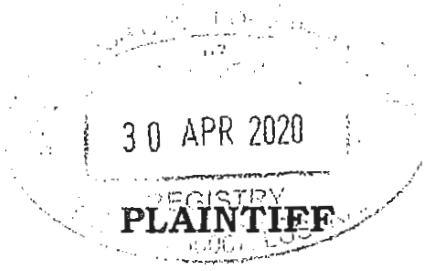
IN THE HIGH COURT FOR ZAMBIA **2012/HP/0529**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:



MANELA DEVELOPMENTS LIMITED **PLAINTIFF**

AND

MKP BUILDERS (Z) LIMITED **DEFENDANT**

Before Hon. Mr. Justice M.D Bowa on 30th April 2020.

For the Plaintiff: Mr. N Ngandu of Shamwama and Company
For the Defendant: No appearance

JUDGMENT

Cases referred to

1. Australian Blue Metal Limited v Hughes (1963) AC 75 at 99

2. Livingstone vs. Raywards Coal (1980) 5 App Cas 25

3. Zambia National Building Society vs. Ernest Mukwamataba Nayunda (1993) ZR 31

4.Anderson Mazoka & Others vs. Levy Patrick Mwanawasa & ECZ (2005) ZR 138

5. Demka Engineering Services Limited vs. BCB project consultants Limited (2014) ZR at P 45

6.Konkola Copper Mines PLC vs. Mitchell Drilling International Limited & Mitchell Drilling Zambia Limited (2015) 2 ZLR at P 203,

Other works referred to

Kendrick E, Contract Law Text, cases and materials, Oxford University Press 2003.

Burrows A S et al (eds) Chitty on Contracts "specific contracts" volume 2 thirtieth edition Sweet and Maxwell London 2008.

This matter was commenced by writ of summons and statement of claim on the 17th of May 2012. By its statement of claim the Plaintiff Company avers that it entered into an agreement with the Defendant in which its services were engaged for the construction of 106 semidetached houses in batches of 7 blocks at North Gate Gardens in Lusaka. Pursuant to the agreement, the Defendant was to make available to the Plaintiff a mobilization fee to enable the commencement of works on the site. In addition, the building material for the housing project was to be purchased from suppliers appointed by Defendant.

It was averred further that by letter dated 15th of July 2011, the Plaintiff made a request to the Defendant to expeditiously communicate with recommended suppliers in order to facilitate placement of orders as this was required for of the project. Further that several updates were made to the Defendant concerning progress on site and the challenges faced during the project.

It was averred further that by letter dated 26th July 2011, the Plaintiff requested the Defendant to make provision for project finance as well as additional funding for the project. It further gave the Defendant official notification of the shortage of cement that invariably affected planned works on the site. That despite of all these efforts, the Defendant opted to terminate the agreement without giving notice on the 12th of September 2011 on the basis that the Plaintiff had delayed the construction process. As a consequence, the Plaintiff was ordered to leave the site on the 16th of September 2011.

The Plaintiff avers that its materials and implements were left at the site when it was forcefully asked to vacate by the Defendant. It was the Plaintiff's position that the Defendant did not provide sufficient funding and the requisite materials as per agreement causing a negative impact on mobilization, site establishment and execution of permanent works. The Plaintiff thus claims.

(a) Damages for wrongful termination of contract.

(b) Payment for the work done on the site to the date of the termination.

(c) Damages for loss of profit the Plaintiff would have gained had the project been completed.

(d)Interest

(e) Costs

(f) Any other relief the court may deem necessary.

The Defendant filed in a defence and counterclaim. In it its defence the Defendant averred that it did as per contract advance the Plaintiff the sum of K350, 000 to enable the company to fulfill part of its contractual obligations. Further that in terms of the agreement the Plaintiff was only entitled to further payments from the Defendant upon stipulated levels of completion of works broken down to slab level, wall plate level and roof installation.

The Defendant further availed the Plaintiff 300 bags of cement which was sufficient to enable the Plaintiff complete no less than 7 blocks at slab level. The Defendant acknowledged receiving several letters from the Plaintiff in response to its various reminders to them to adhere to the work schedule. It averred that the updates from the Plaintiff were mere demands for more money which were

devoid of the requisite account of how the K350, 000 advanced to it by the Defendant was utilized.

The Defendant maintained that it exercised its right to terminate the contract as the Plaintiff failed to construct a single slab from July 2011 to September 2011 despite being availed the stated sum of K350,000 and 300 pockets of cement which was more than sufficient to construct 7 blocks at slab level.

The Defendant denied ordering the Plaintiff to vacate the site and that it in fact made several attempts to contact the Plaintiff by phone and mail to no avail. An inventory conducted on site by a third party the National Housing Authority established that the works conducted by the Plaintiff were for the value of K137,696,126.98 leaving a balance of K229,103,873.02 unaccounted for. It was averred further that the Plaintiff failed to perform its part of the contract and is therefore not entitled to any of the reliefs prayed for.

In its counterclaim, the Defendant prayed for the following reliefs.

(1)Damages for breach of the agreement dated 12th of June 2011.

(2)The sum of K229, 103,813.02 being mobilization funds unaccounted for by the Plaintiff.

(3)Interest

(4)Costs.

(5)Any other relief the court may deem fit.

Trial commenced on the 26th September 2017. PW1 was Fisho Tembo the Managing Director of the Plaintiff Company. He testified that the company is a development company that designs and build construction works and project recovery. Further that he had been Managing Director for the company from its inception which was about 12 years at the time of his testimony.

He testified that the Plaintiff Company entered into a business relationship with the Defendant by which the Plaintiff was to build 106 houses in the North Gate Gardens. The agreement was reduced in writing and presented on page 4-6 of the Plaintiff's bundle of documents. The contract price at the time was K154, 050,875 per unit.

According to the contract, the scope of work to be undertaken was to build the units up to shell level. In terms of site handover the

Plaintiff Company was supposed to be provided with pegs and all other setting out details by the Defendant. The contract also had provision for a mobilization fee. Mr. Tembo explained that this is money that is given to the contractor in readiness to start the works on site and was not fixed from the start. The 106 units were to be completed in 24 months and the client recommended suppliers whom the Plaintiff was to get some of the materials to be used. This included cement, building sand and tough sand.

The Plaintiff Company worked out a programme with the information given to them by the client to contact all the suppliers. They also mobilized the men needed to execute the works. The programme of work to be undertaken was reduced in writing and availed to the Defendant. From past experience having done similar works the Plaintiff designed the programme in such a manner that different lines would perform different activities from setting out, an excavations team in place, and another to pour the concrete for the foundations. All the other teams would follow through pretty much like an assembly line taking into account the number of units.

Mr. Tembo acknowledged that the Plaintiff Company received a mobilization fee in the sum of K200 million kwacha as per page 71 of the Defendant's bundle being a receipt raised on the 10th of June 2011 confirming receipt of the money. He added that the money was paid soon after the signing of the contract on 12th of June 2011.

However there were no pegs on the site as expected. He emphasized that there was not a single peg on any of the stands in spite expectation as per clause 3 of the contract. The Plaintiff questioned the Defendant on this and was told there would be a variation of the agreement. The Plaintiff was further told to use its own resources to survey and peg the stands. These concerns were reduced in writing evidenced on page 7-8 of the Plaintiff's bundle of documents. This was correspondence to the Defendant under Mr. Tembo's hand advising on the site conditions. He pointed out that Item 11 of the issues raised was on the pegging of the stand. On page 77 of the Defendants bundle is another letter Mt Tembo wrote asking about the laid down area or construction compound.

He testified further that the contract provided for exclusions in clause 5 of the contract. These include from clause 5 (a) – (d) that water would be available; that the price did not include rock blasting where it may be deemed necessary; that the price did not include adverse ground conditions or hard pickable material and under (d), electrical and plumbing works. He explained that an exclusion term is works which have been performed but are not included in the pricing of the job.

Mr. Tembo testified further that there was no water on site. The Plaintiff was advised to sink a bore hole. The Plaintiff accordingly brought in a company to sink the bore hole, provided the tank and tank stand. The Plaintiff also had to provide for electricity to pump the water. He stressed that the Plaintiff communicated the challenges faced in writing to the Defendant right from the beginning. This was also in the letter on page 7-8 of the Plaintiff's bundle advising what the site conditions were. Also mentioned was the need for a generator for the water for which running costs would be levied.

Upon commencement of works and excavation of the site, the Plaintiff came across hard pickable material which was stony and gravel in nature. Mr. Tembo testified that it is not easy to work on such surface in comparison to regular soil. This was also communicated in the letter on page 7 of the Plaintiff's bundle in item 1 in particular. The witness clarified that it was important to do so because the rates payable vary hence both parties must be involved in the inspection to agree on the rate.

He went on to testify that apart from the hard pickable material, the Plaintiff also encountered other challenges on the site. On part of the land a refuse damp was discovered. He explained that it was close to impossible to do any excavation for the houses in this area. In another stand there was an encroachment. A structure had been built up to slab level at the same spot where the houses should have been done. Like other challenges before, these findings were made known to the Defendant. Correspondence to this effect is on pages 60 and 67 of the Defendant's bundle of documents.

The Plaintiff requested the Defendant to send a member of their staff to appreciate the problems and instruct on the course of action

the Plaintiff was to take. The instructions were given by a letter in response advising the Plaintiff to proceed anyway which translated in more extensive work to build on the site. That it involved a lot of what the witness referred to as "remedial work" in order to build on the site.

The Plaintiff was then advised to leave block B where the refuse was and move on to another site. In his letter at page 46-48 of the Defendant's bundle of documents, Mr. Tembo informed the Defendant that although his company had been asked to move sites, the company had already done some work on the abandoned site. He therefore sought clarity on the instruction given to suspend the work given by letter on page 58.

It was Mr. Tembo's further testimony that the contract made provision under clause 9 that the building material was to be bought from the Defendant's appointed suppliers. This included blocks, cement and roofing material as required for the project. However The list of suppliers was not immediately availed. Once it was provided, the Plaintiff did not manage to get the blocks from the listed suppliers. The suppliers were approached but none

supplied the material sought. Blocks were subsequently procured from a company called Aidom enterprises as per delivery notes on pages 60-73 of the Plaintiff's bundle.

There were further other materials procured for the project from different sources due to passage of time and the Plaintiff's resolve not to wait any further to register progress in the works. These other sources included Zantu Investments, and Micmar. Delivery notes to this effect are at pages 74 to 104 of the Plaintiff's bundle of documents.

He added that there was no cement procured from an MKP supplier as there was a shortage in the country at the time. Larfarge cement was not producing any cement. The Defendant was informed about this development by letter on page 15 of the Plaintiff's bundle as well as pages 18 and 21. The Plaintiff advised that perhaps effort could be made to source the cement from outside Zambia. The Plaintiff had identified a supplier in South Africa instead of the proposal by the Defendant to source the cement from Brazil that would have taken longer to procure. There was also the question of the shelf life that the Plaintiff was concerned about.

Emails on the subject and concerns expressed are on pages 21 to 23 of the Plaintiff's bundle of documents. The cement was not procured as advised. As a consequence the Plaintiff did not hand over the shells to the Defendant as per contract. The major reason for this according to Mr. Tembo was the non-availability of the cement.

The court learnt that the failure to hand over the shells became a source of misunderstanding and friction between the 2 companies. The Defendant sourced some cement and gave the Plaintiff 300 pockets. However, granted the magnitude and scope of the work to be undertaken the 300 pockets were consumed on the works on site and the Plaintiff managed to complete some foundations. The company could not however hand over the completed shells because the contract was terminated by the Defendant before the time fixed for completion. The reason cited in their letter was nonperformance or failure to deliver.

Mr. Tembo testified that this was communicated by letter dated 12th September 2011 on pages 22 of the Defendant's bundle of documents. Upon receipt of the letter, the Plaintiff company reacted

by explaining the reason why the work could not be delivered as programmed or agreed. This response is on pages 24-27 of the Plaintiff's bundle.

Afterward, the Plaintiff was not allowed on site and was asked to leave. There was no handover or joint inventory conducted. The Plaintiff was later informed the National Housing Authority was called in to carry out an inventory. Mr. Tembo lamented that the termination of the contract led to losses. The Plaintiff had done work which should have been evaluated and a claim lodged so that the company could be paid. Further, that there were variations which as he had explained earlier, was work beyond the original scope of work agreed. The work was done and not paid for.

Further that there were other commitments to various suppliers which the Plaintiff was expected to pay for but could not. In the main, that there was a loss of profit. He added that the materials that were on site including the tools and furniture was all taken by the Defendant.

Counsel for the Defendant withdrew his services midstream during cross examination. What followed was a number of adjournments

on account of non-attendance by the Defendant's representative. I therefore directed the Plaintiff's advocate to file their final submissions and reserved the matter for judgment. It must be said that the little cross examination done did not get to the root of the claim and was merely introductory in nature. It was at that point that an adjournment was sought and later followed by counsel's application to withdraw representation which I granted on 27th of September 2018.

That said, in final submissions filed into court on 24th July 2019, the Plaintiff argues that as a result of the termination of the contract 3 questions arise which the court is invited to consider. In The first I was invited to consider whether the Plaintiff had failed to perform the contract. Under this head, it was argued that although the Defendant accused the Plaintiff of having failed to perform the subject contract for reasons stated in the termination letter, it was their submission that the delay in the performance of the contract could not be attributed to the Plaintiff, for several reasons. The first of which was the problems regarding the site handover. In this regard that despite the Defendant being responsible for handing

over the building site to the Plaintiff, there were no pegs in place when the Plaintiff took over the site. In addition that the Plaintiff did not have access to the site as communicated by the Plaintiff in its letter dated 17th June 2016.

Secondly that in so far as exclusions were concerned, clause 5 provided in part that the contract price did not cover extra work arising from adverse ground conditions or hard pickable material. In this case that apart from there being an occurrence of rocks and hard pickable materials there was also rubbish dumps encountered by the Plaintiff.

Importantly that the Plaintiff also experienced challenges in acquiring building materials from the Defendant's recommended suppliers and was only availed the list of suppliers after being prompted by the Plaintiff as highlighted from pages 80-82 of the Defendants bundle of Documents. Further that there was the issue of the shortage of cement which affected the progress of works under the contract. That when the commodity was available the price had increased from K35, 000 as indicated in the bill of quantities, to K60, 000 as per page 18 of the Plaintiff's bundle. It

was submitted further that the non-availability of the cement in spite efforts made to engage the Defendant about it also contributed to the delay.

Further that blocks could not be procured from the recommended suppliers as they did not have the materials in stock. Therefore to alleviate the situation, the Plaintiff procured concrete blocks from other suppliers as per delivery notes referred to in evidence. This was a pattern in relation to the other materials sought. Therefore the Plaintiff took it upon itself to source these materials from other suppliers. The Plaintiff concludes that from the above it is evident that the delay in performing the contract cannot in any way be attributed to it.

The Plaintiff proposes the second question to be addressed to be whether the Defendant wrongfully terminated the contract. The Plaintiff submitted that prior to the termination of the contract, the Defendant unilaterally altered the terms of the contract by reducing the blocks agreed. It was submitted that in the absence of any variation or amendment clause the Defendant could not at will, amend the contract terms to the detriment of the Plaintiff.

The Plaintiff submits as not in dispute that the Plaintiff received the mobilization fee of K200, 000.00. However the mobilization was insufficient as highlighted in the Plaintiff's letter to the Defendant dated 26th July 2011. That it was only after the Plaintiff's lamentation with respect to the funding that the Defendant released an additional funds of K 150,000 and a supply of 100 bags of cement on 13th August 2011 and 200 bags on 17th August 2011.

It was submitted further that contrary to the letter terminating the contract and reasons cited therein, there was no agreement for the delivery of 6 completed blocks by 8th September 2011 before the court. The Plaintiff thus concludes that the termination was unfounded for this reason and the issues earlier highlighted of inadequate funding on non-availability of cement an essential commodity.

The third question posed by the Plaintiff is whether the Defendant could terminate the contract without notice. In this regard it was submitted that a perusal of the subject contract would reveal that there was no termination clause. Therefore that in cases where there was no termination clause the Defendant was bound to give

reasonable notice to the Plaintiff before terminating the contract. I was referred to the case of ***Australian Blue Metal Limited v Hughes***[1] in which Land Devlin stated that:

"The question whether a requirement of reasonable notice is to be implied in a contract is to be answered in the light of the circumstances existing when the contract is made the length of the notice if any, is the time that is deemed to be reasonable in the light of the circumstances in which the notice is given."

It was argued that in the case in casu the parties entered into a construction contract for the building of 106 houses. The cycle of deliverables for the housing units was 3 months for 7 blocks. That granted the first 3 months were faced with the challenges earlier alluded to and the evidence before court clearly showing that works only commenced in earnest on or about 13th of July 2011 a month after the contract date, it was only possible for the first 7 blocks to be delivered on or about 13th October 2011. However that the Defendant terminated the contract on 12th September 2011 exactly 3 months from the date when the contract was commenced and when in fact the first handover should have occurred.

The Plaintiff in concluding its submissions contended that it had discharged its burden of proving its claims. Further that it had established it had lost profits prom the premature termination of the contract. I was referred to the case of ***Livingstone vs. Raywards Coal*** [2] in which it was held:

"where any injury is to be compensated by damages in settling the sum of money to be given for reparation of damages, you should as nearly as possible get the sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation or reparation..."

Further reliance was placed on the case of ***Zambia National Building Society vs. Ernest Mukwamataba Nayunda***[3] which echoed the same principle. Counsel prayed that judgment in favour of the Plaintiff be entered accordingly.

I have carefully considered the evidence before me and the submissions filed by the Plaintiff. It is trite that the Party claiming bears the burden of proving his/her case. Therefore in spite of the failure by the Defendant to defend the matter, the Plaintiff still had an obligation to prove its case. Thus in the case of An ***Mazoka and***

2 others vs. Levy Patrick Mwanawasa & 2 others, [4] the Supreme Court stated the following:

"As we said in Khalid Mohamed vs. The Attorney General (1982) ZR 49, this court said on the burden of proof that; an unqualified proposition that a Plaintiff should succeed automatically wherever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiffs case has collapsed of its own volition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need a defence.

We held in that case that a Plaintiff cannot automatically succeed wherever defence failed; he must prove his case..."

I find as undisputed the fact that the Plaintiff and Defendant entered into a construction contract by which the Plaintiff agreed to build 53 block shells semi detached houses in batches of 7 no blocks (14 houses) at a unit price of 154,050,875. The contract had provision for periodic payments due upon various stages of performance.

I further find as not in dispute that a total of K350, 000 was paid to the Plaintiff as mobilization fees. In addition that 300 pockets of cement were also availed to the Plaintiff to facilitate the work. It is further an undisputed fact that the Defendant terminated the contract by letter dated 12th September 2011.

The Plaintiff claims damages for wrongful termination of contract by the Defendant and failure to give notice of the termination. The Defendant's position on the other hand is that it was the Plaintiff that was in breach of its obligations by failing to deliver the shells within the set timelines. That it was as such duly entitled to terminate the contract and to claim damages for the breach and further demand the refund of amount paid as mobilization fees in excess of what was used for work done.

The controversy as I see it is to be resolved by addressing two questions. Notably was there a breach of contract in the circumstances of this case? and if so, which party breached its contractual obligations.

Ewan Kendrick the learned author of **Contract Law. Text, cases and materials Oxford University Press 2003 at P24** opines that:

"A breach of contract consists of failure without lawful excuse to perform a contractual obligation. The breach can take different forms such as a refusal to perform, defective performance or late performance."

The Plaintiff contends breach on the part of the Defendant in the manner it wrongfully terminated the contract and argues that the Defendant was under an obligation in any event to give reasonable notice for the termination. Support for this position is to be found in the case of ***Demka Engineering Services Limited vs. BCB project consultants Limited*** [5] in which lady Justice F. Chishiba held that a party wishing to terminate a contract is required to give a notice to the other party asserting that the party is in breach, specifying the breach and giving the party in breach a chance to rectify the breach within the specified time.

However in the case before me, it is common cause that there was no specific provision for termination or let alone one for dispute resolution contrary to what is typically seen in building contracts. Ewan Kendrick in his work (supra) recognizes that the failure to make provision for termination often presents a challenge and that it is resultantly necessary for the law to provide a "default rule" that

is applicable in such circumstances. The author suggests there is a tension at the heart of English law in striking a balance between the need for certainty that such a rule would bring and need for flexibility to ensure fairness. He concludes that the English law employs two apparent and often inconsistent strategies at the same time.

In the first and traditional strategies focus is on the nature of the term broken. Thus the view is that if the term broken is of sufficient importance, the law will confer upon the innocent party the right to terminate further performance of the contract irrespective of the consequences of the breach .However that where the term broken is of minimal significance the right to terminate will not arise. The second strategy calls for the consequences of the breach rather than the term broken. It is nonetheless a settled principle in the law that a breach of condition of the contract gives to the innocent party the right to terminate further performance of the contract.

The Plaintiff does not question the Defendant's right to terminate but argues that the requirement for reasonable notice is implied

into the contract. I disagree that such a term can be implied based on the facts before me. The Defendant's position was that the Plaintiff failed to meet an important condition stipulated in the contract on the time of delivery which was clearly expressed to be of the essence. In this regard clause 8 provides:

"8 handover of completed shells

Every three months seven blocks to be delivered at a time, with final handover of all 53 blocks not to exceed 24 months from date of payment of mobilization fee."

Further expression of this desire was manifest in letters from the Defendant to the Plaintiff dated 30th June 2011 and July 11th 2011 set out below.

30th June 2011

The Managing Director

Manela Developments

Post net Box 584

P/Bag E891

Lusaka.

Attention: Mr. Fishoo Tembo

Dear Sir,

RE: PROGRESS REPORT AS AT 24 JUNE 2011

We are in receipt of your report as per above and have noted your progress so far.

We however wish to state that the first 14 blocks (28 housing units) should be handed over to us at roof level, three months from date of receipt of mobilization funds.

Further we wish to advise that all correspondence pertaining to the Northgate Gardens Housing Development Project should be addressed to "The General Manager – Mr. A. Djallil" or "The Project manager – Mr. Ghani."

Yours faithfully,

MKP Builders Zambia Limited

A. Djallil

General Manager

July 11, 2011

The General Manager

Manila Developments

Postnet Box 584

P/Bag E891

Lusaka.

Attention: Mr. Fishoo Tembo

Dear Sir,

Re: Notification of Rubbish Dumps and Pit on Site

We are in receipt of your notifications as per above, but wish to state that these unforeseen site encounters should not hamper the progress of the works at the site as time is of high essence in meeting the targeted project deadline.

Instead, these spots should be temporarily skipped awaiting the necessary action to be taken after consultations. Meanwhile, works should progress where there is no encounter of these setbacks.

Also be advised that as you progress on site, focus should initially be on completing block 'A' which happens to be the font block.

Yours faithfully,

MKP BUILDERS ZAMBIA LIMITED

A. Djallil

This was also expressed by letter to the Plaintiff dated 13th of July 2011 on page 84 of the Defendants bundle of documents.

The Defendant contends that not a single slab was delivered in spite of payment of the K350, 000 mobilization funds and delivery of 300 pockets of cement in the first 3 months which was sufficient for this purpose. The Plaintiff does not dispute not having delivered in the set timeframes but states that there was a lawful excuse and reasons for this. PW1 testified that this ranged from:

- ✓ Delayed handover of the site and failure to provide pegs by the Defendant
- ✓ Discovery of hard pickable surface calling for variation.

- ✓ Discovery of refuse damp and encroachment at the site
- ✓ A failure by the Defendant to provide sufficient resources
- ✓ failure by the Defendant to avail the list of suppliers to provide blocks and cement
- ✓ Unavailability of cement on the market and indecision on the importation of the product from Brazil as suggested

Further that all this was communicated to the Plaintiff. In short that if there is anyone to blame for the failure to deliver it would be the Defendant itself.

The learned authors of Chitty **on Contracts "specific contracts" volume 2 thirtieth edition** state in paragraph 37-075 that

"Construction contracts will often require a high degree of collaboration between the contractor and the employer (or his representative under the contract) and between the main contractor and his specialist sub-contractors. The implication of a term as to cooperation between contracting parties is well established and arises as a matter of law since otherwise A might frustrate the performance by B which was dependent on action being taken by A. The precise scope of A implied obligation to co-operate in his contract with B will depend upon the nature of the obligations under the contract, but it is thought that in

most cases, A's obligation to cooperate is more in the nature of an obligation to maintain the state of affairs between A and B rather than an obligation upon A positively to facilitate the performance which B has undertaken to carry out." (Emphasis mine)

Based on the above I readily imply a term of the Defendant's obligations to co-operate in this case. The question is, is there evidence that the Defendant company did not cooperate in this case nor did nothing to maintain the contact between the 2 parties? My findings are that contrary to the Plaintiff's assertion that there was a delay in availing a list of suppliers, page 77 of the Defendants bundle of document shows what the list was availed a day after the request was made.

There is evidence of correspondence in which the Plaintiff lamented about the insufficiency of resources. The Defendant responded by availing additional funding from the K200, 000 initially given to make it K350, 000. The discovery of the dump site was followed by an instruction to abandon this site and emphasis to nonetheless adhere to agreed deliverables and timelines.

The Defendant further made adjustments to the output expected as evidenced in minutes of a meeting held on 15th July 2011 at which the Plaintiff was represented by PW1. Targets and timelines for delivery were agreed to in light of challenges presented. The termination letter further indicates a scaling down to 6 completed blocks which was to be done by 11th September 2011. Therefore in as much as there as no agreement to show this as submitted by the Plaintiff evidence before me is suggestive of a constant consultative and collaborative effort towards performance of the contractual obligations .I would therefore dismiss the assertion that there was a unilateral variation to the detriment of the Plaintiff in this case.

There is further evidence that the Defendant tried to reach the Plaintiff who had changed its physical address without giving notice and was only availed days after a letter complaining about it on page 72 of the Defendants bundle of documents had been delivered. The bottom line therefore is that not a single slab was delivered in the 3 months in spite of the payment of K350, 000 and materials availed. This in my view was a breach of a fundamental and sufficiently important condition of the contract on the part of the

Plaintiff which entitled the Defendant to terminate the contract as it opted not to accept the breach.

The Plaintiff's claim for damages for wrongful termination of the contract therefore fails for the above reasons.

The Plaintiff also seeks payment for the work done on the site to the date of termination. I am satisfied that the Plaintiff did do some work on the site as confirmed by the assessment done by the Defendant's agent National Housing authority on page 7 of the Defendants bundle of documents. The Plaintiff expresses reservations on the objectivity of the assessment done. There is further a dispute on the amount that was expended on the works with the Defendant insisting the cost was less than the K350, 000 that was paid to the Plaintiff hence its counterclaim for the difference. Undisputed however is the fact that some work was done. I would in the circumstances enter judgment for the Plaintiff for work done to be assessed by the Deputy Registrar.

As regards the prayer for damages for loss of profit the Plaintiff would have gained had the project been completed, I decline to grant this claim. It is trite that a defaulting party cannot benefit

from its breach. The Supreme Court makes this proposition clear in ***Konkola Copper Mines PLC vs. Mitchell Drilling International Limited & Mitchell Drilling Zambia Limited*** [6] in which it observed that:

"The Appellant was in breach of contract resulting in the Respondents failure to meet the completion schedule and a party cannot benefit by taking advantage of the existence of a state of things he himself produced"

Having found that the Plaintiff was in breach resulting in the termination of the contract in this case, it follows that he cannot be awarded the damages for the loss of profit that he seeks. The Defendant did not prosecute its counterclaim. The counterclaim is accordingly dismissed for want of prosecution. Costs are for the Plaintiff to be taxed in default of agreement.

Dated at Lusaka the 30th day of April 2020

HON. JUSTICE M.D BOWA