

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2012/HPC/0599**

*(Civil Jurisdiction)*

**BETWEEN:**

DELOITTE AND TOUCHE *(Suing as a Firm)* **PLAINTIFF**

**AND**

CABLE NETWORK SOLUTIONS LIMITED

**DEFENDANT**

*For the Plaintiff : Mr. Nchito S.C and Mr. Hamwela of Messrs Nchito & Nchito*

*For the Defendant : Mr. Simposya of Messrs MSK Advocates*

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**J U D G M E N T**

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**CASE AUTHORITIES REFERRED TO:**

1. *Zambia Building & Civil Engineering & Contracts Limited Vs Janina Georgopoulos (1972) Z.R*
2. *Sir Fredrick Pollack in Dunlop Vs Selfridge (1915) AC 847 at 845*
3. *London Export Corporation Limited Vs Jubilee Roasting Coffee Co (1958) 2 ALL AR 411 at 420*
4. *National Coal Board Vs. Wm Neill & Son (St Helens) Ltd [1984] 1 All ER 555*
5. *De Groot Vs. Attala (1973) Z.R. 77 (H.C.)*
6. *Hanak Vs Green 1958 2 QB*
7. *Milburn Services Limited Vs United Trading (1995) 52 Con LR 130*

**LEGISLATION AND OTHER WORKS:**

1. *Chitty on Contracts 27<sup>th</sup> Edition paragraphs 24 - 32 at page 1170*
2. *Cheshire, Fifoot & Furmston's Law of Contract 15<sup>th</sup> Edition paragraph 1 A at page 157*
3. *Oxford Large Print Dictionary at page 827*

By way of Writ of Summons and Statement of Claim dated 22<sup>nd</sup> October, 2012, the Plaintiff claims against the Defendant the following reliefs;

- (a) *The sum of K141, 261,218.00 being the money paid to the Defendant by the Plaintiff for the acquisition and installation of the following;*
  - (i) *Five suppression and detection switches;*
  - (ii) *Two CISCO catalyst 37506 URS - C3750g switches;*
- (b) *Liquidated damages in terms of the provisions of the contract at 0.5% of the contract value per week from 21st September, 2011 until completion.*
- (c) *Interest*
- (d) *Costs.*

It is averred in the Statement of Claim that by a contract dated 10<sup>th</sup> August, 2011 the Defendant was contracted to supply, deliver and install an Information Technology (IT) local area network to the Plaintiff at the cost of US\$81,311.00 equivalent to ZMW426, 344.47. The Plaintiff paid 80% deposit. The Defendant was required to complete the works by 21<sup>st</sup> September, 2011. It was further agreed that in the event that the Defendant delayed due to its negligence, the Defendant would pay the Plaintiff 0.5% of the contract value per week as liquidated damages until completion.

It is further averred that the Defendant has failed to meet the completion date and to complete the works.

The Plaintiff states that the completion of the works has been delayed due to the negligence or failure of the Defendant, and that the tasks remain incomplete. As a result of the Defendant's

negligence in failing to complete the works on time, the Plaintiff has suffered loss and damages.

The Defendant avers in its Defence dated 5<sup>th</sup> November, 2011, that due to the delays caused by the Plaintiff and its Suppliers it was impossible to meet the deadline. The claim of 0.5% by the Plaintiff cannot stand as the Plaintiff delayed the project by not providing the required information to enable the Defendant finalise the works. The failure to complete the works was due to the Plaintiff changing the scope of work outside the initial scope which the Defendant had originally budgeted and prepared for and in turn the Defendant required a complete re - design of the works which needed specific data from the Plaintiff which data is still not forthcoming. The failure by the Plaintiff to provide the vital data made it impossible for the Defendant to install the works. As a result of the Plaintiff's delays the Defendant has incurred additional unbudgeted costs and lost monies on orders already placed and additional works commenced.

The Defendant's counter - claims for the following;

- (a) The price of three CISCO 2960 switches supplied and installed as a temporary measure at the Plaintiff's premises while waiting for information from the Plaintiff at a cost of US\$7,000.00 being the equivalent of ZMW35, 140=00*
- (b) The cost of sourcing and installing additional patch panels and patch codes valued at US\$2,000.00 being the equivalent of ZMW10, 040=00*

*(c) Further compensation for additional technical and engineering works done and valued at US\$8,000.00 being the equivalent of ZMW40, 160=00*

*(d) Interests and costs*

The Plaintiff filed a reply to the defence and a Defence to the counter -claim dated 20<sup>th</sup> November, 2012. It is stated that the delay in completion was not due to any fault of the Plaintiff and that the sitting arrangements were provided to the Defendant in the request for quotation document submitted to the Defendant. The Defendant was part of several meetings held regarding the re - design of the sitting plan on the eastern wing of the building which the Defendant consented to. The Plaintiff states that the impossibility claimed by the Defendant is inconceivable as the Defendant installed the current data points currently in use. The Plaintiff refutes having agreed that it would pay for the CISCO 2930 switches temporarily supplied and installed by the Defendant. The cost of sourcing and installing additional patch panels and patch codes was as a result of the Defendant's oversight in the design of the cabling structures.

The Plaintiff filed a witness statement settled by Henry Mubanga Mulenga dated the 30<sup>th</sup> July, 2013. It is stated that sometime between July and August 2011, a team of consultants were instructed by the Plaintiff Company to get quotations from companies that provide networking and ICT solutions. The grand total cost of the quotation was US\$84,374.33 inclusive of VAT. A meeting was held where it was disclosed that CNS would provide the contract and that the Plaintiff Company would pay a deposit of 50%. CNS issued the Plaintiff Company with an invoice and a

sum of US\$40,655.50 was paid to CNS. In September, 2011 CNS was paid a second payment of US\$23,948.00 by the Plaintiff Company. It is stated that the time for commissioning was extended because there was delay on the delivery of the furniture. There was never a time when the Plaintiff Company agreed to pay the Defendant Company for the temporary switches installed. CNS failed to install the required fire suppression system. As at January, 2012 CNS and the Plaintiff had not signed off the project. Several assurances were made stating that the project would be signed off and commissioned by 13<sup>th</sup> February, 2012.

It is further stated that between December 2012 and March 2013 PW1 wrote to Mr. Sinyangwe in respect of the works but no response was made. To date the project has not been commissioned or signed off. The Plaintiff has paid the sum of US\$21,161.31 for work which the Defendant has refused and or neglected to complete. The Defendant is liable for liquidated damages. The Defendant never carried out additional technical and engineering works and is therefore not entitled to any of the claims in the counter - claim.

In cross examination PW1 stated that the delay was caused by a consultant hired by the Plaintiff and due to the variation made by the Plaintiff. The main contractor worked on the server room and the Defendant could only work after the contractor had done his job. PW1 contended that the delays by the main contractor affected the works of the Plaintiff and other contractors. When referred to the e-mail at page 48 of the agreed bundles, PW1 stated that the email originated from the Plaintiff requesting the

Defendant to place an Order for supply and the installation of the CISCO switches at a scaled down model. The e-mail dated 14<sup>th</sup> September, 2011 at page 48 of the agreed bundles, was not a variation of the contract because it was sent before the contract. It is stated that original quotations from the Defendant included components of workings and electricals. The parties then later agreed that the electrical components were not required as they could be fitted by another company. Due to the instructions to remove the electrical components, the Plaintiff had to recalculate the costs.

PW1 was referred to the document on page 55, an email dated 5<sup>th</sup> October, 2011 to Graeme and at page 57 an email dated 12<sup>th</sup> October, 2011 requesting for a quotation of 1 wireless switch and 3 wireless APN CISCO. The said quotation was made after the date of completion because the original plan for the eastern side of the building would use cables for connection having been advised that it would be cheaper to use wireless. The document at page 60 of the agreed bundles of documents was referred to, namely an email PW1 sent dated 14<sup>th</sup> November, 2011 seven weeks after the date set for completion. PW1 stated further that he could not recall what EML stands for but stated that it provides network services. EML was contracted by the main contractor engaged by the Plaintiff. EML caused delays that affected the Defendant's completion of the works. PW1 further stated that there was no urgency to deliver the faceplates to the site. Molex fittings were originally ordered by the Plaintiff but varied to legrand fittings. The variation entailed a delay in performance and EML is to blame for the delays as per document at page 62 of the agreed bundles namely an email dated 15<sup>th</sup> November, 2011 to

Shannon. When referred to paragraphs 12 and 18 (2) of his witness statement, PW1 stated that the supplied switches are in the premises of the Plaintiff who are still utilizing them. The Plaintiff has enjoyed the use and does not need to pay for them because the Plaintiff paid CNS for switches not delivered. The total value of the contract was US\$84,374.33 and part payment was made to the Defendant. CNS was paid US\$40,655.50. The sums of US\$23,948 and US\$8,062.50 were paid to the Plaintiff. Page 23 of the agreed bundles was referred to namely a quotation by the Defendant to the Plaintiff for network installation in the sum of US\$84,374.33.

PW1 conceded that the Defendant did not cause the delays but that it was Third Parties. Due to the delays the Defendant incurred further project management costs. The Plaintiff's claim for 0.5% of liquidated damages cannot stand against the Defendant because of the reordering, revaluation of specs and the constant delays of the third parties.

In re - examination PW1 stated that the project has not been commissioned to date with items valued US\$ 26,653.06 still incomplete. Certain things were required to be commissioned. The extension of contracts was done by CNS though PW1 could not recall whether it was agreed by the parties that the contracts be extended. PW1 stated that it was not feasible for the Plaintiff to set off the claim of US\$2161.31 for the outstanding works against the Defendant's claim for the unpaid works. The switches that had been installed were a scaled down version. Had the correct switches been installed, the Plaintiff would not claim from the Defendant.

PW1 further stated that there was a contractor dealing with fittings and that the said works did not affect the works by CNS who to date has not signed off the work. The contract expressly stated that delayed payments led to a charge of 0.5% of the invoice value to be charged to the client's account. The Defendant has not completed the works according to the Contract. Variations of the contract were to be done in writing. The adjustments resulted in savings of the costs to the Plaintiff.

The Defendant filed a witness statement settled by Cyrial Funda Sinyangwe dated 6<sup>th</sup> September, 2013. According to the DW1's statement the Plaintiff changed the specs for the CISCO switches. The temporary installation by the Defendant was as a gap measure. The Plaintiff through its functionaries constantly delayed the implementation of the works. It was impossible for the Defendant to complete the works without access to the server room. It is stated that the project was agreed to be completed by the 21<sup>st</sup> September, 2011 but on the 14<sup>th</sup> September, 2011 the Plaintiff changed the specs for the CISCO switches. The Defendant Company then temporarily installed 3 CISCO 2960 switches whilst waiting for the correct information from the Plaintiff. It is stated that the Plaintiff engaged another contractor called EML to supply the face plates and the delays were partly caused by the said new contractor. The delays by the contractor and the Plaintiff led to the Defendant incurring additional costs for technical and engineering works. The Plaintiff then engaged another contracting company called Amiran to install a PBX voice system. The unconditional design led to the Defendant incurring additional



costs of installing of patch codes and patch panels. The Defendant accepts no liability such as the liquidated damages at 0.5% for the delays that led to the non - completion of the project. The Plaintiff made it a very difficult task for the Defendant to complete the project on time. All the funds paid to the Defendant were used as expected.

The Defendant disputes that it has neglected to complete outstanding works valued at US\$21,161.31. The Defendant stated that it spent the sum of US\$24,139 on cabling infrastructure, US\$ 13,881.13 on the UPS Systems, US\$5,421.25 on the works relating to the raised floor and additional works in the sum of US\$8,125.15 bringing the total in the sum of US\$51,569.53.

The additional technical engineering costs incurred by the Defendant occasioned by the Plaintiff as a result of its delay are in the sum of US\$8,000 in respect of patch panels and patch codes. The price of the CISCO 2960 switches supplied and installed as a temporary measure was equivalent to US\$7,000. There is a surplus of US\$4,569 due to the Defendant.

The Defendant was only given access to the server room on the 1<sup>st</sup> October, 2011. The Defendant carried out substantial works and used all the funds paid to them and overrun the costs by US\$4,000.

In cross-examination DW1 stated that the contract had not been completed, and that work was still outstanding. DW1 testified that the contract was to have been completed by 21<sup>st</sup> September, 2011. The Court suit was instituted on 22<sup>nd</sup> October, 2012. DW1

stated that the correct UPS were supplied though the Defendant did not supply the switches. DW1 stated further that the Defendant is claiming payments for the network switches that were temporary installed. The temporary specifications installed were not what the Plaintiff had ordered and that the Plaintiff did not agree to pay for the temporal ones. The Defendant was paid the sum of US\$64,000.00. When referred to paragraph 18 of the Plaintiff's witness statement DW1 stated that the said works have not been installed. Items 1 and II were valued roughly at US\$24,000.00. An e-mail at page 46 of the bundles of documents addressed to the Plaintiff by DW1 was referred to which informed them of the sourced scaled down model of the CISCO switches which brought a saving of US\$9,000. DW1 however was quick to state that this was a different contract. The savings was on the adjustments on the given proposal. The five suppression systems have not been supplied because of an overrun in the expenditure. The initial contract was for about 4 - 6 weeks. If all the works had been done by the other contractors on time, the Defendant would have finished the works within 4 - 6 weeks. There is no reason why the defendant did not complete the works. It was unreasonable for the Defendant to complete the works in 7 months. On the issue of delayed payments, the Defendant had agreed to pay a charge of 0.5%, and that legal fees would be paid by the Defendant in the event of delays. DW1 conceded that the matter was in Court due to the delays in the contract.

In re - examination DW1 stated that the delays were caused by the Plaintiff and its Agent Contractors. The delay of 7 months was caused because of funds withheld by the Plaintiff; leading to the

stalling of the works. When referred to the document on page 58, DW1 stated that the term overruns meant *“any changes resulted in going back to the drawing boards resulting in costs of overrun”*. The saving of US\$9,000 was swallowed up due to the prolonged delays by the Plaintiff’s Agent Contractors. The sum of US\$64,000 was to be paid as a down payment. The contract was not commissioned due to the breakdown in communication between the parties.

The Plaintiff filed submissions dated 13<sup>th</sup> May, 2014. It is submitted that the Plaintiff is entitled to the payment of the liquidated sum of K141, 261 for the incomplete work by the Defendant. The incomplete work is contended as follows;

- “(i) Installation of CO2 Fire Suppression System, including installment works at US\$8,062.50***
- (ii) Supply and installation of two CISCO Catalyst 3750G WS-C3750G-24PS-E Switches with PoE, 4 SFP Ports, enhanced image at US18, 590.56***
- (iii) Installation of brush panels over the voice points in the network cabinets and change in the voice patch cords to distinguish, with regards colours, voice from date.***
- (iv) Assembling fully, the Network cabinet on the eastern wing of the building”.***

It is contended that it was a term of the contract that in the event of delay on the part of the Defendant, the Defendant would pay the Plaintiff 0.5% of the contract value per week as liquidated damages until completion. The Defendant failed to meet the obligations. The sum of ZMW 141,261 being claimed is in respect of money paid to the Defendant by the Plaintiff for the acquisition

and installation of the five suppression and detection systems, two CISCO Catalyst 37506 URS-3750g switches.

The Plaintiff contends that the issues to be determined are whether the Defendant performed the contract to discharge it from the obligations and whether the Plaintiff is entitled to the claims herein. It is submitted that the general rule is that the parties must perform precisely all the terms of the contract in order to discharge their obligations. I was referred to *Chitty on Contracts General Principles, 27<sup>th</sup> Edition, Paragraph 24-32* which reads as follows;

***“The general rule is where one party failed to perform a promise which went to the whole of the consideration, the other party was released from performance as the former had not performed that which was a condition precedent to the latter's liability”.***

It is submitted that the Defendant having failed to install the switches, the fire suppression unit and generally failing to complete the installation, it failed to perform its part of the bargain. The Plaintiff is therefore entitled to be discharged from the contract and to be refunded the said sums. The case of ***Zambia Building & Civil Engineering & Contracts Limited Vs Janina Georgopoulos*** <sup>(1)</sup> was cited where it was held that;

***“An implied term of a building contract that the contractor should maintain reasonable progress. Failure to proceed expeditiously after reasonable notice will evince an intention no longer to be bound and so to justify the employer in treating that contract as at an end”.***

In respect of the claim for liquidated damages, the provisions of Clause 11 of the contract providing for the claim of 0.5% per week until work is completed was referred to.

It is contended that the completion date was 21<sup>st</sup> of September, 2011 which was extended. The Defendant was to complete works within a reasonable time but did not do so even after agreeing to complete by 13<sup>th</sup> February, 2012.

The defence by the Defendant that it failed to complete due to change in scope of work from the initial scope of work, cannot stand.

The Plaintiff submits further that the Defendant was given reasonable notice within which to complete the contract but the Defendant failed to proceed expeditiously after reasonable notice. The Defendant was part of the several meetings held in conjunction with other technicians regarding the re - design of the sitting plan and cannot claim to have been unprepared for the re -designing. It is submitted that the impossibility claimed by the Defendant is unimaginable because the Defendant installed the voice and data points that are currently in use over the eastern wing area.

In respect of the counter-claim for the CISCO 2960 switches supplied and installed as a temporary measure at a cost of US\$7,000. It is submitted by the Plaintiff that it never agreed at anytime to pay for the temporary switches installed by the Defendant. It was the Defendant's proposal that it installs temporary switches while waiting for the permanent switches to be ordered. The Defendant cannot put the cost of the switches

on the Plaintiff. Further that the temporary switches installed were not the switches contracted for.

In respect of the additional patch panels and patch codes, the Defendant contends that the final plan was agreed upon by the time the Defendant started the works which included the said panels and patch codes as a result of the Defendant's oversight in the design of the cabling structure of the voice network. At no point was it agreed that the Defendant would pay extra for the cost.

It is submitted further that the Defendant never did any additional technical and engineering works neither is there an invoice nor a claim for the payment. It is submitted that the Defendant is not entitled to any of the claims in the counter-claim and prays that its reliefs be granted with costs as not granting the Plaintiff the reliefs would unjustly enrich the Defendant.

The Defendant filed submissions dated 29<sup>th</sup> May, 2014. It is submitted that the successful completion of the contract was frustrated by the actions of the Plaintiff in failing to co-ordinate and control the various contractors. The case of ***Sir Fredrick Pollack in Dunlop Vs Selfridge*** <sup>(2)</sup> was cited where it was held that;

***“An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable”.***

The Defendant submits that it bought the promise of the Plaintiff by performing its own obligations under the contract. A party which performs an action in return for a promise given cannot be blamed for failure to completely perform its obligations under the

contract if the other party fails to fulfill its promise. It is submitted that the reason why the contract was not fully performed was because the Plaintiff failed to avail the Defendant access to the server rooms until after the date set for completion of the contract had passed and further that the Plaintiff consistently delayed in providing the Defendant with all the data needed on specifications and access points. It is submitted that the Plaintiff cannot escape its own culpability in the delays that affected the works and subsequent failure to complete the project. *Chitty on Contracts, 27<sup>th</sup> Edition, Paragraphs 24-32* already cited by the Plaintiff was drawn to my attention.

The Defendant submits that as a contractor it waited for the Plaintiff being the client to avail it access to the server rooms which access was only availed after the time fixed for completion had passed. The case of ***London Export Corporation Limited Vs Jubilee Roasting Coffee*** <sup>(3)</sup> was brought to my attention which dealt with the principle of incorporation of a custom into a contract.

It is submitted that the obligation to avail the server rooms to the Defendant was a term of the contract and must be enforced as against the Plaintiff because it is customary for the Defendant to wait for access to be granted to building and construction sites. The Defendant contends that for the cited case by the Plaintiff of ***Zambia Building & Civil Engineering & Contracts Limited Vs Janina Georgopoulos*** <sup>(4)</sup> to apply, the delays that affected the completion of the project must squarely and directly be due to the contractor's lack of action after having been given reasonable notice to complete within the time frame set for completion. It is submitted that the Defendant has not neglected nor refused to complete its part of the agreement.

The failure if any to comply with the express or implied terms of the contract must be blamed on the Plaintiff's other contractors who delayed the Defendant's work.

The Defendant disputes the liquidated claim of 0.5% because the delay was not caused by it.

The Defendant contends that it has suffered direct losses as a result of the changes to the scope by the Plaintiff. Brush panels were supplied and installed as per quotation and bill of quantities submitted. The difference in the brush panel numbers is a result of an increase in the scope outside the initial scope of work resulting in complex redesign during the installation of the voice back bone cable. At the request of the Plaintiff, the Defendant supplied additional patch panel and codes to facilitate completion of the telephone contractor's work. No payments have been received for these additional works.

As regards the non installation of the Fire Suppression Systems, the same was due to the non completion of works by other contracts on site.

In respect of the argument by the Plaintiff that there was no discussion with regard to payment for temporary CISCO switches, I was referred to the Learned Authors *Cheshire, Fifoot & Furmston's Law of Contract, 15<sup>th</sup> Edition at page 157, Paragraph 1A* that reads as follows;

***"If the extent of the agreement is in dispute, the Court must first decide what statements were in fact made by the parties either orally or in writing... A contract may be made wholly by***



***word of mouth or wholly in writing or partly by word of mouth and partly in writing...***"

It is submitted that the use of the word temporary switches needs to be afforded a literal interpretation so as to understand what exactly the parties intended. I was referred to the definition of temporary in the Oxford large print dictionary. It is submitted further that the Plaintiff failed and neglected to perform its duties under the contract therefore making it impossible for the Defendant to complete its own obligations. It is prayed that the counter-claims by the Defendant be allowed and that the Plaintiff's claims be dismissed.

I have considered the claims by the Plaintiff and the Counter-claims by the Defendant. I have further considered the evidence adduced on record, authorities cited and the submissions advanced by Learned Counsel for the Parties.

The nature of the specific contract in issue relates to construction contracts. Construction contracts have particular characteristics depending on the subject matter of the contract under consideration. It involves the provision of works, materials and designs or it can be a building contract. In the case in casu it is the provision of works involving an element of design. In construction contracts as in any other contract, the Parties are bound by what they have agreed and the general principles of Contracts apply. I refer to the Learned Authors of Chitty on Contracts Volume II Specific Contracts (Sweet & Maxwell) and the case of **National Coal Board Vs. Wm Neill & Son (St Helens) Ltd** <sup>(4)</sup>.

It is not in dispute that the Plaintiff and the Defendant entered into a contract dated 10<sup>th</sup> August, 2011 for the supply, delivery, installation and commissioning of Local Area Network valued at US\$81,311=00.

The Plaintiff as contractor was to pay for all the materials. The Plaintiff further paid a deposit of 50%. I refer to the Tax Invoice at page 28 of the agreed Bundles of Documents.

The Plaintiff claims the sum of ZMW141,261.21 being money paid to the Defendant for the acquisition and installation of fire suppression and detection switches and two Cisco switches.

It is contended that the Defendant failed to discharge its obligations under the contract.

The Defendant on the other hand contends that it did perform its obligations therein.

The first issue is whether the Defendant did supply the Five Fire Suppression and Detection Switches. The contract between the Parties did provide for the supply of the fire suppression and detection switches. The evidence adduced by PW1 was that the Defendant failed to supply the fire suppression system.

In cross-examination DW1 when referred to paragraph 18 of the Plaintiff's witness statement listing the pending works, testified that the said works were outstanding and had not been installed and that the value of the CO2 Fire Suppression System including installation was US\$8,062.50

DW1 further testified that the Fire Suppression Units had not been supplied because of an overrun in the expenditure caused by the delays occasioned by the Plaintiff.

It is my view and finding that the Defendant herein did not complete the works contracted *vis a vie* the installation of the Fire Suppression System. The issue of the alleged overruns in the budget will be addressed at a later stage.

In respect of the supply and installation of two Cisco Catalyst 3750G, WS-C375G-24PS-E Switches valued at US\$18,590. It is not in issue that the above specs of work were specified and quoted for and paid for as per contract. The issue in respect of the Cisco Switches arises from the temporal switches installed by the Defendant. The Defendant did concede that whilst the Plaintiff ordered Cisco Switches Catalyst 37506UR-C3750 it installed Cisco 2930 switches as a temporary measure.

There is evidence adduced on record that the Plaintiff placed an order for the supply and installation of the scaled down model of switches they had originally ordered. I refer to page 48 of the agreed bundle of documents. In my view there was a variation of contract with respect to the specs of the Cisco Switches. As a temporal measure whilst awaiting delivery of the ordered Switches, the Defendant installed its Cisco 2930 Switches. The variation was mutually agreed upon and as such I will not dwell much on the Law relating to variation.

It is further my view even assuming that there was no variation and a scaled down version was installed, that the Plaintiff has had use and benefit of the temporary switches. The Court in the case of **De Groot Vs. Attala** <sup>(5)</sup> held that in the absence of an agreement as to the prices of material and labour to be supplied under a contract, a party is entitled to a reasonable amount for the same.

It therefore follows that the claim in respect of the temporal Cisco switches by the Defendant ought to be set off against the claim by the Plaintiff.

A Set Off at Common Law is available if the claims made on both sides are in respect of Liquidated debts or money demands. The Plaintiff is demanding a liquidated sum of ZMK 141,261,218=00 and the Defendant is demanding the liquidated sum of ZMW35,410 in respect of the three temporary Cisco 2960 switches.

Under construction contracts, equitable set off is allowed by the Courts where a cross claim is so closely connected with the claim that it would be unjust to allow the claim without taking account of the cross claim. I refer to *Chitty on Contracts (Specific Contracts)* already cited and to the case of **Hanak Vs Green** <sup>(6)</sup> where the Court allowed a set off. This prevents injustice. It is my view that the Plaintiff is only entitled to the refund of the sums claimed less the sum for the value of the switches temporally installed by the Defendant. Equally the Defendant is entitled to the value of the temporary switches installed. The said value be deducted from the sum paid for the Cisco Catalyst 37506 URS - C375g Switches and outstanding. The Counter-claim by the Defendant herein succeeds, equally the claim by the Plaintiff succeeds to the extent stated.

The Plaintiff's second claim is liquidated damages in terms of the provisions of the contract at 0.5% of the contract value per week from 21<sup>st</sup> September, 2011 until completion.

The contract between the Parties provided for the Liquidated damages in the event of the Defendant delaying completion due

to negligence. The Plaintiff contends that the completion date of 21<sup>st</sup> of September, 2011 was extended till February, 2012 but the Defendant failed to complete even after reasonable notice was given.

The Defendant on the other hand contends that the contract was not performed fully due to the delay by the Plaintiff in providing the data requested for as well as due to the failure to avail it access to the server rooms or access points. In a nutshell the Defendant contends that the delay was caused by the Plaintiff.

The evidence by DW1 was to the effect that the Plaintiff changed the specs for the Cisco Switches and that this lead to the delays. In addition, lack of access to the server room contributed to the delay and further that EML another contractor engaged by the Plaintiff to supply face plates partly caused the delays. DW1 testified that had other contractors finished the work on time, the Defendant would have completed the works.

PW1 under cross-examination testified that the delay was caused by a consultant hired by the Plaintiff and due to variations made by the Plaintiff. The main contractor worked on the server room. The Plaintiff could only work after the contractor had done his job.

I have perused the e-mail dated September 8, 2011 appearing at page 46 of the agreed bundles of documents from the Defendant to the Plaintiff.

In the said e-mail, the Defendant informed the Plaintiff that;

*“the server room works have delayed due to pending works on the part of the main contract on site”* and requested them to intervene in making sure that *“those works are completed at the earliest possible time”*.

It is further not in issue that the Cisco Switches specs were changed to a scaled down model and that a savings was made in respect of the prices.

From the evidence adduced, I find as a fact that the delays in the completion of the contract on time was partially due to the main contractors on site, a fact conceded by DW1 and further partly caused by the changes in the specs made by the Plaintiff.

It is further my view that the Defendant cannot be blamed squarely for the delay in the prosecution of works.

In construction contracts, the Parties will usually make express provisions for a completion date. Where time is stated to be of the essence, it will allow the innocent Party to treat the breach as end of the contract. The Courts generally treat the time for completion in the context of reasonable time. In fact, the Court in the case of **De Groot Vs. Attala** <sup>(5)</sup> where the construction of a house was in issue held that in the absence of agreement between the parties on the time of performance of a contract and in the absence of evidence of reasonable time for performance, time is not of the essence of the agreement.

However, most contracts provide for extensions of time and liquidated damages. It is not in issue that as a results of the delay, the Parties extended the time of completion to February, 2012.

Where problems occur which are not covered by the terms of the contract, the Parties will frequently seek to imply a term into their contract such as access to the site or particular working areas of the site and timely provisions of information. According to *Chitty on Contracts, Volume II* the general rules governing the implication of the terms by the Court may apply to construction contracts. The basic principles are that; the term must be reasonable, equitable, it must be necessary to give business efficacy, it must be obvious that it goes without saying and the term must be capable of clear expression and not contradict any express term of the contract.

The Parties herein did extend the time for completion. Even though the Plaintiff contends that despite extending the time for completion, the Defendant failed to complete, there is evidence adduced that the Defendant is not the only party responsible for the delays. There is further the issue of access to the premises raised by the Defendant.

In the case of ***Milburn Services Limited Vs United Trading*** <sup>(7)</sup> the Court implied a term that the sub-contractor was to have access to the works notwithstanding that the main contract contained an entire agreement clause. Claims for damages arising out of the delays of works are often based on breach of an implied term as to non prevention or timely delivery of information.

Most construction contracts require a high degree of corroboration between the contractor and the employer or his representatives or sub-contracts. The implication of a term as to co-operation is well established and arises as a matter of law otherwise a Party may frustrate the performance of an obligation by another Party which is dependent on action being taken or not

taken by a Party. Hence the obligations to maintain the state of affairs.

The issue then in view of the delays mentioned relating to provision of information and access to premises and delay by third parties is whether the Defendant is liable for the liquidated damages. Clause 11 on indemnification provided that delayed work on the account of neglect by the Contractor would result in the sum of 0.5% per week of liquidated damages of the contract value to be paid out.

In my view the neglect by the Defendant in respect of the delay of completion of the works was not caused by the Defendant as earlier held. Therefore the Defendant is not liable for the liquidation of damages being claimed therein. I accordingly find that the Plaintiff has failed to prove the above claim and it is accordingly dismissed.

I now move on to the counter-claim by the Defendant. In respect of the claim for the price of the three Cisco 2960 switches supplied and installed as a temporally measure, I had earlier on held that the Defendant is entitled to the same.

The second counter-claim by the Defendant is the cost of sourcing and installing of additional patch panels and patch codes valued at US\$2,000 (ZMW10,000).

DW1 testified that the Plaintiff engaged Amiran to install PBX Voice System. This unconditional design led to the Defendant incurring additional costs of installing patch codes and patch panels.



The Plaintiff contends that the final plans were agreed upon by the time the Defendant started the works. The final plans included patch codes and panels as a result of the Defendant's oversight in the design of the cabling structure of the voice network. There was no agreement to pay extra for the costs aforementioned.

In my view it is not in issue that the contract between the Parties provided for patch panels and patch codes. What is in issue is the alleged additional costs and installation of the patch codes and patch panels in the sum of US\$2,000.

I have analyzed the documents in the agreed bundles. There is no evidence adduced before Court of additional costs of patch codes and patch panels or that the alleged changed panels incurred further costs. No invoices were issued by the said Defendant. Any variations in the contract were to be in writing. I refer to the Clause on modifications to the work appearing at page 34 of the agreed bundles of document which stipulated that;

***“All changes and deviations in the scope of work ordered by the client must be in writing and the contract sum being increased or decreased accordingly by the Cable Network Solutions (Defendant) will also have to be in writing. Any claims for the increase in the costs of the work must be presented by the contractor (Defendant) to the client (Plaintiff) in writing and approvals by the client shall be obtained before proceedings with the ordered change or revisions”.***

According to Chitty on Contracts (construction contracts) construction works will vary from what was contemplated at the

date when the contract was priced between the contractor and client. Without express authority there is no power to carry out extra work. Likewise works may not be exceeded without Consent or outside the express terms of the contract.

It is therefore my view and finding that the Defendant has failed to prove its counter-claim in respect of the claim for patch codes and patch panels in the sum of US\$2,000 and the said claim is dismissed accordingly.

The last counter-claim by the Defendant is in respect of compensation for additional technical and engineering works done valued at US\$8,000 (ZMW40,000)

The Defendant contends that the delays by the contractor and the Plaintiff led to it incurring additional costs for technical and engineering works.

In as much as the Defendant contends that the delays by the Plaintiff's Agent contractors resulted in incurring technical and engineering works, no evidence has been adduced of the technical and engineering works effected and presented to the Plaintiff.

One of the terms of the contract (Clause 4) provided that; *"Any claims for the increase in the cost of the work must be presented by the contractor to the client in writing"*. Further approvals were to be obtained from the Plaintiff by the Defendant before proceedings with the change or revisions. There are no such approvals adduced before the Court to prove the claim therein.

It is for the foregoing reasons that I am of the view that the Defendant did not incur any additional technical and engineering

works valued at US\$8,000. The counter-claim for additional technical and engineering works is accordingly dismissed.

In respect of the Plaintiff's claim, I hereby enter Judgment in favour of the Plaintiff in the sum of ZMW 141,261,218 being money paid in respect of the Five Fire Suppression/Detection Switches and two Cisco Catalyst 37 506 UR - C 375 switches less the value of the temporary switches supplied by the Defendant in the sum of ZMW35, 410.00.

The said sum shall be paid with interest from date of Writ of Summons to date hereof at the current Banking Lending Rate, thereafter interest at Bank of Zambia Bank Lending Rate.

The Parties shall bear their own costs. Leave to appeal is granted.

**Dated the 18<sup>th</sup> day of December, 2014**

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Hon. Mrs. Justice F. M. Chishimba  
**HIGH COURT JUDGE**