

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2017/HPC/0223

**BETWEEN:**

DOCKLAND CONSTRUCTION LIMITED

PLAINTIFF

AND

MAUREEN MWANAWASA (Sued in her capacity as  
Trustee and Chairperson of the Maureen Mwanawasa  
Community Initiative)

DEFENDANT

*Appearances:*

*For the Plaintiff : Mr. Bwalya Messrs Solly Patel Hamir & Lawrence*

*For the Defendant : Mr. C. Mpanga Messrs Levy Mwanawasa & Company*

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## JUDGMENT

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**Cases Referred to:**

- 1. Westminster City Council v J Jarvis & Sons Limited and Another [1970] 1 ALL E R 943*
- 2. HW Neville (Sunblest) Limited William Press and Sons Limited*
- 3. Stroms Bruks Bolag and Others v Hutchinson [1905] AC 515*

**Legislation and other works referred to:**

- 1. High Court Rules, Cap 27 of the Laws of Zambia*

1. This matter was commenced by way of writ of summons dated 16<sup>th</sup> May 2017 and accompanied by a statement of claim. The Plaintiff is seeking the following reliefs:

- (i) The sum of K265,422.02 being the value of unpaid/outstanding amount agreed as payable and due to the Plaintiff for the construction of the Skills Training Centre for Women in Kapiri Mposhi.
- (ii) Interest at short term deposit rate from date of the writ until Judgment and thereafter at the commercial bank lending rate.
- (iii) Costs of and incidental to these proceedings; and
- (iv) Any other relief that the Court may deem fit.

2. The claim as expounded in the statement of claim arises from a contract dated 12<sup>th</sup> August 2007 for the construction of a skills training centre for women and youth in Kapiri Mposhi on subdivision of Plot No. 71 off Great North Road. The terms of the contract were that MMCI would pay the Plaintiff a total sum of ZMK1,103,676,30 for the construction works. Specifically, Clause 15 (1) of the contract provided for issuance of a certificate of practical completion of the work by Enviro-Design (Zambia) limited (the architect for the project).
3. On 11<sup>th</sup> March 2009 a project handover took place during which MMCI was handed all the keys to the constructed building and pursuant to clause 15(1) of the conditions annexed to the contract, the Plaintiff was issued with a certificate of practical completion by Enviro-Design (Zambia) Limited being MMCI's representative.
4. On 30<sup>th</sup> March 2009, MMCI's representative issued a report which alleged that the Plaintiff's general performance of the construction works was poor and highlighted a number of construction works that remained outstanding.

5. A meeting was held on 17<sup>th</sup> August 2009 between the Plaintiff, Enviro-Design (Zambia) Limited and H. B. Chalwa Associations the Chartered Surveyors to discuss the final contract price and conclusion of the contract.
6. During the said meeting, claims and counterclaims were made by the parties present regarding final payment certificate amount payable and due to the Plaintiff. It was agreed that the sum of ZMW247,607.49 was payable and due to the Plaintiff representing the penultimate final payment certificate.
7. From the date of the meeting, no payments were allegedly received by the Plaintiff and this led to a demand letter of 5<sup>th</sup> October 2009 requesting for payment of the ZMW247,607.49. On 4<sup>th</sup> March 2010, another letter of demand was written and MMCI was informed that the retention sum of ZMW17,814.53 inclusive of VAT had become due from 11<sup>th</sup> September 2009 when the defect liability period had expired increasing the amount to ZMW265,422.02.
8. The final agreement on the contract price was signed off by MMCI's representatives and H. B. Associates on 15<sup>th</sup> January 2010.
9. On 16<sup>th</sup> March 2010, MMCI informed the Plaintiff it would settle the outstanding amount. This was followed by letters of demand from the Plaintiff to Defendant dated 8<sup>th</sup> April 2010 and 23<sup>rd</sup> April 2010. On 24<sup>th</sup> August 2010, Messrs Levy Mwanawasa and Company acknowledged the debt and a commitment to liquidate the said amount was made. Several other reminders were sent to the Defendant who only responded on 15<sup>th</sup> January 2014 denying their indebtedness to the Plaintiff on the

outstanding amount based on the 30<sup>th</sup> March 2009 report. The Defendant further denied the debt in its letter to the Plaintiff dated 12<sup>th</sup> February 2014.

10. At a meeting held on 15<sup>th</sup> September 2015 at MMCI's Advocates office, the chairperson Maureen Mwanawasa acknowledged and accepted the debt and indicated the organisation was going through some financial difficulties due to the withdrawal of its donors and offered to pay ZMW100,000.00 in two instalments as full and final settlement of the outstanding amount. The Plaintiff wrote to the Defendant the same day rejecting the proposal as the outstanding amount had not been paid over a long period of time.

11. The Plaintiff avers it has suffered loss as a result of the Defendant's failure to pay the outstanding debt due to it.

12. The Defendant filed its defence on 9<sup>th</sup> June 2017 and denied liability to the Plaintiff on the basis that the Defendant's representative was not knowledgeable on architectural works and could not identify the defects of the said works on the surface. The Defendant denied owing the sum of ZMW265,422.02 to the Plaintiff as the works purportedly done by the Plaintiff were incomplete and had defects. In relation to the acknowledgment of debt, the Defendant disclosed that this was done out of duress by the Plaintiff who threatened legal action which ultimately was going to embarrass the Defendant.

13. According to the Defendant, the Plaintiff had not completed the works as per agreement as contained in a letter dated 29<sup>th</sup> March 2000 originated by the Supervising Engineer under the name Enviro-Design (Zambia) Limited who actually introduced the Defendant to the Plaintiff. It is

alleged that the said Enviro-Design had told the Defendant the Plaintiff had not completed the works 100% and outstanding works were to be executed by other contractors or individuals to have been recommended by Enviro-Design (Zambia) Limited. They recommended the retention of 5% deductible from the interim payment certificates on condition the defects were rectified or the retention fees would be used to rectify the said defects. The Defendant alleged the defects have never been rectified by the Plaintiff.

14. The particulars of unfinished works by the Plaintiff were itemised in the defence.

### **Counterclaim**

15. The Defendant counterclaimed the costs of construction of incomplete works, cost of labour and supervision for uncompleted works, costs of usage of the property due to unfinished works, general and special damages, interest and costs.

### **Plaintiff's evidence**

16. At the trial held on 10<sup>th</sup> June 2019, the Plaintiff called 1 witness Francis Sujani who filed a witness statement into Court on 11<sup>th</sup> August 2017 with similar averments as those contained in the statement of claim.
17. In cross-examination, PW1 conceded the Plaintiff was engaged to construct a building for MMCI in 2007 and the project time was 6 months. The project was only completed 55 weeks later on 17<sup>th</sup> February 2009.
18. On questioned about the role of Enviro-Design (Zambia) Limited, PW1 confirmed they were the project managers hired by the Defendant herein.

He further stated that Enviro-Design (Zambia) Limited had referred the Plaintiff to a number of incomplete works. As to the issue of liquidated damages raised it was his belief that it made reference to completion of the project.

19. When queried about the defect liability period, PW1 responded the certificate of practical completion detailed the defect liability period from 11<sup>th</sup> March 2009 and reiterated that all the defects were rectified. He was not aware of the Defendant incurring costs to rectify the said defects. PW1 told the Court that he was not given a final certificate of completion and it was not because of the lack of non-completion of the defects. PW1 maintained an acknowledgment of debt meant that the Defendant admitted the amount owing.

20. In re-examination, PW1 clarified that all the works inside the building were completed and a handover was done but it had some external plumbing works, electrical works and powering were pending completion.

21. PW1 reiterated the defect liability period commenced on 11<sup>th</sup> March 2009 and was to have ended on 11<sup>th</sup> September 2009. He maintained that the Defendant had acknowledged the debt in a letter dated 5<sup>th</sup> October 2009 (page 41 of the Plaintiff's bundle of documents).

### **Defendant's evidence**

22. The Defendant called one witness Maureen Kakubo Mwanawasa (DW1) who filed a witness statement which mirrored the averments in the defence.

23. In cross-examination, she stated that Enviro-Design (Zambia) Limited was engaged by the Plaintiff to supervise their works on their behalf. When referred to page 1 of the Plaintiff's bundle of documents, DW1 told the Court the letter was on Enviro-Design (Zambia) Limited letter head and conceded it made reference to MMCI.
24. DW1 maintained that Enviro-Design (Zambia) Limited was engaged by the Plaintiff to supervise the works and a certificate of practical completion was issued by Enviro-Design (Zambia) Limited to the Plaintiff which set out the defect liability period from 11<sup>th</sup> March 2009 to 11<sup>th</sup> September 2009.
25. When queried as to whether the certificate of practical completion issued pursuant to clause 15 (1) of the contract entailed that all construction works were practically completed, she responded in the affirmative. However, DW1 maintained that to the best of her knowledge there had never been a hand over ceremony of the skills centre. When shown a letter dated 11<sup>th</sup> March 2009 acknowledging the hand-over, DW1 was non-committal and merely confirmed the content of the letter. In respect to the issue of defects referred to in the letter dated 30<sup>th</sup> March 2009, DW1 responded that the said letter was written by Enviro-Design (Zambia ) Limited on behalf of the Defendant.
26. When queried as to whether she brought the defects to the attention of the Plaintiff, she responded she did so vide the letter dated 30<sup>th</sup> March 2009. She further stated she was not personally responsible for bringing the defects to the attention of the Plaintiff as that was the responsibility of the Executive Director of MMCI to do. When referred to the contract on page 2 of the Plaintiff's bundle of documents, DW1 told the Court it was

signed by the Executive Director of MMCI who had the authority to bind the institution.

27. DW1 maintained that under clause 15 (2) of the contract, any defects were to be brought to the attention of the Plaintiff within 14 days from the expiration of the defect liability clause. DW1 reiterated the defect liability period ended on 11<sup>th</sup> September 2009 and that the notification was not done within 14 days but was done before 11<sup>th</sup> September 2009.

28. When questioned as to who Enviro-Design (Zambia) Limited represented, DW1 acknowledged that it was MMCI but went further to state they also represented the Plaintiff who were relying on them to produce the certificate of practical completion.

29. In respect to the minutes of 17<sup>th</sup> August 2009 arising from a meeting attended by Enviro Design (Zambia) Limited, H B Chalwe Associates and the Plaintiff's representatives, DW1 maintained she was not in attendance and could not comment on what was discussed at the meeting (page 35 of the Plaintiff's bundle of documents). She conceded she signed the letter dated 29<sup>th</sup> September 2010 on behalf of Messrs Levy Mwanawasa & Company in response to a demand made by Counsel for the Plaintiff (page 46 of the Plaintiff's bundle of documents).

30. In respect to the letter dated 15<sup>th</sup> September 2015 from Messrs Solly Patel Hamir and Lawrence where a demand for the claimed sum was made, DW1 stated that the Defendant disputed the amount being claimed (page 54 Plaintiff's bundle of documents). When queried as to why a proposal was made to settle the debt in instalments, DW1 maintained it was done for the sake of burying the hatchet.



31. In re-examination DW1 clarified that according to clause 15(1) of the contract it was the responsibility of the architect to notify them of the defects and it was the contractor's duty to rectify the defects. She reiterated that Environ-Design (Zambia) Limited acted for both the Plaintiff and Defendant.

32. As to the letter dated 16<sup>th</sup> March 2010 which was a response to the Plaintiff's letter of demand wherein an apology was rendered for the delay in payment of the outstanding debt, DW1 told the Court it was written by the Executive Director of MMCI and she could therefore not comment on its content.

33. After the one witness the defence closed its case.

34. Both parties filed written submissions which I shall not restate except to inform the parties that due consideration has been given to them in the determination of this matter where relevant and necessary.

### **Analysis and determination**

35. Having set out the respective parties' position and having considered all the eminent points of view of Counsel, the evidentiary hearing, pleadings, applicable authorities for and against the substantive claim by the Plaintiff and the Defendant's counterclaim, I now embark on analysing and determining the matter by framing the issues as follows:

1. Whether the Plaintiff completed the project as per contract.
2. Whether the certificate of practical completion was duly issued by the Defendant and its effect.
3. Whether the Plaintiff is entitled to the reliefs sought.
4. Whether the Defendant is entitled to its counterclaim.

36. It is common cause that the Plaintiff was engaged by the Defendant to construct a women's skill training centre in Kapiri Mposhi on subdivision of Plot No. 71. According to the letter of award dated 4<sup>th</sup> July 2007 from Enviro-Design (Zambia) Limited the tender price was ZMK1,103,676,256.50 (page 1 Plaintiff's bundle of documents).

37. It is not in dispute that following acceptance by the Plaintiff a contract was duly executed by the parties herein on 12<sup>th</sup> August 2007 (page 2 - 29 of the Plaintiff's bundle of documents).

38. The Defendant denied liability of the claimed sum and has counterclaimed against the Plaintiff.

39. I shall first delve into the sub-issue as to whether Enviro-Design (Zambia) Limited was an agent of both parties as alleged by the Defendant. I have examined the Defendant's letter dated 4<sup>th</sup> July 2007 stating as follows:

*"We are pleased to inform you that our client has authorised the above named contract to you after negotiations at your tender price of ZMW1,103,676,256.50 (VAT inclusive) for the execution of the works in accordance with the form of tender and all other documents referred to therein."*

*For the purposes of this contract the Consultant Architect or his representative will supervise the works and all correspondence shall be addressed to the Director- Architecture Enviro-Design (Z) Limited .....*

40. From a perusal of the contract, the parties' clause Enviro-Design (Zambia) Limited was responsible for the drawings and bill of quantities and described the work to be done and prepared by or under the direction of Enviro-Design (Zambia) Limited as architects and it was the Employer (Defendant) who engaged them as architects.

41. This position is re-instated in the Articles of Agreement dated 12<sup>th</sup> August 2007 where the architects are described as Enviro-Design (Zambia) Limited. In terms of the role of the architect, what can be discerned from the contents of the cited letter dated 4<sup>th</sup> July 2007 is that the architect played a supervisory role relating to the works under the project. All in all, there is no doubt in my mind that Enviro-Design (Zambia) Limited was appointed as architects for the Defendant herein. Therefore, I need not belabour the point any further.

42. Therefore, I shall proceed to determine the matter on the basis that Enviro-Design (Zambia) Limited were the Defendant's agents and not agents for both parties as the Defendant would want me to believe.

**Claim of ZMW265,422.02**

43. The Plaintiff claims the sum of ZMW265,422,02 being the value of unpaid/outstanding amount agreed as payable and due to the Plaintiff for the construction of the skills training centre for women and youth in Kapiri Mposhi.

44. In determining whether there was performance of the contract by the Plaintiff, the document that governs the business relationship between the parties is the contract dated 12<sup>th</sup> August 2007 which I have carefully examined. Evidently, the Plaintiff's version in this respect is as one can expect diametrically different from the one advanced by the Defendant.

45. Of relevance in the contract is clause 15 on the which states as follows:

*"(1) When in the opinion of the Architect the Works are practically completed, he shall forthwith issue a certificate to*

*the effect and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in the certificate.*

- (2) *Any defects, shrinkages or other faults which shall appear within the defects liability period stated in the appendix to these conditions and which are due to materials or workmanship not in accordance with this contract or to frost occurring before Practical Completion of the Works, shall be specified by the Architect in a schedule of defects which he shall deliver to the contractor not later than 14 days after the expiration of the said defect liability period, and within a reasonable time after receipt of such instructions comply with the same and (unless the Architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) entirely at his own cost. Provided that no such instructions shall be issued after delivery of a schedule of defects or after 14 days from the expiration of the said defect liability period.*

(3).....

- (4) *When in the opinion of the Architect any defects, shrinkages or other faults which he may have required to be made good under sub-clauses (2) and (3) of this condition shall have been made good he shall issue a certificate to that effect, and completion of making good defects shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate."*

46. It is important to note that in construction law there is no precise legal or agreed definition of what practical completion means and therefore there

are no hard and fast rules in applying this concept. Counsel for the Defendant relied on the English case of *Westminster City Council v J Jarvis & Sons Limited and Another* [1970] 1 ALL E R 943<sup>1</sup> where the Court held *inter alia* that:

*“ So the final certificate may not be issued until long after the completion of the works. These provisions there are, in my opinion, two conclusions to be drawn: first that the issue of the certificate of practical completion determines the date of completion, which may of course be before or after the date specified for that in the contract; and secondly that the defects liability period is provided in order to enable defects not apparent at the date of practical completion to be remedied. If they had been then apparent, no such certificate would have been issued. It follows that a practical completion certificate can be issued, when owing to latent defects, the works do not fulfil the contract requirements and that under the contract works can be completed despite the presence of such defects. Completion under the contract is not postponed until defects which became apparent only after the work had been finished, have been remedied.”*

I find the above passage enlightening.

47. In the subsequent case of *HW Neville (Sunblest) Limited v William Press and Sons Limited*[1981] 20 BLR 78<sup>2</sup> the Court articulated the position on practical completion as follows:

*“I think the word “practically” in clause 15 (1) gave the Architect a discretion to certify that William Press had fulfilled its obligations under clause 21 (1) where minor de minimis works had not been carried out, but if there were any patent defects in what*

*William Press had done, the Architect could not have given a certificate of practical completion.”*

48. I adopt this excerpt as my own and it is my understanding that in construction where a certificate of practical completion is issued, works are to be considered as substantially complete in accordance or in conformity with the contract and free from defects that would prevent the Defendant from taking over and making use of the building for its intended purpose. The effect of this certificate is that it ends any right of the Defendant to claim for liquidated damages for delay in completion of the works and any retention money is then payable to the contractor (Plaintiff herein).
  
49. According to the letter dated 11<sup>th</sup> March 2009, it shows that Enviro-Design (Zambia) Limited issued the certificate of practical completion. This is vehemently denied by the Defendant who alleged that the Defendant's representative was not knowledgeable on architectural works and could not identify the defects of the said works on the surface. I find this argument untenable as the architect was an agent of the Defendant and any negligence on the part of the architect should not affect the rights of the Plaintiff.
  
50. The Defendant's further denied liability on the basis that defects were not rectified hence the absence of a final certificate. DW1 maintained that there was never a hand over ceremony of the building even though the letter of 11<sup>th</sup> March 2009 clearly shows that a handover was done. She however conceded that where a practical certificate of completion is issued it meant that all construction works would have been practically completed.

51. It is my finding that a certificate of practical completion was issued by Enviro-Design (Zambia) Limited the architects and signed off by R S Nkunika. The certificate stated that practical completion of the works was achieved on 11<sup>th</sup> March 2009 and the defect liability period was to end on 11<sup>th</sup> September 2009. The record shows that the architect notified the Employer being the Defendant of the project handover and drew to their attention the defect liability period of 6 months. The effect of the defect liability period is to enable defects not apparent at the date of practical completion to be remedied.
52. Counsel for the Plaintiff argued that the letter of 11<sup>th</sup> March 2009 was never received by the Plaintiff nor is there an acknowledgment of the same as it was not addressed to the Plaintiff. I find the lack of notification directly to the Plaintiff was contrary to the requirements under clause 15 (2) of the contract where the architect is required to deliver to the contractor being the Plaintiff herein not later than 14 days after expiration of the defect liability period and within a reasonable time after receipt of instructions comply with the same.
53. However, there is evidence from the Plaintiff itself that it was fully aware of the remedial works as in its letter dated 4<sup>th</sup> March 2010 they made reference to handover of the project on 11<sup>th</sup> March 2009 and the defect liability period of up to 30<sup>th</sup> September 2009 and the certificate of practical completion was attached to the said letter.
54. Going back to the issue whether the Plaintiff carried out the remedial works, the documentary evidence is a useful starting point to ascertain what was done by the Plaintiff. A perusal of Enviro-Design (Zambia) Limited letter of 11<sup>th</sup> March 2009 is clear where it inter alia states that:

*“the buildings in themselves are complete as they are excepting for a few items relating to finishes such as wall tiling in the kitchen area and in the toilets, steps at the entrance (in slate stones) and stone cladding of the plinths.*

55. Following the defect liability period outlined in the certificate of practical completion, the issue of defects was addressed in the same letter of 11<sup>th</sup> March 2009 as follows:

*“ the defect liability period will now run from the next 6 months up to 11<sup>th</sup> September 2009 during which time the contractor will be expected to rectify snags from the defects list.*

*Once this has been successfully done, the contractors retention of 5% (deducted from all interim payment certificates will be released). If defects will not have been rectified to our satisfaction the same retention amount will be used to make good the snags through third parties.*

*The building and services were handed over AS IS meaning that the contractor was relieved off the site without 100% completion.*

*All outstanding works will be executed by other contractors or individuals as will be recommended by us and authorised by your goodselves.*

*The main reasons for our course of action included contractors poor general performance and other factors as listed below:.....”*

56. It is PW1’s position that all defects were rectified even though a final certificate was not issued by the Defendant.



57. From my understanding and arising from the issuance of the certificate of practical completion, the correct inference to draw is that the Plaintiff completed performance of the contract subject to rectification of the defects. From the evidence, I accept if this had not been done, the parties would not have engaged in discussions relating to the final contract payment. I also find that by conduct of the Defendant, it is estopped from denying that the Plaintiff did not carry out remedial works.

58. I am guided by clause 30 (1) of the contract that states as follows:

*“(1) At the period of interim certificates names in the appendix to these conditions, the Architect shall issue a certificate stating the amount due to the contractor from the Employer, and the Contractor shall, on presenting such certificate to the Employer, be entitled to payment therefor within the period for honouring certificates names in the Appendix to these Conditions, Interim valuation shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate.”*

59. The minutes of the meeting which I find to be authentic show that the parties present discussed the penultimate final payment certificate which carried an amount of ZMK247,607,488.25. It was at this meeting after protracted debate that the Plaintiff accepted the sum of ZMK247,707,488.25 . At page 39 of the Plaintiff’s bundle of documents is a summary and application for payment No 7 dated 15<sup>th</sup> January 2010 and signed off by H B Chalwe Associates and Enviro-Design (Zambia) Limited. This summary had a computation of the amount recommended for payment as calculated by H B Chalwe and Enviro-Design (Zambia)

Limited. I find as a fact that these discussions took place after the termination of the defect liability period on 11<sup>th</sup> September 2009.

60. I am further inclined to believe the Plaintiff rectified the works as in a subsequent letter dated 5<sup>th</sup> October 2009 from the Plaintiff to Enviro Design (Zambia) Limited appearing at page 38 of the Plaintiff's bundle of documents, it reads as follows:

*"In order to settle the matter amicably at the earliest, we agreed to your final amount of K247,607,488.25 ....."*

In my considered view, this demonstrates that discussions were held with the Defendant's agent and the Defendant is bound by any decision made by its agents who were the architect's for the project.

61. By a letter dated 16<sup>th</sup> March 2010 appearing at page 41 of the Plaintiff's bundle of documents, the Defendant under the hand of its Executive Director Miriam J K Nkunika wrote as follows:

*"Kindly accept our sincere apologies for the delay in payment of this outstanding debt. This has been due to financial constraints we have been experiencing, as a result of drying up of financial support from our well wishers who in turn have been negatively affected by the global credit crunch.*

62. This is followed up by a letter dated 29<sup>th</sup> September 2010 where the Defendant intends to make good the commitment to pay (page 46 Plaintiff's bundle of documents).
63. At one point the Defendant through DW1 acknowledged and accepted the debt due to the Plaintiff vide a letter dated 23<sup>rd</sup> August 2010 and the reason for the delay in settling its indebtedness was attributed to the Defendant undergoing some financial difficulties which I opine is no valid defence (page 44 of the Plaintiff's bundle of documents). DW1

when pressed in cross examination as to their commitment to settle the debt in instalments, she remarked that it was done “for the sake of burying the hatchet”.

64. The Defendant flip flopped by first acknowledging the amount due to Plaintiff, thereafter in its letter dated 16<sup>th</sup> March 2010 apologised for the delay in settlement occasioned by a lack of funding (page 41 Plaintiff’s bundle of documents). The Defendant then brought to the Plaintiff’s attention that not all works were completed and the outstanding works remained unfinished in its letter dated 15<sup>th</sup> January 2014 (page 49 Plaintiff’s bundle of documents).
65. All this commitment to settle from the Defendant came to an abrupt end on 15<sup>th</sup> January 2014 when Messrs Levy Mwanawasa and Company on behalf of the Defendant wrote as follows:

*“Please note that our client has brought to our attention a detailed report which was written by enviro-design (Zambia) limited which highlighted the fact that not all works were completed and the outstanding works have remained unfinished to date.....*

*In view of this it is extremely difficult for our client to accept the liability of the sum of ZMK265,422,012.77 being claimed by your client.”*

66. The provisions of the contract were clear that any snags/defects in the construction works were to be brought to the attention of the Plaintiff not later than 14 days after the expiration of the defect liability period. The documentary evidence shows that the Defendant only brought the defects to the attention of the Plaintiff almost 5 years later.

67. I do not accept the Defendant's defence of incomplete works as there is no evidence to suggest that a third party executed the works and bill of quantities were prepared to that effect.
68. For the foregoing reasons, I accept the Plaintiff's evidence that it is owed monies by the Defendant and find the Defendant's defence on incomplete works as an afterthought. From the conduct of the Defendant, it is estopped from raising the issue of incomplete works as a basis of denying its liability to the Plaintiff.
69. On the whole and after an evaluation of the evidence and material before me and on a balance of probabilities, I find that the Plaintiff has proved its claim in the sum of ZMK 247,607,488.25

#### **Counterclaim**

70. The Defendant counterclaimed against the Plaintiff for its failure to make good any of the defects and outstanding works outlined in the letter dated 11<sup>th</sup> March 2009 (pages 2-5 Defendant's bundle of documents).
71. The Defendant counterclaims the cost of construction of the items mentioned namely –
- (1) installation of the feeder pillar complete with circuit breakers and cabling to the distribution boards of the two buildings;
  - (2) equipping of the kitchen with cooking implements and an extraction hood;
  - (3) completion of the plinths in stone cladding;
  - (4) paving with interlocking bricks of the drive way, parking lot, walk ways and construction of concrete kerbs;
  - (5) fencing off the site;

- (6) borehole and elevated tank;
  - (7) water reservoir on the concerted deck of the toilet block;
  - (8) landscaping; and
  - (9) signage, key tags and inauguration plaque
72. The Defendant further counterclaimed the cost of labour to complete the works, cost of supervising the unfinished works, loss of usage of the property due to the unfinished works, general and special damages, interest and costs. It is the Defendant's submission that as much as a certificate of practical completion was issued to the Plaintiff, it provided for a defect liability period of 6 months and that these defects were not rectified by the Plaintiff.
73. According to the letter from Enviro-Design (Zambia) Limited dated 11<sup>th</sup> March 2009 it stated inter alia that:
- "The buildings in themselves are complete as they are excepting for a few items relating to finishes such as wall tiling in the kitchen area and in the toilets, steps at the entrance (in slate stone) and stone cladding of the plinths.*
74. As to whether the works were rectified in accordance with the terms of the contract, PW1 testified that some of the works brought to their attention fell outside the scope of the contract. My finding is that this piece of evidence was not challenged by the Defendant in cross-examination of PW1 and in this respect I accept the Plaintiff's evidence.
75. I further opine that under a construction contract at the time a certificate of practical completion is issued, works are already completed subject to rectification of defects that are identified during the defect liability period. There is no evidence that the incomplete works were not carried out as

envisaged under clause 15 (1) of the contract nor is the evidence that a third party undertook the works in line with the Enviro-Design (Zambia) Limited's instructions and find the Defendant's denial untenable.

76. As to the claim for costs of usage of the property due to unfinished works, I find that the Defendant's counterclaim remains unsubstantiated and it fails for lack of merit.

### **General and special damages**

77. The Defendant claimed for general damages. The purpose of damages is to put the claimant back into the same financial position as he would have been in but for the breach.
78. General damages are such damages as the law presumes to be the direct natural or probable consequence of the act complained of as espoused in the old English case of *Stroms v Hutchinson [1905] AC 515*<sup>3</sup>. The party claiming for damages should lead evidence as to what damages has been suffered at the instance of the defaulting party.
79. As to special damages it is settled law that the Courts will not award a claim for special damages unless the same is specifically proved.
80. I have combed through the record and find no tangible evidence to support a claim for both general and special damages. I find no basis to depart from this settled and sound principle of law. Therefore, I am reluctant in the circumstances of this case in the absence of cogent evidence to support the same, to award any damages of any type or form.
81. I find no merit in the Defendant's counterclaim and dismiss it accordingly.

## **Disposal**

In view of the above, I find that the Plaintiff has proved its case on a balance of probabilities against the Defendant.

1. Judgment is entered in favour of the Plaintiff in the claimed sum of ZMW265,422.02. The Judgment sum shall attract interest at the short-term deposit rate from date of the writ until Judgment and thereafter at the commercial lending rate as determined by Bank of Zambia until full payment.
2. The Defendant's counterclaim lacks merit and is accordingly dismissed.
3. Costs to the Plaintiff to be taxed in default of agreement.

*Leave to appeal granted.*

Delivered at Lusaka this 14<sup>th</sup> day of February 2020

  
.....  
**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**