IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

COMMERCIAL CASE NO.143 of 2018

BETWEEN

G4S SECURE SOLUTION (T) LTD.....PLAINTIFF

VERSUS

DANGOTE INDUSTRIES LTD TANZANIA.....DEFENDANT

Last order: 27th April, 2021
Ruling-Date: 28th June, 2021

JUDGMENT

NANGELA, J:,

The Plaintiff and the Defendant are both limited liability companies registered and operating their businesses in accordance with the laws of the United Republic of Tanzania. Whereas the Plaintiff carries on the business of providing security services to various clients, including the Defendant, the latter is a manufacturer of cement products whose Plant Facility is in Mtwara, Tanzania.

At the heart of this suit are allegations of breach of contractual obligations. Such allegations emerge from both parties by way of a suit filed by the Plaintiff and a counterclaim raised by the Defendant. I will briefly set out the facts constituting this suit before I delve into the nitty-gritty of the dispute between the parties herein. It all started on 8th April 2016, when the Plaintiff and the Defendant concluded an agreement wherein the Plaintiff agreed to provide security services at the Defendant's plant facility, located in Mtwara, Lindi Road, Mayanga Ward, Tanzania.

In the course of execution of their contractual relations, the Plaintiff claims that the Defendant breached that contract. It is alleged that, although the Plaintiff discharged its obligation of providing security services with the Defendant, upon submission of invoices to the latter, payments in respect of such invoices were not honoured. The Plaintiff avers, as a result, that, as of March 2018, **TZS 618,161,619.83** stood as an outstanding amount due and payable to the Plaintiff.

It is the Plaintiff's further averments that, although there have been several demands calling for payments of the outstanding amount, such demands have been falling on a deaf ear. As a result, the amount claimed has continued to accumulate and accrue default interest rate

above the Barclay's lending rate from September 2017 to date.

In view of the above, the Plaintiff has prayed for judgement and decree against the Defendant as follows:

1. Payment of the outstanding sum of **TZS 618,161,619.83.**
2. Payment of the agreed interest of 2% from the date of filing the suit to the date of judgement.
3. Payment of interest on the decretal sum at the Court's rate of 7% per annum from the date of judgement till final settlement.
4. Costs of the suit ; and
5. Any other relief as the Court may deem just and fit to grant.

On 21st January 2019, the Defendant filed a Written Statement of Defence. Apart from denying the claims raised by the Plaintiff, and requesting that this suit against the Defendant be dismissed with costs, the Defendant asked this Court, if so be pleased, to grant the Defendant any other relief as it may deem just and fit. Besides, the Defendant raised a counterclaim against the Plaintiff.

In particular, the Defendant counterclaimed a total of **TZS 1,294,274,446.32**, being losses resulting from theft incidences which took place on account of poor provision of guarding services by the Defendant).

In response to the counterclaim, the Plaintiff contends that, the alleged theft incidences were a result of the Defendant's own negligence, and, thus, demands to be paid the amount due. It is alleged in the counter-claim that, Plaintiff herein failed to provide the services efficiently, hence causing security lapses which led to various items being stolen while under the protection and supervision of the Plaintiff herein.

The Plaintiff averred further that, the agreement between the parties provided, expressly, that, the Plaintiff would be liable for loss suffered by the Defendant herein, provided that the Defendant herein notifies the Plaintiff of the occurrences of any of such losses. The Defendant herein claim to have provided such prior notifications on 10th June 2017, concerning consistent lapses, negligence and under-performance of the Plaintiff's staff deployed at the Defendant Plaint, but nothing improved.

The Defendant alleges to have carried out investigations which attributed the theft incidences to the Plaintiff's staff, and, hence, on 16th January 2019 demand notices were dispatched to the Plaintiff for payment of **TZS 1,277,183,600.00,** being losses caused by the theft of various equipment, including tyres, rims, truck batteries, drums of copper wire and tarpaulins; and **TZS 477,167,533.33,** being losses caused by the theft of

drums of copper wire, while under the watch of the **Plaintiff**'s staff. It is alleged that the **Plaintiff** has neglected or refused to pay for the losses.

It is on that basis that the **Defendant** counter-claimed, praying for judgement and decree against the Plaintiff as follows:

1. An order for payment of the outstanding sum of **TZS 1, 294, 274,466.32.**
2. An order for payment of general damages for the loss occasioned to the **Plaintiff/**Defendant as may be assessed by the Court.
3. An Order for payment of interest on the decretal sum at the Court's rate from the date of judgment to the date of full payment;
4. Costs of the suit,
5. Any other relief as the Court may deem just and fit to grant.

In response to the Counterclaim, the Plaintiff (**Defendant to the Counterclaim**) herein filed its WSD on the 08th February 2019. The Plaintiff denied the Defendant's counterclaims stating that, the theft incidents were as a result of the Defendant's own negligence. It was the Plaintiff's further response to the counterclaim that, any liability on the part of the Plaintiff, was subject

to the relevant **clauses 6.3** and **6.4** to the agreement. As such, the Plaintiff prayed for the dismissal of the counterclaim with costs.

Unfortunately, this suit could not be resolved through the mediation process and, on 12th November 2019, when the parties appeared before this Court, in agreement with the parties, the Court framed the following issues:

1. *Whether the Plaintiff provided security services to the defendant in accordance with the terms of the agreement for guarding services.*
2. *If the first issue is in the negative, what loss did the defendant suffered as a result thereof.*
3. *If the issue No.2 is answered affirmatively, to what extent is the Plaintiff liable to the defendant under the agreement for guarding services.*
4. *To what relief are the parties entitled.*

Having framed the above issues, this Court made an order for the filing of witness statements within 14 days as per Rule 49 (2) as amended by GN.107 of 2019, and, thereafter the parties' witnesses appeared in Court for the tendering of documents and for cross-examination/re-examination.

However, due to various reasons connected to the outbreak of Covid-19, the matter could not proceed expeditiously as anticipated. Nevertheless, through the aid of virtual court technology, on 16th March 2016, the hearing finally commenced. The Plaintiff enjoyed the services of Mr Jonathan Wangubo, learned advocate, while Mr Luka Elingaya, learned advocate appeared for the Defendant. The Plaintiff had only one Witness, Mr Johan Weyers.

Mr Weyers testifed while in South Africa as **PW-1.** In the course of his testimony, he tendered and requested to be admitted in Court, his witness statement, filed in this Court on 22nd November 2019. This Court admitted it as his testimony in chief. Besides, **PW-1** tendered in Court an Agreement between the Plaintiff and the Defendant for provision of security services. This agreement was admitted in evidence with no objection and was marked as **Exh.P.1**.

PW-1 told this Court that, the Plaintiff performed its obligations in accordance with the terms of the Agreement **(Exh.P.1)**, and, that, **Exh.P.1** was for a period of 12 months, and was renewed for a second period of 12 months.

PW-1 stated further that, throughout the provision of the services to the Defendant, the Plaintiff was not

responsible for stock taking, stock control or checking of waybills. **PW-1** averred that, acting in accordance with the agreement, the Plaintiff issued various invoices to the Defendant in relation to the security services provided, and, while the Defendant effected payments to some, others were not honoured to date, hence leading to an outstanding debt amounting to **TZS 618,161,619.83.**

PW-1 tendered before this Court (as **Exhibit P.2**), statements of accounts showing amounts claimed to be unpaid according to the invoices. Mr Elingaya had no objection to their admissibility. **PW-1** tendered, as well, **Notices of Claims** made by the Defendant and a Demand letter by the Plaintiff dated 09th February 2018, and, the two were received in Court without objection as **Exh.P.3**; and **Exh.P.4**, respectively.

Besides, **PW-1** testified that, upon reports of occurrences of theft incidences, the Plaintiff conducted investigations. Such investigations revealed that, the alleged theft incidences occurred as a result of the Defendant's own negligence since, in certain incidences, the Plaintiff's own guards were not allowed to search the Defendant's trucks when they exited the premises.

Further, that, the guards were denied access to some areas, and, the Defendant failed to maintain proper record keeping. **PW-1** tendered in Court an Investigation

Report regarding certain theft incidences which took place at the Defendant's premises. This report was received as **Exh.P-5. PW-1** stated that, while the Plaintiff took actions against staff suspected by the Defendant of being involved in theft incidences, the Defendant failed to mitigate the losses by failing to implement majority of the recommendations made by the Plaintiff to improve security.

PW-1 stated further that, as per the Service Agreement (**Exh.P.1**), the Plaintiff is absolved from liability for whatever losses, and that, if proved to be negligent, the Plaintiff's liability is only limited to three times the monthly invoice per incident or series of incidents attributable to one cause and not exceeding the annual value of the contract for all claims in aggregate over any consecutive 12 months' period.

Upon being cross-examined by Mr Elingaya, **PW-1** stated that G4S (the Plaintiff) was contracted by the Defendant to guard the whole site of Dangote Plant at Mtwara premises. He admitted that, Dangote Plant, as per **Exh.P-1**, include the entire premises.

PW-1 further admitted, on cross-examination, that, the Defendant was required to notify the Plaintiff whenever a theft incident occurred as a result of breach of security at the premises. He further admitted that,

many times the Defendant was notified the Plaintiff regarding security breaches at the premises. Nevertheless, **PW-1** maintained that, notifications regarding incidents resulting from security breaches were gauged by the conditions agreed upon in **Exh.P.1** regarding what G4S was to do to compensate for any losses that might have been occasioned. He stated that, after the reports, the Plaintiff made recommendations regarding what measures were to be taken up by the Defendant.

As regards the compensation claims by the Defendant, **PW-1** stated, on cross-examination, that, as per the schedule to **Exh.P.1**, there was a limit of liability for any loss. Further, it was also his understanding under the agreement that, the Defendant would have its own insurance in case there were losses. He maintained that, some of the claims for compensation by the Defendant were duly paid but did acknowledge that others were not.

PW-1 stated further that, G4S (the Plaintiff) was not contracted to guard immovable properties since, in the agreement, there were certain functions reserved for the Defendant to perform on his own. Although **PW-1** did acknowledge that the Plaintiff was contracted to guard the entire premises of the Defendant, he stated that the

Plaintiff did not have a full responsibility for everything on site.

As far as **Exh.P.2** is concerned, **PW-1** told this Court that, the same was generated at G4S offices and sent to the Defendant by E-mail. He stated that, invoices issued to the Defendant were generated on a monthly basis and the Defendant signed them off as the recipient of such invoices. However, while he stated that he did not have the proof of such invoices being received, **PW-1** maintained that, as the project Manager, he handed over every monthly invoice to the Defendant's Manager and signed off.

During re-examination by Mr Wangubo, **PW-1** stated that the person he had referred to in paragraph 7 of the WSD to the counterclaim as the recipient of the invoices was the Defendant herein. He maintained that the statement of account indicates that the invoices had been sent to Dangote as well as credits notes, which entails the amount that were given back to Dangote with regards to claims for losses suffered by the Defendant.

He stressed that each incident of loss was investigated and if it was found to be resulting from negligence caused by the Plaintiff, G4S, then the Defendant was compensated accordingly if, as soon as possible, it was reported and registered as per the

agreement in order to allow for investigation to be carried out after 7 days or so.

Relying on clause 6.5 of **Exh.P.1**, **PW-1** emphasized that the reporting should have been made within a month of the discovery of the loss. He maintained that, failure to do so; then the Plaintiff would be exonerated from payment of such a loss. He pointed out, further, that, the alleged theft of copper cables indeed took place as per **Exh.P.3** (*Notice of Claims*) but its reporting was made more than a month after the incident. He reiterated his testimony in chief that, the Plaintiff was not responsible for stock taking, or handling of keys. He noted that, as per clause 6.3 of **Exh.P.1**, the liability of the Plaintiff was limited.

Upon closure of the Plaintiff's case, the Defendant's case opened with only one witness, Mr Philipo Mwamanda, a security supervisor in the Defendant's employment, who testified as **DW-1**. **DW-1** sought to be admitted by the Court, his written witness statement filed in this Court on 5th August 2019, and which this Court admitted as his testimony in chief.

In his testimony, **DW-1** referred to **Exh.P.1** (**Exh.D-1**) and stated that, the Plaintiff consistently failed to provide guarding services efficiently causing lapses in the provision of such services while lapses led to theft or

loss of various items and equipment belonging to the Defendant.

It was **DW-1's** testimony that, sometime on 30th November 2016, there was a theft of an air condition from an area under the guarding services of the Plaintiff and on 9th December 2019, the incident was reported, together with other security lapses involving the Plaintiff's officer allowing stolen materials to pass by the main get. He tendered as exhibit, various e-mails which were sent to the Plaintiff (G4S) reporting about the various security lapse. The emails were received as **Exh.D.3.**

DW-1 tendered in Court, as well, an investigation report dated 15th May 2017, and this was received without objection as **Exh.D.4**. According to **DW-1** testimony, there was an incident involving theft of 45 pieces of *Tie Angles* and it was reported to the Plaintiff on 18th April 2017.

It was a further **DW-1's** testimony that, due to non-improvement of guarding services, the Defendant, on various dates sent claim letters to the Plaintiff, but the latter, in breach of the Agreement failed or refused to compensate the Defendant. Thus, on various dates including 11th and 16th January 2018, the Defendant sent demand notices to the Plaintiff demanding compensation for losses caused by thefts of drum copper wire and other

equipment, all of which amount to **TZS 1,754,351,133.3/.**

DW-1 told the Court that, sometimes in April 2018, the Plaintiff, responding to the Defendant's claims concerning two truck batteries, admitted liability for loss and promised to compensate the Defendant but only paid half of the loss. He told the Court that, the Defendant carried out own investigations and discovered that; the theft incidences were attributed to the Plaintiff's poor guarding services. He tendered the investigation report with no objection and it was admitted as **Exh.D-4**. He prayed, therefore, that, the Plaintiff's case be dismissed and the counterclaim be granted.

During cross-examination, **DW-1** told this court that **Exh.D2** was sent to one Hermie Botes by Mr Benedict and the email was copied to others. He told the Court, however, that, he was not in a position to prove to the Court that the Plaintiff did not provide guarding services as per the agreement. What **DW-1** knew was that, G4S (the Plaintiff) used to submit invoices to the Defendant and the Defendant had to verify them before effecting payment.

DW-1 stated, on cross-examination, that, although he did not state expressly in his witness statement, it was true that the Plaintiff's invoices submitted to the

Defendant were promptly and fully paid. He further admitted that the Plaintiff did submit an investigation report and provides recommendations regarding what steps should be taken, and, that the Defendant implemented them.

DW-1 denied that G4S were restricted from inspecting the Defendant's vehicles. What he told the Court was that, even if there were Defendant's own guards (or officers) whose responsibilities were to implement security protocols/procedures so that the Plaintiff might execute its assignments, it was G4S who had the core task of providing guarding services.

He told this Court, therefore, that, the authority to allow a car out of the premises and the authority to inspect a car were all in the hands of the Plaintiff. He stated further that, the vehicle which was found with drums of copper wire was arrested by the Police. He told the Court that it was the Plaintiff who had the duty of ensuring that, all standard operating procedures (SoPs) were being followed.

According to **DW-1**, the agreement between the Plaintiff and the Defendant limited liability of the Plaintiff to the value of the property stolen. He admitted that, as per the agreement, the Defendant was supposed to have insured all of its properties and, that, even if it is not

shown in the WSD, all properties of the Defendant are insured.

During re-examination, **DW-1** insisted that, the emails were copied to 9 more other people as its recipient. He stated that it is the Plaintiff who is claiming that he was not paid for the services rendered and that he must prove his case. **DW-1** stated further, that, the Plaintiff's duty was to provide guarding services to the Defendant.

At the closure of the defence case, the learned counsels for the parties herein prayed to file written final submissions. Their prayer was granted and I am grateful that they complied with the order of filing such submissions. I will therefore consider them as well in the course of my deliberations.

Before I start to examine the issues, let it be noted that, as a trite law that, decision of any court need to be grounded on the evidence properly adduced during trial. (See **Shemsa Khalifa and Two Others vs. Suleman Hamed, Civil Appeak No. 82 of 2012, (CAT) (unreported)**). I am reminded of the evidential principle that, he who alleges must prove. To that end, sections 111 and 112 of the law of Evidence Act, Cap. 6 [R.E 2019], are relevant.

It is also a common legal knowledge, that, unlike in criminal case, the standard of proof in civil cases is on the balance of probabilities. I will, therefore, be guided by these principles as I seek to examine the evidence, both oral and documentary when addressing and resolving the issues involved in this suit and the counterclaim.

As I stated earlier herein, four issues were agreed upon in this suit which need to be proved. The first issue was:

> *Whether the Plaintiff provided security services to the defendant in accordance with the terms of the agreement for guarding services.*

It is not in dispute that the parties herein executed **Exh.P-1 or D-1** for the provision of guarding services. Under Clause 1 of the Agreement, the Defendant is referred to as "the Customer" while the Plaintiff is referred to as "the Company".

The relevant terms of the Agreement, in light of the present suit, are those stipulated under Clause 5 (**Customer's Obligations**) and Clause 6 (**Limitation of Liability**). I will reproduce these clauses as hereunder:

> **"5.THE CUSTOMER'S OBLIGATIONS**
> **5.1** Except as may be expressly provided in the Schedule, the Customer will, at its own expense, provide all necessary equipment and facilities at the Premises to enable the Company's employees to carry out the Services. Such facilities and equipment shall include without limitation, adequate lighting, power, toilet facilities, access to drinking water, suitable shelter from whether elements, minimum of a 2.5 meter wall fence and fire fighting equipment.
> **5.2** The Customer will, from time to time, notify the Company of existence and location of all materials at the Premises which are

hazardous, and, the Customer will ensure that, those parts of the Premises, which the Company's employees may visit, will constitute a safe place at work. The Customer will indemnify the Company against any claims resulting from any failure by the Customer to comply with these obligations.

5.3 The Customer will notify the Company of any dishonest, wrongful, negligent acts or omissions of the Company's employees or agents in connection with the Services as soon as possible after the Customer becomes aware of them.

5.4 It is the Customers responsibility to ensure that all movable items in value must be secured such Manhole Covers, Fire Extinguishers, Generators, Pool Pumps and Tools. Movable items are not limited to items specifically mentioned above.

5.5 The Customer will not instruct the security officer deployed on site to perform non-security related assignments, e.g. gardening, washing of vehicles, clothes etc. or offsite errands.

5.6 The Customer will provide proof of valid insurance cover for all property with relation to possible liability claims against the company as stipulated in the liability clause of this contract which for the avoidance of doubt is clause 6. Failure of such will result in the Company not entertaining any related claims of this nature.

6. LIMITATION OF THE COMPANY'S LIABILITY

6.1 Nothing in this clause 6 will limit or exclude the Company's liability for death or personal injury caused by the Company's negligence or wilful misconduct.

6.2 The Company and the Customer agree that:

(a) The value of the property intended to be protected under the Contract and the potential extend of Loss are each better known to the Customer than to the Company;

(b) The potential extent of Loss is disproportionate to the amounts which the Company can reasonably charge under this Contract;

(c) The Company cannot obtain unlimited cover for its potential liability under contracts such as this, there are some risks against which the Company cannot insure and, the Customer is better able to and should insure the property intended to be protected under this Contract and against any consequential loss the Customer might suffer;

(d) It is difficult to investigate claims unless they are received a shorter time after Loss is alleged to have occurred.

(e) The Company would wish to correct any ongoing default under this Contract at the earliest opportunity;

and, that, consequently the Company should restrict its liability for Loss to the circumstances described in this Clause 6 and to the Limit of Liability.

6.3 If the Company, its employees or agents have any liability to the Customer for any Loss, such liability shall in all cases whatsoever (subject to clause 6.4) be limited to the payment by the Company on its own behalf, and on behalf of its employees or agents of an amount equal to the limit of liability (refer to the Schedule) in respect of any one event or series of related events attributable to one cause.

6.4 Without prejudice to the limitation of the Company's liability as provided in clause 6.3 above, the Company shall have no liability to the Customer in any circumstances under or in the course of performing this Contract (whether under the express or implied terms of this Contract, or in tort (including negligence or breach of statutory duty) or in any other way and whatsoever the cause) for: (a) any loss of profit, business contracts, revenues or anticipated savings, or special, indirect or consequential damage of any nature whatsoever suffered by the Customer; or (b) any Loss of whatsoever nature directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear assembly or nuclear component thereof; or (c) any Loss arising out of or related in any way to asbestos-contaminating materials.

6.5 The Company, its employees or agents, shall not be liable to the customer in any circumstance or to any extent whatever in respect of Loss unless **notice of claim is received by the Company within one month** of the discovery by the Customer or within one months of the time when the Customer ought reasonably to have discovered such Loss, whichever is the earlier. "**(Emphasis added).**

In the course of proving its claim for payment of **TZS 618,161,619.83**, the Plaintiff relied on **Exh.P.1**

which, as stated herein, has not been disputed by any of the parties. Reliance was also placed on the Statement of Account (**Exh.P.2**) which, according to **PW-1's** testimony, shows Invoices sent to the Defendant and which were never settled and, to date, the amount claimed as per **Exh.P-2**, remains outstanding.

It is also clear, according to paragraph 7 of the Defendant's amended Written Statement of Defence; that, the Defendant does not dispute the that the Plaintiff sent invoices to the Defendant claiming for payments.

It worth noting, however, that, although the learned counsel for the Defendant seems to discredit **Exh.P.2** in his final submissions, stating that **Exh.P.2** was merely drafted by the Plaintiff for the purpose of being brought to the Court, during the hearing of **PW-1's** testimony, the document was admitted without any objection from the Defendant. In my view, the opportune time to assail a document intended to be tendered in Court as evidence (if the opposing party seeks to topple it) is at the time when it is being tendered in evidence.

In Japan International **Corporation Agency vs Khaki Complex Ltd, [2006] TLR 34**, it was held, *inter alia,* that, once accepted without objection and marked as exhibit, a document becomes part of the record of the Court. To discredit it afterwards does not make much

sense as it could have been, had it been questioned or objected to when it was being tendered in evidence. As such, the Court will be at liberty to rely on it.

Besides, the Court of Appeal of Tanzania, held, *inter alia*, in the case of **Kilombero Sugar Co. Ltd vs. Commissioner General of TRA, Civil Appeal No.261 of 2018 (unreported)**, that, where a document is admitted in the course of trial without objection, it unquestionably goes without saying that, the contents of the documents are also admitted.

It is true, indeed, that, during cross-examination **PW-1** was asked if he had proof that **Exh.P-2** was received by the Defendant, and, that, he said he had none. But it is also on record that **PW-1** did say that **Exh.P-2** was generated at G4S's offices and electronically sent to the Defendant by e-mail. Further that, the invoices issued to the Defendant were generated on a monthly basis and the Defendant signed them off as the recipient of such invoices.

Besides, it is also pretty clear that, in his testimony, **DW-1** did not dispute the validity of **Exh.P-2** as well. One would have expected **DW-1** to dispute the Statement of Account **(Exh.P-2)** and the invoices indicated thereon. Unfortunately, however, that did not happen. To me, this is indicative of the fact that, the

claims for payment of **TZS 618,161,619.83** were indeed raised and were not settled; hence, they are genuine claims. But is that the end of the story?

In my view, notwithstanding such a finding, there are still matters that require attention before the dust is allowed to settle. In particular, the next question that calls the attention of this Court is: *if the claims by the Plaintiff were genuinely raised and payments were not declined by the Defendant, was that warrantable?* In order to render a suitable answer that question, one will need to scrutinize the pleadings further and all that which the parties submitted in Court as their testimonies.

In its pleadings, the Plaintiff has stated that, the Defendant has been refusing to pay for the services rendered on the basis of the latter's claims that the Plaintiff had occasioned losses to the Defendant to the tune of **TZS 1,294,274,446.32**. This is a fact which is well acknowledged in paragraph 8 of the Defendant's amended **WSD**. The Defendant attributes the losses to the Plaintiff and, contends that, the Plaintiff failed to provide services with due care and skills leading to security lapses and theft of the Defendant's properties. These allegations by the defendants, which are the basis for the counter claim, require proof as well by the Defendant.

In proof of the Plaintiff's case, it is on record that **PW-1** did tender in Court and without objection, Notices of Claims made by the Defendant (**Exh.P.3)**; and a Demand letter by the Plaintiff dated 09th February 2018, (**Exh.P.4)**. It must be noted, however, that, although **PW-1** testified and made reference to the **Credit Notes** indicated in **Exh.P.2**, which credit notes were an indicative that the claims raised by the Defendant were settled, **PW-1** did admit that, it is only some of the Defendant's claims were settled. This means there were unsettled claims. Even so, it is worth noting, that, in his testimony both in chief and during cross-examination, **PW-1** did not state how much exactly was settled as against the Defendant's claims as indicated in **Exh.P-3** *(Notice of Claims by the Defendant)*. That being the case, how much was settled and why not the whole amount claimed?

In essence, response to the above question will necessitate a closer look at what **Exh.P-2** provides. **Exh.P-2**, does make reference to three credit notes, the CRN1687 and CRN1688 dated 19th October 2017 for **TZS 9,644,200.00** each (which is a total of **TZS 19,288,400**), and CRN1713 dated 13th November 2017 for **TZS 10,407,600/-**.

Put together the total amount shown to have been paid, as per the credit notes referred to in **Exh.P-2**, is a total of **TZS 29,696,000** as against a claim of **TZS 1,294,274, 466.32**. No other evidence was tendered in Court to show that the rest of the Claims made by the Defendant in the Counterclaim were settled. That being said, the next question that follows is: *why were such claims not paid in full?*

In order to respond to the above, one has to look at the Plaintiff's response to the counterclaim and the testimony as well as the exhibits tendered in evidence. In the Plaintiff's defence to the counterclaim, the Plaintiff has alleged that the Defendant is not entitled to what is being counterclaimed because the Plaintiff provided services as per the **Exh.P-1.** The Defendant is disputing this fact and alleges that, the Plaintiff failed to provide services with due care and skills leading to security lapses and theft of the Defendant's properties.

It must be noted that, in the course of his testimony in Chief, **PW-1** testified that, upon being informed of the theft incidents, the Plaintiff carried out an investigation and tendered in evidence **Exh.P5** which was received with no objection from the Defendant. However, it must, as well, be noted that, **DW-1** tendered the Defendant's own investigation Report as well received in

evidence without objection as **Exh.D4.** I will look at these documents.

Exh.P-5, gives details of reported thefts of various items from the Defendant's premises. It is composed of various investigation reports with findings and recommendations. Taken as a whole, the report does acknowledge instances where the Plaintiff's stationed guards failed to execute their duties or colluded with some employees of the Defendant to facilitate the theft.

For instance, the findings of a theft incident report dated 01 May 2017 (which is part of **Exh.P5**) concerning theft of a steel pipe, indicates that, a security guard at tower 11 was either sleeping on duty of colluding with the intruder. The report dated 05th June 2017 concerning theft of an air conditioner box at the Crusher Area, does carry findings one of which is to the effects that the security men were either colluding or sleeping over their job.

Besides, the report dated 6th June 2017, concerning theft of a split unit air condition, does carry with it a finding that, the same was stolen from an area not far from where the Plaintiff's guarding officers were stationed. There are also findings regarding intruders breaching the perimeter wall and committing criminal incidents. The Report does also indicate that some of the

Plaintiff's personnel were terminated from employment for their negligence and others were given final warning.

Finally, in a report dated 6th December 2017, concerning theft of nine (9) truck batteries, an investigation report signed by Johan Weyers (the **PW-1**), the author concluded that the Patrolman, one Milanzi, was, in his opinion, "*gross negligent in the performance of his duties and through that action the customer (Defendant herein) suffered loss of the batteries*)".

In my view, with all such admissions within **Exh P-5** which was ironically tendered by the Plaintiff's witness, **PW-1**), it cannot be said that the Defendant's allegations of Plaintiff failure to provide services with due care and skills leading to security lapses and theft of the Defendant's properties, are unwarranted.

In his testimony, however, **PW-1** testified that, it was the Defendant who was negligent for not implementing various recommendations given by the Plaintiff. As I give a look at **Exh.P-5**, it is indeed true that **Exh.P5** carries with it recommendations. Even so, such recommendations were "*after the fact recommendations*". This means that, such recommendations, were given after the Defendant had suffered losses and, consequently, they were largely reactive rather than being proactive.

In my view, since the counterclaim case falls under claims involving premises liability for negligent security litigation, the skill and care expected are those of any reasonable and experienced security guard.

Generally, negligent security as an emerging area of tort law in respect of premises liability, involves claims against business or property owners for damages or injuries on their property due to a lack of security precautions against reasonably foreseeable criminal actions or security breaches. To my understanding, such skill and care of a reasonable security guard would be that of proactively studying the premises or the environment of his operation and provide solutions to the yet to occur events in a preventive manner.

It is trite, under negligent security claims, that, the Plaintiff (who in our counter-claim case is the Defendant herein) must establish, by a preponderance of the evidence, that, the defendant (in our counterclaim the Plaintiff herein) owed the Plaintiff a duty to have reasonably safe and secure premises; the defendant breached his or her duty by failing to act as the duty required; the defendant's breach of duty caused some harm or injury to the plaintiff.

There is no doubt in his case that, G4S owed a duty of care to the Dangote (the Plaintiff in the Counterclaim

by virtue of **Exh.P.1**). Consequently, the issues drawn in respect of the counterclaims case were meant to find out if there was a breach of that duty and suffering of damages due to that breach.

I have also looked at **Exh.D-4,** which is an investigation report tendered by **DW-1**. The reading of the findings in **Exh.D-4** does, as well reveal that, those who were responsible for providing security on various days when theft incidents took place, acted either unprofessionally, slept over their jobs or were in collusion with others outsiders, thereby facilitating the thefts.

For instance, the theft of a welding machine on the night of 15th May 2017, took place while the machine was handed over to an in-coming guard by an outgoing guard, and, that, on the same material date, a G4S supervisor had asked a guard to abandon the post, alleging that it was not under G4S watch. Clearly, such an instance suggests that, there was collusion of some kind with those who stole the Defendant's property, hence, inflicting loss of the part of the Defendant. The circumstances that led to theft of truck spare parts and other properties as per **Exh.D-1**, for instance, do indicate similar conclusions.

I have also had an opportunity to examine various e-mail correspondences between the Defendant's officers

and the Plaintiff's officers, regarding the various theft incidences. These were tendered in evidence by **DW-1** as **Exh.D-2**. In one of the e-mails, sent by **DW-1** to one **Andre Kok,** it is shown that, the Plaintiff did pay compensation, for the loss of two batteries which were stolen from a mining yard.

According to **DW-1**, and, as per one of the emails in **Exh.D2,** which email was sent to Mr Andre Kok, **TZS 505,000/-** which were paid to the Defendant were only in respect if one of the two batteries stolen. According to that email, the amount which ought to have been paid was **TZS 1,010,000/-**. **DW-1** testified that, the amount claimed was not paid.

Considering the above analysis of the documentary evidence, in particular **Exh.P-5, Exp.D-4** and **Exh.D2**, I am of the view, and in response to the question I raised earlier, to wit: *whether the Defendant's refusal to pay the Plaintiff's claims of* ***TZS 618,161,619.83,*** *was justified,* I do find that, the Defendant's refusal was indeed justified owing to the various losses which the Defendant suffered in the hands of the Plaintiff.

In my considered view, since the Plaintiff had noted that, even his own employees were untrustworthy, there should have been more proactive security interventions in the course of discharging its duty to protect the

properties of the Defendant. Besides, as part of duty-foreseeability analysis, having there been reported theft incidents, there was already on the part of the Plaintiff, a reasonable foreseeability that such incidents could repeat themselves.

As it was stated in **Trammell Crow Cent. Texas v. Gutierrez, 267 SW 3d 16—Tex: Supreme Court 2008,** which decision I find to be persuasive:

> "A criminal act is more likely foreseeable if ***numerous prior crimes are concentrated within a short time span*** than if few prior crimes are diffused across a long time span."

In my view, since there was several theft incidents being reported and complaints on security lapses, one would have expected the Plaintiff to take more proactive steps to prevent such occurrences, that being part and parcel of what the Plaintiff was expected of under the contract as any reasonable security provision agency hired for would have done.

The above finding means, therefore, that, the Plaintiff failed to provide security services to the Defendant in accordance with the terms of the agreement for guarding services. In that regard, even if the claims by the Plaintiff were genuinely raised, their payments were subject to settlement of existing compensation

claims by the Defendant. The first issue, therefore, is responded to in the negative.

Following the above findings, the second issue is:

> *If the first issue is in the negative, what loss did the defendant suffered as a result thereof.*

As may be gathered from **Exh.P-3**, the Notices of Claim, the Defendant is claiming **TZS 1, 294, 274,466.32/-**.

As I stated herein above, the claims by the Defendant were justified. However, in its pleadings, and, as per the testimony of **PW-1** and, as the Plaintiff's defence against the counterclaim does, **PW-1** stated that, any liability on the part of the Plaintiff was subject to the relevant **clauses 6.3 and 6.4** to the agreement. **Clause 6.3** provides that:

> "If the Company, its employees or agents have any liability to the Customer for any Loss, such liability shall in all cases whatsoever (subject to clause 6.4) be limited to the payment by the Company on its own behalf, and on behalf of its employees or agents of an amount equal to the limit of liability (refer to the Schedule) in respect of any one event or series of related events attributable to one cause."

The schedule to the agreement did also provide on limitation of liability, stating that, *the limit of liability is three times the monthly invoice per incident or series of related incidents attributable to one cause and not*

exceeding the annual value of the contract for all claims in aggregate over any consecutive twelve month time period.

According to the schedule to **Exh.P.1**, the total annual value of the contract was (**TZS 59,845,000 x 12**) which amounts to **TZS 718,140,000/=**. Generally, according to **Clause 6.3** and **the Schedule to the Agreement**, the Plaintiff's liability may not exceed that amount. This means that, the loss which the Plaintiff should compensate the Defendant is for **TZS 718,140,000/=**. The second issue is thus responded to effectively that way.

Since the first issue was in the negative and, since the 2nd and 3rd issues depended on whether the 1st issue was responded to affirmatively or negatively, the third issue, thus, dies a natural death. The last issue is: to *what relief are the parties entitled.*

In my deliberations based on the evidence on record, it is clear to me that the Plaintiff did raise a claim of **TZS 618,161,619.83** genuinely for services provided for to the Defendant, as evidence by **Exh.P-2.** However, the Defendant refused to pay because the services provided for were not up to the mark as they had been rendered in a manner that occasioned loss to the Defendant. The loss created was the basis of the

Defendant's counter claim. As I stated herein above, and given the available evidence, the Defendant was justified to raise the Counterclaim but, in line with **Clauses 6.3** and **6.4** of **Exh.P1** (**Ex.D-1**), those claims were subject to the limitations set out in those Clauses.

That means, therefore, that, the Defendant will be entitled to compensation to a tune of **TZS 718,140,000/=** only. Taking into account that the above amount arises from loss occasioned by persistent theft incidents at the Defendant's premises, as per **Exh.P.5** and **Exh.D-4**, there is no doubt that the Defendant suffered damages of general nature. The follow-up on the theft incidents and damage to properties vandalised will definitely call for award of general damages amounting to **TZS 50,000,000/=.**

In the upshot, this Court hereby dismisses the Plaintiff's case and grants judgement and decree in favour the Defendant's counterclaim as follows:

1. That, the Plaintiff (G4S) (who is also Defendant in the Counter Claim) is hereby ordered to pay the Defendant (Dangote) (who is also Plaintiff in the Counterclaim) **TZS 718,140,000/-** payable as compensation for losses incurred by the Defendant due to the Plaintiff's inability to provide adequate guarding services to the

Defendant as per the Agreement executed between the two parties on 8th April 2016.

2. That, the Plaintiff (Defendant in the Counter Claim) shall pay the Defendant (Plaintiff in the Counterclaim) **TZS 50,000,000**/- as general damages for the loss occasioned to the Defendant (Plaintiff in the Counterclaim).
3. The Plaintiff (Defendant in the Counter Claim) shall pay the Defendant interest on the decretal sum at 7% rate from the date of this judgment to the date of full payment;
4. The Plaintiff (Defendant in the Counter Claim) shall pay Costs of the suit.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this 28th JUNE **2021**

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

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HON. DEO JOHN NANGELA
JUDGE