalments between 6 and 21 January, 2016. On each of those 12 deliveries, the goods were received and signed for by Chingwalu himself. It was only later on that he learnt from the Police that the LPOs were forged. He does not know where Chingwalu is.

CWI also told the Court that he knew Chingwalu as someone working in the defendant’s Stores or Procurement Department when he was working for Universal Trading Company as a Sales Representative. He had dealt with Chingwalu on more than ten times before. Chingwalu used to come to Universal Trading Company to order goods on behalf of the defendant. However, no evidence was produced before this Court to substantiate this contention. On one transaction between the claimant’s sister company, Africa Commercial Agency, and the defendant involving safety boots, the order was placed by Mr Knoxy Makonyola, the defendant’s Procurement Controller. When CW1 went to deliver the safety boots, he found Chingwalu at the defendant’s Stores Office who could not take delivery of the goods

before he obtained confirmation from Makonyola that the goods were actually ordered by the defendant.

The defendant's witnesses, Knoxy Makonyola (Procurement Controller) and Noel Fole (Head of Internal Audit), told the Court that Chingwalu was employed by the defendant as a Stores Assistant. His duties, among others, were to take delivery of supplies of goods and at no point did they include going out to order goods on behalf of the defendant. The defendant is a public entity which follows procurement procedures laid down in the Procurement Act and by the Office of Director of Public Procurements (ODPP). In terms of the procedures, any procurement of goods and services of more than K5 million is supposed to be floated in the daily newspapers for 30 days and thereafter tenders received to be opened in the presence of bidders. This process did not happen in respect of the goods the subject matter of these proceedings. And a contract of the magnitude the claimant alleges herein could not have been entered into with the defendant without the approval of the ODPP. The claimants knew or ought to have known of these procedures when they dealt with Chingwalu. In any case, the LPOs they acted upon were not issued by the defendant's authorized officers and the signatures thereon were forged. All these facts were brought to the claimant's attention but still the claimant refused to take back the goods and opted to commence the present proceedings.

The question to be answered is whether, on these facts, there was a valid contract between the claimant and the defendant.

It is important to note that the defendant is a public entity established under the Communications Act. This is duly acknowledged by the claimant in its statement of claim. Being a public entity, it follows that the defendant was legally bound to follow all the procedures prescribed in the Public Procurement Act (hereinafter "the Act") and the ODPP. See section 27(5) of the Act. According to section 30(1) of the Act, all procurement by procuring entities using public funds must be realized by means of open tendering except in cases provided for under the subsection. And procurement by means of single source method is only permitted in circumstances specified under section 30(10) which include, when the estimated value of the procurement does not exceed K5 million. The contract alleged to have been concluded with the defendant is for goods worth K48,940,138.48. No doubt there was need for the defendant to float tenders in the daily newspapers for the supply of such goods. It could not be done by means of single sourcing.

During cross examination, CW1 told the Court that he had never dealt with a public entity before the alleged contract with the defendant. This is a contradiction bearing in mind that he claims in his witness statement to have dealt with Chingwalu, who he claims was acting for the defendant, for more than ten times prior to the contract alleged in the present proceedings. Even if it were true that CW1 had never handled public procurement contracts before, what about the claimant itself, could it say the same thing? I have not received evidence to that effect. In any event, that purported ignorance of the law and procedures on public procurement cannot come to the claimant's aid. The claimant is caught by the famous maxim *ignorantis juris non excusat* (ignorance of law is no excuse).

On the evidence before me, it is apparent that had the defendant required to purchase the alleged goods, the necessary procurement procedures would have been followed. Tenders would have been invited from potential suppliers through the newspapers. And without doubt, the claimant would have come to know about the defendant's requirements through the newspapers and not through visit by Chingwalu or an email from Chingwalu. In the circumstances, the claimant should have been put on alert by the fact that no tenders had been invited for such a large procurement.

Further, it is clear from the testimony of CW1 that he was very familiar with Chingwalu, being someone he had dealt with for more than ten times before. In my judgment, CW1 knew or ought to have known that Chingwalu was working in the defendant's Stores Office. I do not believe that CW1 had reason to believe and did believe that Chingwalu was in the defendant's Procurement Department. In any case, he told the Court that at one point, it is Makonyola who came to procure the safety boots and when CW1 went to the defendant to deliver them, it was Chingwalu who took delivery. He found Chingwalu at the defendant's Stores Office. And that Chingwalu refused to accept delivery because he was not aware of the purchase, and that Chingwalu had to check with Makonyola, the Procurement Controller, on whether to accept the goods or not. Had Chingwalu been a procurement officer, surely, he would have been aware of the procurement of the safety boots and would not have needed to crosscheck with Makonyolo whether there was an order for such goods. And the fact that it is Chingwalu who undertook to find storage space for the goods in the instant case and singlehandedly took delivery of the goods on all the 12 occasions the goods were delivered at a warehouse in Limbe, in my opinion, ought to have alerted the claimant and/or CW1 that Chingwalu was more of a stores

officer than anything else. And that he was not the kind of person who had the authority to transact such kind of business on behalf of the defendant.

On the evidence before me I am inclined to believe the defendant's witnesses that they did not issue the LPOs and that the signatures thereon were forged. I do not see how, being a public entity and aware of the public procurement procedures, the defendant could have issued the LPOs before complying with the prescribed procurement procedures. I do not believe that the defendant could have decided to breach the law in the procurement of the materials in question. In any case, there is no evidence suggesting that the materials were required by the defendant, in the first place, or that they were needed urgently. May be if there was such evidence, there may have been inferred the motivation on the defendant's part to sideline the procurement procedures. Otherwise, from the totality of the evidence before this Court I am satisfied that the LPOs were not issued by the defendant's authorized officers. They were forged. No wonder Chingwalu disappeared when the transaction was discovered by the defendant.

As a general rule a forgery is a nullity and does not confer any rights, *Right Price Wholesalers Ltd v National Bank of Malawi* Commercial Cause Number 242 of 2009 (unreported), *Dylan Mafunga v Robby Kaombe and NBS Bank Ltd* Commercial Cause Number 2 of 2012 (unreported). I find the dictum of Wright J in *Slingsby v District Bank Ltd* [1931] 1 KB 588 at 604-605 to be very instructive. He said;

"This question was discussed in *Ruben & Ladenburg v Great Fingall Consolidated*, and more recently and since *Lloyd v Grace, Smith & Co.* in *Kredit Bank Cassel G.m.b.H. v Schenkers*. In both cases the forgery was in the signatures to the documents and the question was whether the documents were binding on the respective companies, on the principle that outsiders were entitled to assume that matters of indoor management were in order.... It was held that the question could not be raised in the case of forgery. Though a man can be estopped by conduct from denying that a forgery is his signature, yet as a forgery is a crime he cannot authorize it in advance (if indeed it is not a contradiction to authorize a forgery) without being an accessory to the act. Nor can he agree to be bound by it consequently, so as to shield a criminal or compound a felony. Hence an act of forgery is a nullity and outside any actual or ostensible authority..."

This dictum also answers the second question in this case, that is, whether Mr Chingwalu was an agent of the defendant with authority, actual or

ostensible, from the defendant to transact with the claimant in the manner that is alleged by the claimant. Because of the forgery, Chingwalu could not be an agent of the defendant on the alleged contract. The LPOs were a nullity and the defendant is not bound by them.

In the premises I find that Chingwalu had no authority to enter into contracts for goods on behalf of the defendant. His authority was to receive goods when they are delivered by suppliers upon purchase by the defendant. There is no evidence that he had ostensible authority. Though CW1 claimed that he had dealt with Chingwalu on more than ten times when he was working for Universal Trading Company and or the claimant's sister company, no evidence has been produced to substantiate that, if that is indeed true, and/or that Chingwalu was acting with the defendant's knowledge or that the defendant had represented to CW1 or Universal Trading or any other person that he was acting on their behalf. He who alleges must prove. On the evidence before this Court the claimant has failed to prove that Chingwalu was the defendant agent with actual or ostensible authority.

Therefore, it is my judgment that the claimant has failed to prove its case at the standard in civil matters. It has failed to prove the existence of a valid contract with the defendant for the supply of goods as alleged or at all. I dismiss the action with costs.

Pronounced at Blantyre this 24th day of December 2022.

J N Katsala
PP J N Katsala
JUDGE

