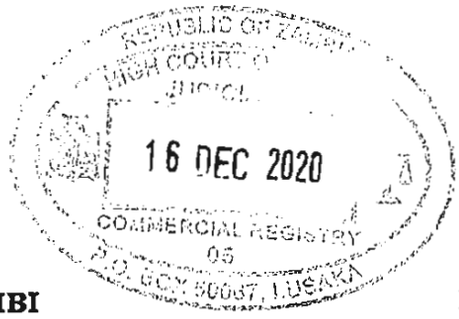
IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0364**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA
(Commercial Division)



BETWEEN:

HELLICY CHAKOSAMOTO NG'AMBI **PLAINTIFF**

AND

OLIVER MUSONDA (TRADING AS PLADOC ENTERPRISES) **DEFENDANT**

Before Lady Justice B.G. Shonga this 16th day of December, 2020

For the plaintiff: Mrs. E. Chiyenge, Messrs. C.C. Mwansa & Advocates

For the defendant: Mr. M. Mpulukusa, Messrs. Charles Siamutwa Legal Practitioners

---

JUDGMENT

Cases Referred to:

1. ***William Kixmiller, William H. Spencer, Business Law - Case Method.***
2. ***Rodgers Chama Ponde & 4 Others vs Zambia State Insurance Corporation Limited (2004) Z.R. 151 (S.C.).***
3. ***Majory Mambwe Masiye v. Cosmas Phiri (2008) Z.R. 56 Vol. 2 (S.C.)***
4. ***Morgan v Griffith (1870-71) L.R. 6 Ex.70.***
5. ***Esquire Roses Farm Limited v Zega Limited (2013) Z.R. Vol. 1. 74***
6. ***Butler Machine Tools Limited v Ex-cell-o Corporation (England) Limited [1979] 1 ALL E.R.965.***
7. ***Heyman and Another v Darwins Ltd [1942] 1 All ER 337.***
8. ***Freeth v Burr (1874) LR 9 CP 208 at p. 213.***

9. *Mersey Steel & Iron Co v Naylor, Benson & Co (1884) 9 App Cas 434.*
10. *Shawton Engineering v DGP International Ltd [2005] AII ER (D) 241.*
11. *Dodd v. Churton [1897] 1 QB 562.*
12. *Justin Chansa v Lusaka City Council (2007) ZR 256.*
13. *Indo Zambia Bank Limited V Mushaukwa Muhanga (2009) Z.R. 266*
14. *Donoghue v. Stevenson [1932] AC 562.*
15. *Msanide Phiri v BHB Contractors Zambia Ltd. and others, Appeal 137/17.*
16. *Zambia Consolidated Copper Mines Limited v. Goodward Enterprises Limited (2000) Z.R. 48.*
17. *Hadley v Baxendale [1854] 9 EX 341.*

Legislation and other materials referred to

1. *Town and Country Planning Act, Cap. 283 of the Laws of Zambia.*
2. *Government Notice 357 of 1962, Town and Country Planning (Delegation of Functions) Order.*
3. *Town and Country Planning (Application for Planning Permission) Regulations.*
4. *Public Health Act, Chapter 295 of the Laws of Zambia.*
5. *the Local Government (Establishment of Councils) and (Transfer and Vesting) Order, Local Government Act, Chapter 281 of the Laws of Zambia.*
6. *Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia.*
7. *Order 82, rule 3 of the Rules of the Supreme Court,1965, Supreme Court Practice, 1999 Edition (White Book).*
8. *Chitty on Contracts, Volume II, Special Contracts, (London, Sweet & Maxwell, 2012) para 37-014 at p. 715.*
9. *Chitty on Contracts, Volume 1, General Principles,31st edition (London, Sweet and Maxwell, 2012) at para 12-111.*

10. *Jack Beatson's "Anson's Law of Contract", 28th Edition, (Oxford, Oxford University Press, 2002).*
11. *Cheshire, Fifoot & Furmston's Law of Contract, 5th Edition, (New York, Oxford University Press, 2007) at p48.*
12. *Chitty on Contracts, Volume 1, General Principles, (London, Sweet and Maxwell, 2008) p.1465 at para. 22-032.*
13. *Butterworths Common Law Series, The Law of Contract, 4th Edition (London, LexisNexis, 2010) at para 7.1 at p. 1589.*
14. *Oxford English Thesaurus, Lexico.com.*
15. *The New Choice English Dictionary, Geedes & Grosset, 2016.*

1.0. BACKGROUND

In this action the plaintiff claims:

1. damages arising out of a building contract entered between the plaintiff and the defendant for the defendant to construct a house for the plaintiff. The damages relate to:
    a) breach of contract.
    b) negligence.
    c) demolition costs of the incomplete structure and redesigning of the house.
    d) monies paid and building materials supplied to the defendant in the sum of K562,893, less the value of materials that can be salvaged from the unutilized materials still at the building site.
    e) the cost differential between the contractual price and the assessed cost of building a new house.

f) the deprivation of occupancy of the house resulting in the loss of a housing allowance payable by the plaintiff's employer pegged at K132, 935.

g) mental distress and inconvenience

2. Refund of K15,000 advanced to the defendant under an oral contract to sink a borehole.
3. Under an oral contract to purchase and deliver house fittings:
    a) damages for breach of contract.
    b) refund of the amounts of USD8,172 and K100,000 for house fittings.
    c) special damages, being the difference between the initial cost and the current higher cost of purchasing the house fittings
4. Interest on the foregoing.
5. Any other remedy the Court may deem fit and cost; and
6. Costs.

The details of the plaintiff's claims are stated in paragraphs 1 to 21 of the statement of claim, at pages 49 to 56 of the supplementary bundle of pleadings dated 4th November, 2016.

The defence, briefly summarised, in regard to the plaintiff's first claim under the statement of claim is that the plaintiff failed to pay the scheduled payments in accordance with the contract and paid monies as and when she saw fit. Further, that she

interfered with the project by buying building materials and constantly changing plans outside the contract terms; that the delayed payments and interference in turn delayed the construction. The defendant asserts that the said building contract was unilaterally terminated by the plaintiff when she refused to pay any more money or buy any more material.

Under the second claim, the defendant counters that he carried out the contract, albeit the borehole was dry. In responding to the third claim, the defendant contends that he purchased the house fittings but encountered a delay in transporting the items to Zambia and that the plaintiff has not paid for the freight and tax charges on the goods.

In addition, the defendant charges that the plaintiff has been tarnishing his personal and business reputation by spreading false rumours to his friends, churchmates, lawyers and professional colleagues. Resultantly, the defendant denies breach, and counter claims:

i) the sum of K293,000.00 being the labour charges incurred by the defendant and his workers from 6th May, 2013.

ii) the sum of K3000.00 being monies owed by the plaintiff to the defendant for the borehole drilling.

iii) payment of freight charges and taxes on the plaintiff's house fittings.

iv) damages for mental distress and anguish.

v) damages for defamation.

vi) exemplary damages for loss and injury to the plaintiff's reputation and business.

vii) exemplary damages for the harassment endured by the defendant during the course of business.

viii) interest on the amounts claimed at the prevailing Bank of Zambia policy rate.

ix) costs.

2.0 FACTS

It is common cause between the parties that on 6th May, 2013 the parties executed a written contract, drawn up by the defendant, for the defendant to construct, for the plaintiff, a two-story farmhouse on Farm No. 3791/A/13/4 situate in the Central Province of Zambia.

The salient express terms of the contract include a contract term of 6 months from the start date of 6th May, 2013 and a contract price set at K600,000, payable in the following instalments:

i. K200,000.00 initial payment.

ii. K200,000.00 when decking for the second floor.

iii. K100,000.00 when roofing.

iv. K100,000.00 after works are complete.

It is also agreed that sometime before starting construction, the defendant drafted plans for the house, which were approved by the plaintiff. Following execution of the contract, but before the plaintiff fully settled the initial payment of K200,000.00, the defendant took possession of the building site and started construction based on the plans approved by the plaintiff.

At that time, neither the plaintiff nor the defendant had submitted architectural or building plans for approval by the Local Authority and no building permit for the construction was secured.

By December, 2013, more than six months after the date of execution of the contract, the defendant had neither completed construction nor reached the decking level. Notwithstanding that the contract term had expired the parties allowed construction to continue.

The parties do not dispute that on or about 9th December, 2013 the plaintiff offered, and the defendant accepted payment in the sum of K50, 000. In March, 2014, the defendant submitted a revised work schedule and signified that he would complete the works by August 2014.The works were not completed by August 2014. Around that time, the plaintiff began purchasing building materials to set off against the balance of the contract price.

On 1st August 2014, the plaintiff wrote to the defendant advising that she could not extend the completion date beyond 31st October, 2014. By 31st October, 2014, construction not only remained incomplete, but it had not reached the decking level. The construction works continued.

On 20th March, 2015, the plaintiff wrote to the defendant to express her dissatisfaction with the defendant's failure to honour the revised completion dates. In that letter, the plaintiff urged the defendant to take the necessary remedial measures to speed up completion.

According the plaintiff's testimony, on 28th March, 2015 she purchased material at the request of the defendant which was delivered to the site. When the materials were delivered to the site, the defendant had no presence on the site. The plaintiff then concluded that the defendant had abandoned the building project. In April, 2015, she retained counsel to make demand upon the defendant, following which these proceedings were instituted in October, 2015.

Seeking to secure completion of her house, on March 22, 2016, after proceedings had commenced, the plaintiff wrote to Kapiri Mposhi District Council to apply for a building permit and to request for an assessment of the incomplete structure. On 18th

April, 2016, the Council responded recommending that the incomplete building be demolished; in addition, that no further work should be undertaken without obtaining the necessary approvals and permits from the local authority. The letter indicates that the recommendations were made following the engineering report given in response to the Council's recommendations to carry out supporting calculations with model-based design check to assess the safety and serviceability of the building.

As regards house fittings and drilling of a borehole, the parties accept that they entered two separate oral contracts: one for the defendant to drill a borehole and the other, for the defendant to purchase house fittings, from China, for the plaintiff's house.

3.0 AREAS OF CONFLICT

3.1 Building contract

There exist several areas of conflict between the parties which need to be resolved prior to determining the claims in this matter.

The first is whether the contract was wholly in writing or partly in writing and partly oral. The second, is whether the contract was varied orally after expiry of the contract term to provide that

the plaintiff could purchase materials against the contract price.

Aside the above, the parties are at odds as to who was responsible for applying for statutory approvals relating to the construction. Further, there is a conflict as to whether the contract was terminated by the plaintiff or the defendant. Ultimately, what is in issue is whether the contract was breached.

3.2 *Oral contract for drilling of Borehole*

The parties are at odds as to whether the contract was performed. The plaintiff submits that the borehole was never delivered by the defendant. The defendant takes the position that his obligation to drill was fulfilled, albeit that the borehole was dry.

3.3 *Oral contract for the purchase of fittings*

Similarly, there is disagreement as to whether the defendant fulfilled his obligation to purchase and supply house fittings from China.

4.0 RESOLUTION OF AREAS OF CONFLICT

4.1 Building contract

The first issue on which the parties are in conflict is primarily one of law and relates to ascertaining the terms of the contract and its form.

The plaintiff submits that the contract consisted of the written contract of 6th May, 2013 as varied by an oral agreement after the initial term of 6 months expired. The defendant contends that the contract consisted of the written contract of 6th May, 2013, text messages, phone calls and other verbal discussions between the parties.

In this case, both parties accept that they entered the written contract exhibited on p. 1 of the plaintiff's bundle of documents. Neither party attacks the legality of the agreement. However, the defendant submits that the contract was ambiguous because it made no provision regarding the true cost of the project.

Since the validity of the contract was not in contention, I will merely outline that it is trite law that the essential requirements of a simple contract are:

(i) consensus.
(ii) capacity.
(iii) consideration
(iv) legality

(v) formality

(vi) intention to create legal relations.

In this case the two parties, whose capacity to contract is not disputed, agreed that the defendant would build a house in exchange for the contract price to be paid by the plaintiff. Absent a suggestion that the contract was for an illegal purpose or that it gave rise to a moral obligation, I am satisfied that the parties entered a valid agreement with the intention that the agreement shall have legal consequences and shall be legally enforceable.

Since neither party has identified any statutory requirement demanding that a type of contract such as the one under consideration ought to be in writing, I accept the possibility that a contract could be made either in writing, orally or partly in writing and partly oral. I stand on the edification of the scholarly works of ***William Kixmiller, William H. Spencer, Business Law - Case Method***[1], who instruct as follows:

> *"In the absence of a statute requirement that a given contract shall be in writing, the agreement may be partly in writing and partly oral."*

In this case, both parties accept that, generally, parol or extrinsic evidence is not admissible to contradict or add to the terms of an unambiguous document. However, the defendant,

---

relying on the cases of ***Rodgers Chama Ponde & 4 Others vs Zambia State Insurance Corporation Limited (2004) Z.R. 151 (S.C.)***[2] and ***Majory Mambwe Masiye v. Cosmas Phiri (2008) Z.R. 56 Vol. 2 (S.C.)***[3] invited me to consider parol evidence that would show that the written contract was not a complete expression of the parties' agreement. The defendant proposes that the absence of a provision speaking to the true cost of the works creates an ambiguity which places this case within the exceptions to the parole evidence rule.

The defendant posits that the ambiguity demonstrates that the contract was a mere template that was subject to modification as situations necessitated.

I examined the contract to discern the intention of the parties. My first observation was that the recitals enlighten that the plaintiff requested for woks described as *"construction of a two-storey farmhouse in a design and build contract"*.

According to ***Chitty on Contracts, Volume II, Special Contracts, (London, Sweet & Maxwell, 2012) para 37-014 at p. 715*** a design and build contract is a type of contract which:

> *"may be regarded as a 'package deal' whereby the employer obtains all or substantially all of the design work and construction through the main contractor...."*

This means that the contractor is appointed to undertake the design and to carry out the construction. Remarking on construction contracts, the learned authors go on to state, at ***para 37-143 at p 782***, that:

> *"where the effect of an agreement, in accordance with the contract conditions, is to carry out work for a stated amount, it is referred to as "lump sum', a technical expression so understood by valuers.*

The erudite explain that the simplest form of lump sum contract is:

> *"That which the technical description of the works is contained in a specification and/or drawings, the terms of the contract requiring expressly, or as a matter of construction, that the contractor is to perform the whole works so described for the stated figure."*

In addition, the authors, at ***para 37-149*** explain as follows:

> *"a lump sum contract may provide for periodic payments in the form of a series of separate lump sums payable at stated intervals or by reference to stages of the work, also referred to as milestones."*

In casu, aside the provisions as to the contract price already alluded to, I observed that clause 2 reads, in part, as follows:

> *"The following documents shall be deemed to form and be read and construed as part of this Agreement. This Agreement shall prevail over all other contract documents.*
>
> *a. The drawings of the dwelling House as on the building plans"*
> *b. Payment term..."*

It seems clear to me that clause 2 not only dictates what documents must be regarded as part of the agreement, but also gives the contract document priority over any other document. Additionally, the contract suggests the existence of drawings and building plans. Since clause 2 does not identify any other document apart from the drawings as forming part of the contract, I do not accept that it was the intention of the parties that other documents, such as emails, formed part of the contract between the parties. In any event, no other document was adduced by the parties as forming part of the agreement.

I have also perpended the import of a design and build contract and the significance of a lump sum contract with milestones. The contract was for a lump sum of K600,000.00 payable upon attainment of specific milestones. Clearly, it was not a matter of necessity for the contract to provide for the true cost of the project. Accordingly, I am satisfied that the contract of 6th May, 2013 was clear and unambiguous. I therefore reject the proposition that the contract was merely a template intended to be supplemented by verbal terms. Consequently, I hold that the contract between the parties was wholly in writing, comprising the Contract Agreement of 6th May, 2013 and the drawings on the building plans.

Having determined the composition of the contract, I looked to the erudition of ***Chitty on Contracts, Volume 1, General Principles,***

31st edition (London, Sweet and Maxwell, 2012) para 12-002 at p. 907 which guides that it is well established that the party signing an agreement that has been reduced to writing will ordinarily be bound by the terms of the written agreement.

On the issue of variation, the plaintiff posits that the parties orally varied the written contract after the defendant failed to complete the works within the contractual period of 6 months. The agreed variations, it is contended were that:

i. the plaintiff would be responsible for purchasing and delivering building materials to the site upon the defendant's request; the purchase price would be reconciled against the contract price upon completion of the works.
ii. the completion date was extended to 31st October, 2014.

The plaintiff submits that parol evidence demonstrating the variation relating to the purchase of building materials should be accepted under the exception which deals with collateral contracts or warranties. Reference was made to the ***Majory Mambwe Masiye*** case where the Supreme Court followed the case of ***Morgan v Griffith (1870-71) L.R. 6 Ex.70***[4] and held as follows:

> *"Parol evidence may be admitted to show that a written agreement is subject to a collateral oral warranty."*

In other words, even where the parties intended to express the agreement between them in a document, extrinsic evidence can be admitted proving a contract or warranty collateral to that agreement. The learned authors of ***Chitty on Contracts, Volume 1, General Principles,31st edition (London, Sweet and Maxwell, 2012) at para 12-103*** reason that the rationale for admissibility in such circumstances is that:

> *"the parol agreement neither alters nor adds to the written one, but is an independent agreement"*

In the present case, although the issue of buying materials is not expressly provided in the contract, I find that there was an implied term arising from the nature of the contract. Being a design and build lump sum contract, the contractor was responsible for purchasing materials for the construction. In addition, the testimonies of both the plaintiff and defendant was that it was understood that the plaintiff was not obligated to buy materials in the original contract. It is clear to me that that the understanding between the parties, and indeed their common intention, was that the plaintiff would pay the contract price and the defendant would be responsible for purchasing the materials to be used to construct the house. From the cited authorities, my jurisdiction to admit evidence to prove a contract or warranty collateral to the initial agreement seems to be restricted to evidence in respect of a matter on which the

written contract is silent or, at best, is consistent with and does not contradict the initial contract.

In this case, considering that the alleged variation in relation to the purchase of building materials is inconsistent with the contract, it is my view that any evidence in support would be outside the permissible scope of admissibility in respect of collateral contracts or warranties.

I have also given thought to the explanation by the authors of ***Chitty on Contracts, Volume 1, General Principles, 31st edition (London, Sweet and Maxwell, 2012) at para 12-111*** that extrinsic evidence is permissible for purposes of ascertaining the original intention of the parties as expressed in the contract and has no application to the variation of the contract by subsequent agreement.

In casu, the plaintiff seeks to demonstrate subsequent variations. Since the parol evidence rule does not relate to a subsequent variation, I accept that the terms of a written instrument may be varied by subsequent agreement, whether oral or written. Evidence to show the variation is, therefore, permissible. In this regard ***Chitty on Contracts, Volume 1, General Principles,31st edition (London, Sweet and Maxwell, 2012) at para 22-1033*** edify that permissible variations may be reconciled with the rule that extrinsic evidence is not admissible to vary or qualify the terms of a written contract because that rule only

relates to the ascertainment of the original intention of the parties, and not to a subsequent variation.

Turning to the law on variations, ***Cheshire, Fifoot & Furmston's Law of Contract, 5th Edition, (New York, Oxford University Press, 2007) at p.709*** expound as follows:

> *"what has been created by agreement may be extinguished by agreement. An agreement by the parties to an existing contract to extinguish the rights and obligations that have been created is itself a binding contract, provided that it is either made under seal or supported by consideration."*

In addition, in the case of ***Esquire Roses Farm Limited v Zega Limited (2013) Z.R. Vol. 1. 74***[5], the Supreme Court held as follows:

> *"In order for a variation of a contract to be a valid defence at law, it must be by mutual agreement of the parties to the contract. The variation must also be supported by consideration."*

In that case, the Supreme Court stood on the edification of the learned authors of ***Chitty on Contracts*** and explicated as follows:

> *"consideration can be found in the mutual abandonment of existing rights, or the conferment of new benefits by each party on the other"*

Reference was also made to ***Jack Beatson's "Anson's Law of Contract", 28th Edition, (Oxford, Oxford University Press, 2002)*** who edify that:

"A variation involves a definite alteration, as a matter of contract of consensual obligations by the mutual agreement of both parties. It must be supported by consideration. In most cases, consideration for the variation can be found in a mutual abandonment of existing or the conferment of new benefits by each party on the other."

In casu, the the plaintiff testified that sometime in July or August, 2014 the parties discussed and agreed that the plaintiff could purchase materials against the contract price, to be reconciled at the end of the project. It was her testimony that from August, 2014 to April, 2015 the defendant did not purchase or deliver materials to the project site. According to PW1's testimony, she reached out to the defendant after 10 months of delay, whereupon the defendant asked her to facilitate the purchasing of materials against the contract price due to him.

Her evidence was that it was agreed that a reconciliation would be done based on receipts that were to be submitted to the defendant.

According to the plaintiff, the defendant undertook to instruct his builders to show her driver, Mr. Sunkutu, PW2, where to buy the material, after which they would sign for it. It was also her testimony that at times the defendant would either dictate or issue or cause to be issued lists of materials for the plaintiff

to purchase. I was referred to pages 8 to 10 of the plaintiff's bundle of documents for copies of the said lists of materials.

The plaintiff attested that she sent her driver to purchase and deliver the requested materials. She kept a record of the purchases and prepared a schedule of expenditure from her driver's record of purchases contained in his notebook. A copy of the schedule and copies of pages from the notebook are exhibited on pages 11 to 15 and 16 to 21 respectively of the plaintiff's bundles. Copies of the receipts for the purchases are exhibited on pages 22 to 52 of the plaintiff's bundles. I was also referred to pages 53 to 68 of the plaintiff's bundles for proof of acknowledgement of funds or materials by builders.

PW2, presented evidence to support the plaintiff. The gist of his testimony was that on several occasions from July, 2014, he was sent by the plaintiff to purchase and deliver building materials for the construction of her house by the defendant. He personally delivered materials to the site and witnessed the acknowledgments of receipt of goods by the defendant's contractors.

PW2 confirmed that he kept a handwritten record of the transactions in his notebook. Reference was made to pages 16 to 21 of the plaintiff's bundles.

The defendant's evidence was that that the plaintiff unilaterally opted to purchase the building materials. He explained that the plaintiff bought and delivered materials to the site until the value of her purchases together with the amount of K250, 000, which she had paid the defendant, reached K600, 000. When re-examined he accepted that initially the plaintiff was not required to purchase materials but that she changed the way of getting materials.

In determining whether the parties agreed to the variation, I call in aid the words of Lord Denning, in the case of ***Butler Machine Tools Limited v Ex-cell-o Corporation (England) Limited [1979] 1 ALL E.R.965***[6] which provides an apt methodology. He states as follows:

> *"The better way is to look at all the documents passing between the parties and learn from them, or from the conduct of the parties, whether they have reached agreement on all material points..."*

I have examined the plaintiff's letter of 1st August, 2014, exhibited at page 146 of the plaintiff's bundle of documents and the conduct of the parties. The letter reads, in part, as follows:

> *"Furthermore, I have offered my availability in sourcing for materials and anything else you may need for completion of the Farmhouse...."*

From the evidence before Court, I perceive that the plaintiff did not impose the alleged amendment but simply offered to amend the contract to enable her to purchase the materials. The defendant's testimony demonstrate that he accepted the building materials purchased by the plaintiff and used them to construct the building until the plaintiff stopped supplying the material. In so determining, I stand on the shoulders of the established principle of the law of contract that acceptance can be inferred from their conduct. In this regard ***Cheshire, Fifoot & Furmston's Law of Contract, 5th Edition, (New York, Oxford University Press, 2007) at p48*** illuminate that:

> *"Whether there has been an acceptance by one party of an offer made to him by the other may be collected from the words or documents that have passed between them or may be inferred from their conduct."*

By this variation, the plaintiff's obligation to make milestone payments was abandoned, as was the defendant's obligation to supply the material for construction. In my view, the mutual abrogation of contractual obligations meant that the variation was supported by consideration. Therefore, I accept that the contract was subsequently validly varied to permit the plaintiff to purchase materials against the agreed purchase price.

With respect to the variation of the completion dates, the testimony of the plaintiff was that she reluctantly agreed to extend the completion date through her letter to the defendant dated 1st August, 2014, well after the original expiry date. The

extension seems to have been for the benefit of the defendant and meant that the plaintiff relinquished insistence upon performance by the defendant within the time provided for in the contract. There is no evidence to support the existence of a correlating benefit accruing to the plaintiff or a surrender of insistence of performance of the plaintiff's written obligations under the contract. Consequently, the extension was not supported by consideration. This notwithstanding, ***Cheshire, Fifoot & Furmston's Law of Contract, 5th Edition, (New York, Oxford University Press, 2007) at p 713*** elucidate as follows:

> *"one party may accede, perhaps reluctantly, to the request of the other, and promise that he will not insist upon performance according to the strict letter of the contract...An arrangement of this kind of substituted mode of performance is generally described as either a waiver or a forbearance by the party who grants the indulgence."*

Similarly, ***Chitty on Contracts, Volume 1, General Principles, (London, Sweet and Maxwell, 2008) p.1465 at para. 22-032*** advises that:

> "A mere forbearance or concession afforded by one party to the other for the latter's convenience and at his request does not constitute a variation, although it may be effective as a waiver"

Further, that:

> *"a mere forbearance or concession given by one party to the other for the latter party's convenience does not constitute a variation."*

The principles stated above were applied by the Supreme Court in the ***Esquire Roses Farm Limited*** case. In that case the Court held that:

> *"a mere forbearance or concession afforded by one party to the other party for the latter's convenience and at his request does not amount to a variation"*

On the strength of the cited authorities, I find that there was forbearance on the part of the plaintiff with respect to the completion date, but that forbearance did not amount to a variation. According to ***Chitty on Contracts, volume 1, General Principles,31st edition (London, Sweet and Maxwell, 2012) at para 22-042***, the party who forbears will be bound by the waiver and cannot set up the original terms of the agreement.

I find it opportune to observe that neither the original contract nor the varied contract contained a term which placed, on the plaintiff, the obligation to pay for labour charges incurred by the defendant for his workers. As earlier observed the contract was a lump sum design and build contract which caried with it the implied term that the contractor was responsible for the construction and all costs related to the construction in exchange for the lump sum price, payable upon identified milestones. As a result, the counterclaim for the sum of K293,000.00 fails.

I now turn to the third issue that is in conflict, whether either party terminated the contract. This conflict is one of mixed law and fact. No legal authorities were submitted by the parties on this issue.

Quoting from ***Butterworths Common Law Series, The Law of Contract, 4th Edition (London, LexisNexis, 2010) at para 7.1 at p. 1589***:

> *"'Termination' refers to the discharge of the parties to a contract from the obligation to perform their contractual obligations. Termination may occur on the exercise of a right (common law or statutory) to terminate, automatically ... or by agreement"*

The scribes also instruct, at para 7.3 at p. 1591, as follows:

> *"The principal basis for termination prior to discharge by performance is breach or repudiation. The exercise of a right of termination is the exercise of a right to choose between inconsistent rights."*

They go on to hypothecate as follows:

> *It follows that where a breach of contract or repudiation confers a right of termination the contract is not terminated unless and until there has been an election by the party in whom the rights is invested"*

And, at para. 7.27 at p. 1625, that:

"Termination for breach or repudiation is not automatic."

This is supported by the case of ***Heyman and Another v Darwins Ltd [1942] 1 All ER 337***[7] where Viscount Simon LC opined as follows:

> *"The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so....". and*
>
> *"However, repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other."*

The true test, which appears to have been laid down by Lord Coleridge, C.J., in ***Freeth v Burr (1874) LR 9 CP 208 at p. 213***[8], and approved in ***Mersey Steel & Iron Co v Naylor, Benson & Co (1884) 9 App Cas 434***[9] in the House of Lords is this:

> *"...whether the acts and conduct of the party evince an intention no longer to be bound by the contract."*

In the present case, the plaintiff testified that the defendant terminated the contract when he absconded the site. According the plaintiff's testimony, on 28th March, 2015 she purchased material at the request of the defendant. Her evidence was that she concluded that the defendant abandoned the building project at the end of March, 2015 because when materials were delivered to the site, the defendant, neither the defendant nor

his workers were on site. I find the plaintiff's conclusion that the defendant abandoned the project inconsistent with her own testimony that she bought materials at the request of the defendant on or about 28th March, 2015. If the defendant requested for material on or about the 28th of March,2015, it cannot be reasonably presumed that he abandoned the project. Why would he be requesting for materials? I therefore do not accept that the defendant terminated the contract in the form of repudiation by absconding the site.

On the other hand, the defendant testified that the plaintiff terminated the contract when she stopped buying materials, because he could no longer continue construction without material. Since the parties varied the contract to allow the plaintiff to purchase materials against the contract price, I cannot agree that the plaintiff terminated the contract by refusing to buy materials in excess of the contract price. At this stage, I find that the defendant failed to carry out his obligation to construct the building within the agreed amount and within the extended period.

As regards liability for the breach, the defendant argues that the delay in completion was occasioned by the plaintiff's failure to pay the initial payment in full at the beginning of the contract. In analyzing the defence, I considered ***Chitty on Contracts, Volume***

II, Specific Contracts, 31st edition (London, Sweet and Maxwell, 2012) at para 37-115 who edify as follows:

> *"Construction contracts almost invariably stipulate a period or date of commencement and/or completion... Any act or prevention, such as the ordering of variations or late access to working areas, will release the contractor from the fixed period unless the contract provides machinery for adjustment of the time period."*

Further, the learned authors instruct that:

> *"The prevention principle is based on the notion that a promisee cannot insist upon the performance of an obligation which he prevented the promisor from performing."*

In addition, at ***para 37-119***, the erudite explains as follows:

> *"Where the work is delayed by the employer and an appropriate extension of time is not granted, time is said to be "at large", i.e., the contractual date is no longer binding. The contractual obligation is then replaced by an obligation to complete within a reasonable time."*

In ***Shawton Engineering v DGP International Ltd [2005] AII ER (D) 241***[10], the English Court of Appeal held that when time was at large the determination of a reasonable time for completion was a composite question that had to be judged objectively as at the time when the question arose and in the light of all the circumstances and not simply by a consideration of the time required to compete any work associated with the instruction of a variation.

In the present case, the evidence before me reveals that the parties entered a lump sum contract for the defendant to carry out the construction of the farmhouse for a stated amount of K600,000.00 within a stipulated period of 6 months. Additionally, the contract provided for periodic payments payable by reference to milestones, beginning with an initial payment. Since the contract referred to a single initial payment, I find that the initial payment was to be made by the plaintiff in full initially, that is, at commencement.

Since the plaintiff accepted that she settled the initial payment in instalments and completed payment over a month after the commencement date of 6th May, 2013, I find that she did not pay the initial payment in one installment at commencement and therefore did not perform her contractual obligation. According to ***Chitty, vol 2, para 37-210***, failure to pay amounts to a breach, although not one which would entitle the contractor to treat the contract as at an end.

In addition, I find the case ***of Dodd v. Churton [1897] 1 QB 562***[11] to be instructive. In that case, Lord Esher MR stated the as follows:

> *"Where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default..."*

In this case, both parties testified that the plaintiff began by paying K100,000 before the contract was signed, with subsequent payments of K50,000 being made on 22nd June and 24 June, 2013. The last payment relating to the initial payment was therefore made approximately seven (7) weeks after the contract was signed. Considering that the nature of the design and build contract, I consider that timely payment of the initial payment to the defendant was necessary to facilitate mobilization, commencement, and progression of the construction to enable the contractor to reach the decking stage milestone. Applying the cited authorities, I take the position that the plaintiff's failure to make timely payment of the initial payment constituted a breach which prevented the defendant from performing his obligation to attain decking milestone within a reasonable time and in turn complete construction within the agreed time.

Since there was no mechanism in the contract for extension, the delayed payment in turn entitled the defendant to a reasonable extension for his deliverable of decking and subsequently, completion. In my assessment, a reasonable extension would be at least a period equivalent to the period in which the plaintiff delayed in settling the initial payment. That would extend completion from the 6th November, 2013 to approximately 25th December, 2013. However, the unchallenged testimony of the plaintiff was that decking was not achieved until the end of 2014. Given the defendant's failure

to even reach the decking stage within a reasonable extension for completion of the entire project, I do not accept that the plaintiff's delayed payment of the initial price was the cause of the defendant's ultimate breach of contract.

As regards the conflict regarding the obligation to obtain statutory approvals, the plaintiff referred me to statutory requirement of obtaining permission from the Minister or Planning Authorities as was stipulated in ***section 22 as read with section 25 of the Town and Country Planning Act, Cap. 283 of the Laws of Zambia***, which was applicable in 2013 when the contract between the parties was entered.

Section 22 (1) stated as follows:

> *"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part for any development or subdivision of land that is carried out after the appointed day"*

The words "development" and "appointed day" were defined in the said Act, as follows:

> *"In this Act, "development" means the carrying out of any building, rebuilding or other works or operations on or under land..."*
>
> *and*

"appointed day" means the 16th November, 1962;"

Additionally, section 25 (1) stipulated as follows:

"Subject to the provisions of this section, where application is made to the Minister or planning authority to whom functions have been delegated under section twenty-four for permission to develop or subdivide land, the Minister or planning authority may grant permission either unconditionally or subject to such conditions as he thinks fit..."

For the purposes of, amongst other things, permission required for development, the term "planning authority" was defined in section 2 of the Act to mean the local or other authority appointed by or under the provisions of section 5. Section 5, *inter alia,* provided for the appointment of planning authorities. Section 5 (2) of the Act prescribed as follows:

"The local authorities set out in the First Schedule are hereby appointed as the planning authorities for the respective areas described in that Schedule."

The first schedule is captioned *"Planning Authorities with Delegated Powers and Responsibilities on the Appointed Day."*

The schedule goes on to list the planning authorities with delegated powers as at the appointed day of 16th November, 1962.

Aside the list in the schedule, section 24 (1) reads as follows:

"The Minister may by instrument in writing ..., delegate to any planning authority his functions under subsections (1) and (2) of section twenty-five relating to the grant or refusal of permission to develop or subdivide land"

The Minister, in furtherance of section 24 (1) above, issued ***Government Notice 357 of 1962*** under the ***Town and Country Planning (Delegation of Functions) Order***, in which the functions of the Minister under subsections (1) and (2) of section 25 of the Act relating to the grant or refusal of permission to develop or subdivide land in respect of the Southern Province, the Central Province and the Eastern Province were, except where they were otherwise delegated, delegated to the Southern Planning Authority.

From the foregoing legal framework, I am satisfied that prior to the repeal of the ***Town and Country Planning Act, 1962*** by ***section 75 of the Urban and Regional Planning Act, 2015*** permission was required for development of land in the Central Province. Additionally, that the planning authority vested with delegated authority to perform the functions of the Minister under subsection (1) of section 25 of the Act relating to the grant or refusal of permission to develop land in in Central Province was the Southern Planning Authority or such other authority otherwise delegated.

At this stage I draw attention to the case of ***Justin Chansa v Lusaka City Council (2007) ZR 256***[12] where the Supreme Court pronounced that ***section 25 of the Town and Country Planning Act,***

1962 related to seeking permission from the planning authorities before developing any piece of land.

In this case, the plaintiff adduced Certificate of Title No, 9470 in respect of S/D No.13 of S/D "A" of Farm No. 3791 where the farmhouse was to be erected by the defendant. The description of the land contained in the said Certificate reads, in part, as follows:

> *"All that piece of land in extent 11.1816 hectares...situate in the Central Province of Zambia..."*

I find, therefore, that the development in the present case related to land in the Central Province. Additionally, that in terms of the law applicable in May 2013 when the parties entered the contract, permission was required from the Southern Planning Authority or such other planning authority vested with delegated authority in the stead of the Southern Planning Authority.

As to who was required to make the application, my observation is that ***section 22 (1) of Town and Country Planning Act, 1962*** did not spell out any particular person. However, by ***Regulation 4(1) of the Town and Country Planning (Application for Planning Permission) Regulations***, all applications for planning permission were to be made on forms issued by the Minister or planning authority, as the case may be. Regulation 2 thereof stipulated that the Regulations applied to, *inter alia*, any application for

permission to develop land. According to Regulation 6, the forms issued by the Minister or planning authority had to be in the form or substantially in the form set out in the schedule to the Regulations.

I examined the prescribed application form for permission to develop which was set out in the schedule. The form contained a signature clause to be signed by either the applicant or an agent. It also required, if the applicant was not the owner, that the applicant's interest in the land be stated and an indication of whether the consent of the owner had been obtained.

I have noted that the Act merely required that permission be obtained before development but did not prescribe who should make the application. My observation is supported by the prescribed forms which show that the application could be submitted by an applicant who was the owner, or one who was not the owner or an agent.

I also accept the plaintiff's submission that, aside the approvals required under Act, approval was required pursuant to the ***Public Health Act, Chapter 295 of the Laws of Zambia***.

In this regard, ***Regulation 5 of the Public Health (Building) Regulations, Public Health Act, Chapter 295 of the Laws of Zambia*** prohibits the erection of any building in the absence of prior

written approval from the Local Authority, evidenced by a building permit issued by the Local Authority. Regulation 5 reads as follows:

"5. (1) No person shall erect or begin to erect any building until he has-

a) Made an application to the Local Authority in Form 1 in the Schedule, to be obtained from the Local Authority.
b) Furnished the Local Authority with the drawings and other documents specified in the following regulations;
c) Obtained from the Local Authority a written permit, to be called a "building permit", to erect the building, together with a signed copy of the plan approved by the Local Authority, as hereinafter provided.

Such permit shall be in Form 2 in the Schedule and shall be signed by the Local Authority or its authorised agent and shall entitle the holder to erect the building in accordance with such approved plan and subject to all conditions imposed by these Regulations. Any subsequent modification or alteration that it is proposed or necessary to make in such approved plan shall be submitted to the Local Authority for approval in the same manner as the original plan, and no such modification or alteration shall be made in the construction of the building until it has been approved by the Local Authority and the particulars thereof endorsed on the original building permit and signed plan."

As to what constitutes a Local Authority, the Regulations provide as follows:

"Local Authority" means-

a) in the area of a city council, a municipal council, township council, such council;
b) in any other area, the District Secretary for the District in which such area is situate..."

In this case, the Certificate of Tile exhibited on p.2 of the Plaintiff's Supplementary Bundle of Documents reveals that Subdivision No.13 of Subdivision "A" of Farm 3791 is situate in the Central Province of Zambia. Page 13 of the same bundles carries a notification, from the Central Province Planning Authority, dated 25th May, 2015 giving approval to subdivide Farm No. 3791/A. In it, the Authority sates that Farm No. 3791/A is situated in Kapiri Mposhi District. The defendant did not take issue with these documents.

On this undisputed evidence before Court, I find that the Farm No. 3791/A and in particular Subdivision No.13 of Subdivision "A" of Farm 3791 where the defendant agreed to build the plaintiff's house is situate in Kapiri Mposhi District. A perusal of ***the Local Government (Establishment of Councils) and (Transfer and Vesting) Order, Local Government Act, Chapter 281 of the Laws of Zambia*** shows that the council established for the district of Kapiri Mposhi is the Kapiri Mposhi District Council. Since the plaintiff's house sits in a district council, it follows that the term local authority, in this instance, refers to the District Secretary for the district of Kapiri Mposhi.

In terms of consequences for non-compliance with the Regulations, Regulation 13 gives the Local Authority power to, by written notice, require a person to demolish and remove a building. *In casu*, the plaintiff presented a letter from the Kapiri

Mposhi District Council dated 18th April 2016, recommending that the incomplete building on plot 3791/A/13/4 be demolished and that no further construction work should be undertaken without the necessary approvals and permits from the local authority.

Having considered the provisions of the ***Public Health (Building) Regulations*** I find, as a matter of law, that there is a prohibition against erecting or starting to erect any building unless an application is made to and approved by the relevant local authority. The question that beckons an answer, once again, is who the prohibition is directed at. Attendantly, who is required to apply and obtain approval.

The questions require some statutory interpretation. In so doing I have taken heed of the dicta of the Supreme Court in the case of ***Indo Zambia Bank Limited V Mushaukwa Muhanga (2009) Z.R 266***[13] where the Court reaffirmed as follows:

> *"It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature that recourse can be had to other principles of interpretation"*

Regulation 5 clearly directs that no person shall erect or start erecting a building unless he, inter alia, applies to the local authority and obtains a building permit.

The natural meaning of Regulation 5 is clear to me. Firstly, according to the ***Oxford English Thesaurus, Lexico.com***, the phrase *"No person"* is akin to the phrase *"No one"* or *"No man"*. In addition, ***The New Choice English Dictionary, Geedes & Grosset, 2016***, defines the adjective *"No"* as: *"Not any; not a; not one..."*

The same dictionary defines the word person as follows:

> *"a human being, individual; ...one who is recognized by law as the subject of rights and duties."*

Moreover, ***section 3 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia*** assigns the following meaning to the word "person":

> *" includes any company or association or body or persons, corporate or unincorporate;"*

Deductively, the term "no person" means not any individual or company or association or body or persons, corporate or uncorporate. I have communed with my intellect in assessing Regulation 5 of the Public Health Act and I am satisfied that neither the plaintiff, as owner, nor the defendant, as the person contracted to erect the building on behalf of the plaintiff was

permitted to commence building before obtaining approval. Here, too, I opine that the law does not prescribe who should make the application.

However, ***Chitty on Contracts, Volume II, General Principles,31st edition at 37-073*** instructs as follows:

> *"the court will imply terms into a construction contract where necessary to achieve the intentions of both parties to a contract, and where necessary to make the contract work as a matter of business efficacy."*

The learned authors also enlighten, ***at paragraph 37-077*** that a duty to warn will arise where there is an obvious danger. In this case, the defendant was tasked to design and construct. In his testimony, the defendant testified that he was aware that approvals were required. He also testified that he was a qualified registered engineer and contractor. I accept his testimony. In so doing, I take pause to interpolate the import of the defendant's professional status.

In terms of ***The Zambia Institute of Architects (Code of Professional Ethics and Conduct and Conditions of Engagement) Regulations, 1999*** every architect registered architect is bound by the Conditions of Engagement of an Architect set out in the Second Schedule to the Regulations. A reading of the Conditions of Engagement demonstrates that standard services offered by architects include:

1. applying for approval under the Public Health (Building) Regulations and the Town and Country Planning (Application for Planning Permission) Regulations.
2. preparing drawings and particulars sufficient to enable applications for approval under the Public Health (Building) Regulations and the Town and Country Planning (Application for Planning Permission) Regulations

From the foregoing and his own testimony, I perceive that the defendant was fully aware that he should have either applied for approvals or moved the plaintiff to make the application upon preparing the drawings and particulars sufficient for approvals.

Turning to the evidence, I find that the person tasked to construct was the defendant, a qualified engineer and contractor who accepted that building approvals were required. The fact that he commenced construction without obtaining approvals or satisfying himself that approvals had been obtained prior to commencement gives me some discomfort because there is no evidence to show that he enquired into the state of approvals.

In my view, the conflict regarding who was responsible to obtain the statutory approvals and a building permit is not clearly

addressed by the expressed terms of the contract. This, to me, necessitates a term which must be implied to it business efficacy. Consequently, I imply the term that the construction was not to commence in the absence of the relevant statutory approvals and a building permit. I also imply that the defendant had a duty to warn the plaintiff of the dangers associated with constructing the building without the said approvals and permits. The existence of the duty to warn invites consideration of the question whether the defendant was negligent.

In their supporting arguments, counsel for the defendant referred to the case of ***Donoghue v. Stevenson [1932] AC 562***[14] as limiting an action for negligence to actions or omissions of the defendant which the defendant could reasonably foresee would be likely to injure the plaintiff.

The principle stated in ***Donoghue v. Stevenson*** remains the *fons et origo* of the law of negligence. Applying that principle to this case, I opine that the defendant, being a qualified engineer and contractor knew or ought to have known that building a structure without complying with applicable statutory approvals exposed the project to the danger of demolition. From my vantage, the defendant should have reasonably foreseen that proceeding to construct the farmhouse absent approvals or a building permit would likely injure the plaintiff. As such, I find

14

that the defendant was not only in breach of the implied terms, but that he was negligent when he commenced construction without the applicable approvals and a building permit.

As regards workmanship, I accept that the defendant was under a duty to carry out his works using all proper skill and care. However, I note that the contract contained clause 3, which reads as follows:

> *"In consideration of the payments to be made by the Employer to the Contractor as indicated in this Agreement, the Contractor hereby covenants with the Employer to execute the Works and to remedy defects therein in conformity in all respects with the provisions of this Contract."*

The evidence before court demonstrates that prior to the discharge of the contract, the defendant was neither notified of any defects in the construction nor called upon to remedy the defects. Since the defendant was not given an opportunity to assess the defects or remedy them prior to discharge, I hold that the claims relating to the alleged defects are premature and lack merit.

Considering the foregoing, I find the defendant liable for breach of the building contract in that he failed to construct the house within the agreed timeframe. I also find the defendant liable for negligence for commencing the construction works without the relevant approvals and a building permit.

4.2 Oral contract for drilling of the borehole

Under this claim, the testimonies of the plaintiff and defendant are consistent in so far as it is agreed that the plaintiff engaged the defendant to drill a borehole. The plaintiff testified that she was quoted ZWM 46,200.00 by the defendant to sink a borehole and that she paid the defendant an advance of ZWM 15, 000.00. Her evidence was that the defendant failed to deliver on the contract. The plaintiff adduced a quotation dated 12th August, 2013 which reflects that she was quoted K46, 200.00 by the defendant to drill and install a borehole. Also adduced was a copy of a cheque dated 1st December, 2013 in the sum K15,000.00 payable to the defendant. This evidence was not challenged by the defendant.

In response, the defendant testified that he procured and paid for drilling services on the plaintiff's property on two occasions at a cost of K18,000, which drilling services were performed although no water was found on the property. The defendant adduced an invoice dated 4th December, 2013 and another dated 6th December, 2013 in which a company called Mabkaps Enterprises charged the defendant K9,000 on each date for mobilization or remobilization, survey, and borehole drilling.

The plaintiff submits that she did not contract the defendant to procure drilling services on her behalf. The defendant submits that the fact that water was not found is not a justification for a claim for refund.

I have examined the evidence and I note that the defendant's invoice of 12th August, 2013 reflected a sub-total of K15,000.00 payable for mobilization and demobilization, siting survey, drilling, developmental and gravel packing, casing, and pump testing. I find that the contract to drill the borehole was between the plaintiff and the defendant. I also note and find that the plaintiff paid the defendant K15,000 o 1st December, 2013.

In terms of provision of the service, the defendant's testimony confirms that he did not drill the borehole but procured the service from a third party. Since there is no evidence to show that the parties agreed to involve a third party or permit the plaintiff to subcontract, I conclude that the plaintiff did not, himself, perform his obligation to drill and install a borehole. Even assuming there was agreement, there is no evidence to show that the plaintiff engaged the defendant, through the third party, to attempt to drill a second time. The absence of such evidence suggests that the defendant unilaterally incurred the re-mobilization and related costs, meaning that the 15,000 paid by the plaintiff covered the initial cost of K9,000 leaving a balance of K6,000 to be refunded to the plaintiff. However, in

the absence of proof of approval to subcontract, I maintain that the defendant did not perform his obligation. Consequently, I find the defendant to be in breach of contract. Thus, the plaintiff is entitled to a refund of the K15,000.00 that she paid the defendant. In the same vein, the plaintiff's counterclaim for K3,000 fails since he was not requested or authorized to subcontract.

4.2 *Oral contract to purchase house fittings*

As regards the oral contract to purchase and deliver house fittings, the defendant admits that he was engaged to purchase fixtures and fittings for the plaintiff. The plaintiff testified that the defendant agreed to purchase house fittings on her behalf from China. Between August and October 2013, she gave the defendant a total of USD 8, 172 and K100,000 to buy the fittings. Reference was made to pages 4, 7, 144 and 145 of the plaintiff's bundle of documents. The fittings have never been supplied by defendant. This testimony was not challenged.

The defendant counters that the plaintiff has not paid for the freight and tax charges on the goods. No evidence was presented to support the existence of a contractual term that the plaintiff was responsible for freight or tax charges. Absent justification for withholding delivery of the fittings, I find the defendant liable for breach of contract for the supply of the fittings. Contemporaneously, for the reasons stated, the defendant's

counterclaim for payment of freight charges and taxes on the plaintiff's house fittings fails. In addition, I find that the plaintiff is entitled to a refund of the amounts of USD8,172 and K100,000 being monies paid to the defendant for the said house fittings.

4.3 Defamation

As regards the counterclaim for damages for mental distress and anguish, defamation and harassment, the plaintiff referred me to ***Order 82, rule 3 of the Rules of the Supreme Court,1965, Supreme Court Practice, 1999 Edition (White Book)*** which requires the giving of particulars of the facts and matters on which a person alleging libel or slander relies. The plaintiff illuminated ***paragraph 3A and 4 of O. 82, rule 3*** which reads follows:

> *"(3A)*
> *... the plaintiff must give full particulars in the statement of claim of the facts and matters on which he relies in support of his claim for damages, including details of any conduct by the defendant which it is alleged has increased the loss suffered and of any loss which is peculiar to the plaintiff's own circumstances."*
>
> *4-This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the plaintiff and the party against whom it is made the defendant."*

I am persuaded that the counterclaim in this case needed to incorporate full particulars relating to the specific rumours and the specific individuals to whom they were spread and not

general classifications, such as lawyers or pastors, to support the defendant's claim for damages relating to defamation.

My analysis of the counterclaim reveals that it does not contain full particulars of the defamation such as what rumours were spread. Consequently, I agree that the pleadings fell short of the prescribed standard. In any event, evidence was not led to support the claims for defamation, mental distress and anguish, harassment and loss and injury to the plaintiff's reputation and business. Therefore, the counterclaim in respect of those heads fail.

5.0 REMEDIES

Considering my findings that the defendant was in breach of the three contracts, I give ear to the words of the Court of Appeal in the case of ***Msanide Phiri v BHB Contractors Zambia Limited and others***[15] where the Court stated:

> *"... we must state at once that any breach of contract commands damages."*

The case of ***Zambia Consolidated Copper Mines Limited v. Goodward Enterprises Limited (2000) Z.R. 48***[16] is also instructive. In that case the Court held that the measure of damages is the estimated loss directly and naturally resulting in the ordinary cause of events from the buyer's breach of contract. In arriving

at its decision, the Court followed the seminal case of ***Hadley v Baxendale***[17] where it was held that:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'*

The principle of *stare decisis* dictates that I follow set precedent. Resultantly, the plaintiff in this case is entitled to general damages that can be said to arise naturally and logically from the defendant's breach of contract, which are the immediate, direct, and proximate result of the breaches.

In my view, the claim for deprivation of occupancy and loss of housing allowance falls outside the scope of foreseeability. From the plaintiff's testimony and that of PW3, Mr. Ngubula. C. Siachiti, the Registrar of Mulungushi University, the University conditions of service resolution entitling the principal officers to owner-occupier housing allowance at the rate of 15% of basic salary per month was passed in December, 2013. This means that the entitlement to the allowance could not have been reasonably foreseen by the defendant at the time the contract to construct was entered.

In light of the foregoing, aside the claim for deprivation and the lost housing allowance, the claim for damages for breach of the contracts succeed. In summary, Judgment is awarded in favour of the plaintiff as follows:

1. Damages for the defendant's breach of the building contract for failing to construct the house within the agreed timeframe.
2. Damages for negligence for commencing the construction works without the relevant approvals and a building permit.
3. Damages for breach of the contract to drill a borehole and a refund from the defendant of the sum K15,000.00 that the plaintiff paid the defendant.
4. Damages for breach of contract for the supply of house fittings and a refund of refund of the amounts of USD8,172 and K100,000 paid to the defendant
5. Damages are to be assessed by the Deputy Registrar.

The Judgment Debt shall attract interest at the average of the short-term deposit-rate per annum prevailing from the date of commencement of this action to date of Judgment and thereafter at 5% until date of full and final settlement.

For the avoidance of doubt, the defendant's counterclaim fails in totality for the reasons already individually articulated within the Judgment.

The plaintiff is awarded costs, to be paid by the defendant and to be taxed in default of agreement

Dated this 16th day of December, 2020

B. G. SHONGA

JUDGE