



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3522 OF 2000

BETWEEN:

H.P DALILI t/a TEKNIKO ELECTRONIC SERVICES.....PLAINTIFF

-AND-

NATIONAL BANK OF MALAWI.....DEFENDANT

CORAM: HON. JUSTICE POTANI

Banda of Counsel for the Plaintiff
Msisha of Counsel for the Defendant
Chuma, Official Interpreter
Chiphwanya, Senior Personal Secretary



RULING

The plaintiff, H.P. Dalili t/a Tekniko Electronic Services, claims damages from the defendant, National Bank of Malawi, for alleged breach of contract, defamation and discrimination.

The relevant facts as they emerge from the evidence adduced by the parties are that sometime in the year 1994, the defendant, a major bank in the country, required the provision of some radio telecommunication services for its operations. Among the service providers that came forward to offer the facility required by the defendant was the plaintiff. Various discussions and correspondence ensued between the plaintiff and the defendant on the issue.

It is the plaintiff's assertion that the discussions and correspondence between the parties culminated into an agreement that the plaintiff would install radio communication equipment to all the defendant's branches throughout the country at a contract price of K1,371,017.00. On its part the defendant asserts that it was not conclusively agreed that the plaintiff would install the equipment at all its branches; rather the agreement was that initially the plaintiff would install the equipment at its branches in the Southern Region and depending on the success of the exercise, the project would extend to the Central and Northern Regions as second and third phase respectively.

The plaintiff conducted a nationwide survey in order to assess and ascertain the needs and requirements such as equipment and other necessities for the execution of the project. Eventually the plaintiff commenced installations in the Southern Region. It is alleged by the plaintiff that as he was carrying out the works, he experienced some lack of co-operation from the defendant's officers and in this respect he singled out a Mrs Pollyanna Pinto and Mr Misinde who

allegedly were unduly delaying in facilitating some crucial arrangements for the implementation of the project such as issuance of local purchase orders (LPOs), release of funds and provision of transport. Despite this, the plaintiff gave out his best and it is his assertion that he duly completed the installation and all equipment was working as confirmed by the defendant's Head of Administrative Services in his letter tendered as HPD 17. The only concern or reservation raised by the defendant was that Zomba and Mangochi Branches were experiencing communication problems and because of that the defendant withheld payment of the sum of K57,616.00 to be paid only after the problem was rectified. There were later other concerns raised by the defendant which were of such a nature that could be explained and had possible solutions. The first concern was that there was no communication between Zomba and Blantyre which according to the plaintiff was not part of the contract but could have easily been addressed by installing a repeater station at Zomba as it was due to high mountains between Zomba and Blantyre but the defendant refused. The second point of concern was that there was no communication between Zomba branch and its mobile agency van while the van was stationed at the branch. According to the plaintiff, although the contract required him to provide communication between the branch and its mobile agency van the essence of the contract was that the communication should be when the van was travelling to and from the branch which was achievable. The third concern was that the system had no backup power supply and therefore would not function during black outs but according to the plaintiff the provision of backup power supply was not part of the contract and that it only came up after the country experienced unprecedented power black outs shortly after the installations were done.

It has been reiterated by the plaintiff in his evidence that the documents relevant to the case clearly show that what the parties had contemplated was that the equipment to be installed by the plaintiff was intended for communication between a particular branch and its mobile agency van(s) and not between or among the defendant's various branches country wide. This according to the plaintiff is also evident from the survey he carried out which

focused on branch and van communication as he only visited those branches that had mobile agency vans and left out those with no vans like Churchill Road Branch and Customs Road Branch. The plaintiff further has it that a countrywide communication would have required VHF frequencies and not UF which was used and that the communication that was there between some branches was just an added advantage that came by chance. It is further the plaintiff's assertion that he believes the decision by the defendant not to allow him to execute the project in the Central and Northern Region was based on grounds of discrimination. On this aspect, the plaintiff has testified that on a certain occasion Mr Misinde, the defendant's Head of Administrative Services, wondered how the plaintiff knew about the project, how he convinced the defendant to award the contract to him and where he learnt that kind of work. Mr Misinde allegedly went on to say as far as he was concerned that type of work could only be done by white expatriates and not black Malawians who once they die there would be no continuity and therefore no one to repair the works as such the bank was not keen to engage blacks in such kind of work. Mr Misinde then allegedly expressed suspicion that the plaintiff probably got the contract through bribery and corruption.

The case for the defendant is that its requirements which the plaintiff had to provide was to install radio telecommunication equipment linking all its branches countrywide to each other, to the head office and mobile agencies. In addition seven senior managers were also be linked to the communication.

It is the defendant's assertion that it decided to cancel the project because after working on the first phase of the project, the plaintiff failed to install a functional system linking all its branches as such it was pointless to proceed with phase two. The defendant, nonetheless, paid the plaintiff for the full cost of phase one.

As regards the claim for damages for breach of contract, the court on the totality of all the evidence is satisfied that there was a contract between the plaintiff and the defendant under which the

plaintiff was to install radio communication equipment for the defendant. Amongst the so much correspondence between the parties, perhaps it is the defendant's letter of August 30, 1995 which mostly bears out the existence of the contract. The relevant part of the letter is as follows:

30th August, 1995.

Mr H.P. Dalili

Tekniko Electronic Services,

P.O. Box 30583,

CHICHIRI,

BLANTYRE 3.

Dear Sir,

RADIO COMMUNICATION EQUIPMENT

This is to confirm our discussion of today when we advised you that the Bank is now ready to place an order for the supply of equipment for our branches.

In the first instance we wish to proceed with the Southern Region of the country, progressing in phases as such installation is completed.

We apologise for the delay involved in getting us to this stage but we now expect this to go according to plan.

Yours faithfully,

Pollyanna Pinto (Mrs)

HEAD, SUPPORT SERVICES

The next question that has to be considered is whether the defendant was in breach of the contract. It is the plaintiff's contention that the defendant was in breach of the contract in that the defendant expressly advised the plaintiff that they were not interested in proceeding with the project/contract into the second and third phase. The position taken by the defendant is that in fact it was the plaintiff who was in breach in that he did not provide a functional service in the first phase as such it was not worthwhile to proceed to the second and third phase. In other words, the defendant contends that successful execution of the first phase by the plaintiff was a condition precedent to the project/contract proceeding to the second and third phase.

The plaintiff, on the one hand, asserts that his obligation under the contract was to install radio telecommunication linking the defendant's branches and their respective mobile agency vans to facilitate communication between the branches and the vans as the vans would be travelling to and fro the branches and nothing else. On the other hand the defendant asserts that the contract required the plaintiff to install radio telecommunication equipment linking all its branches countrywide to each other, to the head office and Mobile Agency Vans and also some seven senior managers. According to the plaintiff on completion of the first phase he performed what was expected of him as all the branches were able to communicate with their respective mobile agency vans. On its part the defendant contends that the service provided by the plaintiff did not meet its requirements as there was no communication between Zomba and Blantyre and also there was communication problem between Zomba and Mangochi.

Counsel for the defendant has submitted that the plaintiff's evidence that the contract did not require him to facilitate inter-branch connection is actually contradicted by his own statement of claim which in paragraph 3(c) describes the work as **"base and repeater stations, inter-branch connection, mobile van communication..."** Thus according to counsel, it is clear from the

plaintiff's own pleading that inter-branch connection was part and parcel of the contract such that the communication problem between Zomba and Mangochi and the absence of communication between Zomba and Blantyre were but non performance by the plaintiff. The court has also noted that in the wake of the communication problem between Zomba and Mangochi the defendant withheld payment of the sum of K57,616.00 until the problem would be sorted out. Instead of the demanding payment of the withheld sum since according to the plaintiff the problem the defendant gave as the reason for withholding payment was not part of the contract, the plaintiff went ahead to suggest possible solutions to the problem. This tends to strongly suggest that it was part of the contract that the equipment to be installed by the plaintiff should facilitate not only communication between mobile agency vans and their respective branches but also inter-branch communication and as earlier observed, this is also borne out in paragraph 3(c) of the plaintiff's own statement of claim.

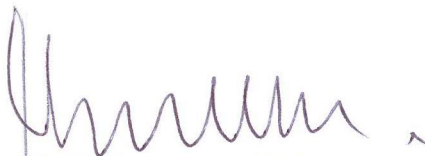
Regarding the claim for defamation, what the plaintiff is complaining of are the remarks made by Mr Misinde, the defendant's Head of Administrative Services. It is alleged that Mr Misinde made statements to the effect that the plaintiff was not qualified to handle the work the defendant had awarded to him and that he most probably got the contract through bribery and corruption. However, the plaintiff has not led any evidence as to whom the alleged defamation words were published. It is trite law that publication is an essential element of the tort of defamation. See **Stuart v Bell** (1891) 2 QB 341. Further, no person to whom the alleged defamatory words were published has testified as such the court is left guessing as what effect the words complained had on right thinking members of the society *vis a vis* their estimation of the plaintiff. The claim therefore must, of necessity, fail.

The claim for damages for discrimination also seems to steam up from Mr Misinde's alleged remarks that the work the plaintiff was given befitted a whiteman and not a blackman who once dead there

would be no one to provide back up and maintenance services. It is the plaintiff's case that these alleged remarks by Mr Misinde and the alleged lack of co-operation by Mr Misinde in responding to requests by the plaintiff pertaining to the execution of the works only go to show that the plaintiff was being discriminated against in favour of whites as a result of which he lost out on the contract. In the court's considered view no case of discrimination has been made out as there is no evidence to show that the contract was awarded to a person of a different race after that awarded to the plaintiff was terminated by the defendant. This claim therefore also fails.

In the end result the plaintiff's action fails in its entirety with costs to the defendant.

PRONOUNCED this day of January 26, 2010, at Blantyre in the Republic of Malawi.



H.S.B. POTANI
JUDGE