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

2013/HP/1612

B E T W E E N:

SUBSONE ENTERPRISES LIMITED — **PLAINTIFF**

AND

AMTRADE LIMITED — **DEFENDANT**

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 23rd day of March 2020.

For the Plaintiff : *Mr. M. Mwansa, Mosha & Company*
For the Defendant : *Mr. L. Mwansa & Ms. M. Nkonde, Simeza Sangwa & Associates*

J U D G M E N T

Cases Referred To:

1. *Sanderson v National Coal Board (1961) 2 QB 244*
2. *Ruxley Electronics & Construction Ltd v Forsyth (1995) 3 All ER 268*
3. *Hadley v Baxendale (1854) 9. Exch. 341*

Other Works Referred To:

1. *Hudson's Buidling and Engineering Contracts Volume 1 by Duncan I. N. Wallace Thomson Publishers, Canada 1994*
2. *Halsbury's Laws of England 4th Edition Volume 4(30)*
3. *FIDIC Construction Contract, 2nd Edition (Red Book) 2017*

1. Introduction

1.1 By an oral agreement of 28th October 2011, the defendant (Amtrade) engaged the plaintiff (Subsone Enterprises Ltd) to renovate its

2. **Trial**

2.1 The matter came up for trial on 15th February 2018 and 13th march 2019. The defendant called two witnesses and the first was its Executive Director Kupusswani Murali (DW1). He testified that sometime in October 2011, the defendant contracted the plaintiff to renovate its building, Radian Retail Park, along Great North Road. The plaintiff was tasked to fix the floor, tiles, roof and aluminium doors to undertake plumbing works and clear the grounds. At the end of November 2011, the plaintiff begum its works and progressed well. However, after four months, the plaintiff's performance became unsatisfactory on account of delays and it failed to meet the schedule of completion.

2.2 DW1 averred that the quality of work was poor and at a meeting held with the plaintiff, the defendant's management expressed their concerns. The plaintiff was told to take remedial action but its workmanship remained poor. For instance, the tiles were not properly fixed, the water pipes had leakages, the aluminium doors were misaligned and a lot of debris was left on the premises.

2.3 DW1 testified that the defendant decided to terminate the oral agreement because it was anxious to lease the building and carried

out the remedial works at its cost. DW1 averred that the defendant incurred additional costs on materials, labour and lost out expected rentals. In concluding, DW1 prayed to Court to grant the defendant the reliefs sought against the plaintiff.

2.4 In **cross-examination**, DW1 testified that the parties agreed on a completion date of six months. The defendant's directors and administrative manager who assessed the plaintiff's works had no formal qualifications in construction. The defendant did not produce the list of defective works, photographs or receipts of the additional expenses in court. Further, the staff employed for the remedial works were casual workers. DW1 averred that the defendant leased nine stores at its building in March 2013 at a monthly rental of K65,000 each.

2.5 In **re-examination**, DW1 responded that the schedule of completion was based on the stages of construction. Further, the defendant periodically reviewed the schedule with the plaintiff to assess progress.

2.6 **DW2** was **Kasim Osman**, the defendant's General Manage who joined the company in June 2012. He was not with the company at the time that the plaintiff performed its works and after the oral

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1. Introduction

1.1 By an oral agreement of 28th October 2011, the defendant (Amtrade) engaged the plaintiff (Subsone Enterprises Ltd) to renovate its

building at Radian Retail Park. The agreement did not set out key terms such as the scope of works, drawings or completion date, and the schedule of works/contract payments were verbally instructed and agreed.

1.2 Around October 2012, when the plaintiff announced that it had completed most of the works contracted for, the defendant complained that some works were poor and unsatisfactorily performed. It asked the plaintiff to undertake remedial action, which in its opinion remained poor. Consequently, the defendant decided to repudiate the contract and carried out remedial/additional works at his cost.

1.3 The plaintiff invoiced the defendant ZMW282,150.05 for the completed works but it only paid ZMW50,000. Aggrieved by the action, the plaintiff on 31st October 2013, instituted this suit against the defendant seeking the following orders:

(i) *The sum of ZMW232,150.05 being the balance due to the plaintiff from the defendant in respect of construction works carried out on the defendant's premises on Radian Retail Park in Lusaka;*

(ii) Interest at the current rate;

(iii) Costs; and

(iv) Further or other relief.

1.4 By a consent order dated 3rd October 2014, the parties settled the plaintiff's case and agreed to refer the defendant's counterclaim filed into Court on 1st November 2013 to trial. In the counterclaim, the defendant alleged that after it contracted the plaintiff to renovate its building on stand no. 8357 Lusaka, at Radian Retail Park; it failed to perform the works to satisfaction. Thus, the defendant undertook remedial action and was condemned to additional expenses.

1.5 As a result, it suffered damages and consequential loss arising from the plaintiff's failure to deliver satisfactorily and claimed special damages as follows:

i. *Cost of improvised construction works to restore some premises – K28,082.00*
ii. *Costs of rebuilding walls, restoration works, cement, blocks etc – K30,000*
iii. *Loss of time in terms of trade or earnings: October 2012 to March 2013, currently, occupation for 9 Tenants at ZMW65,500 per month x 6 months – K390.000*
iv. *Unfinished works still to-date continuing subject to/pending workout to claim*
Interim total: ZMW448,000.00

1.6 The defendant further sought the following orders against the plaintiff:

(i) *Damages and consequential loss arising from and as outlined in paragraphs 2, 3,5, 7 and 8 as aforesaid;*
(ii) *Costs*
(iii) *Interest rate applicable at current market trends and becoming operative;*
(iv) *Further or other relief the Court may deem just and proper in full view of the unfolding scenario.*

2. **Trial**

2.1 The matter came up for trial on 15th February 2018 and 13th march 2019. The defendant called two witnesses and the first was its Executive Director Kupusswani Murali (DW1). He testified that sometime in October 2011, the defendant contracted the plaintiff to renovate its building, Radian Retail Park, along Great North Road. The plaintiff was tasked to fix the floor, tiles, roof and aluminium doors to undertake plumbing works and clear the grounds. At the end of November 2011, the plaintiff begum its works and progressed well. However, after four months, the plaintiff's performance became unsatisfactory on account of delays and it failed to meet the schedule of completion.

2.2 DW1 averred that the quality of work was poor and at a meeting held with the plaintiff, the defendant's management expressed their concerns. The plaintiff was told to take remedial action but its workmanship remained poor. For instance, the tiles were not properly fixed, the water pipes had leakages, the aluminium doors were misaligned and a lot of debris was left on the premises.

2.3 DW1 testified that the defendant decided to terminate the oral agreement because it was anxious to lease the building and carried

out the remedial works at its cost. DW1 averred that the defendant incurred additional costs on materials, labour and lost out expected rentals. In concluding, DW1 prayed to Court to grant the defendant the reliefs sought against the plaintiff.

2.4 In **cross-examination**, DW1 testified that the parties agreed on a completion date of six months. The defendant's directors and administrative manager who assessed the plaintiff's works had no formal qualifications in construction. The defendant did not produce the list of defective works, photographs or receipts of the additional expenses in court. Further, the staff employed for the remedial works were casual workers. DW1 averred that the defendant leased nine stores at its building in March 2013 at a monthly rental of K65,000 each.

2.5 In **re-examination**, DW1 responded that the schedule of completion was based on the stages of construction. Further, the defendant periodically reviewed the schedule with the plaintiff to assess progress.

2.6 **DW2** was **Kasim Osman**, the defendant's General Manage who joined the company in June 2012. He was not with the company at the time that the plaintiff performed its works and after the oral

agreement was terminated, management asked him to supervise the outstanding works. DW2 averred that he received advice from construction experts in the industry on the remedial works that were required and constituted a team. The team went on to correct the bonding, block alignment, mended cracks and plastering as well as the roof because the plaintiff used wrong materials. It also left a lot of debris outside the building which his team cleared.

2.7 In **cross-examination**, DW2 testified that he was not an engineer but had construction knowledge. He did not keep records of the remedial works nor use the specifications for the roof and floor plan. He equally did not have photographs of the tiling work, cracks on the walls, defective plumbing and receipts of the purchases in Court. DW2 averred that the bill of quantities for the remedial work was prepared on a needs basis. While the plaintiff used unbranded and substandard materials, the defendant replaced them with reputable South African brands.

2.8 In **re-examination**, DW2 stated that the cracks on the walls on the building were glaringly obvious. He maintained that the plaintiff's works were substandard while those undertaken by the defendant were superior.

2.9 That marked the close of the defendant's case.

2.10 In response, the plaintiff's director and only witness **Ebenezer Premkumar Chellappa (PW)** gave evidence in Court. He averred that the parties entered into two agreements on 28th October 2011 and 15th May 2012 for the renovation of the Radian Retail Park building. The plaintiff was specifically tasked to renovate the second floor of the defendant's building and works were checked routinely on a daily basis.

2.11 In addition, the plaintiff had two foremen on site while he went to the site on a daily basis. PW averred that the defendant's management varied the scope of works occasionally on site and the most variations were given in writing.

2.12 PW went on to testify that after the plaintiff completed most of the plumbing works at ninety percent, it could not test them because there was no water in the building. Thus, when the defendant alleged that its plumbing work was poorly performed, it had no basis and all the other works progressed well till completed.

2.13 According to PW, after the defendant's tenants occupied the stores on the ground floor, the plaintiff's employees access to the top floor was blocked. The plaintiff informed the defendant about the development,

and it told the plaintiff to halt the works for four weeks. Thereafter, it never called the plaintiff back to site nor afforded an opportunity to conduct final inspections or to correct any defects.

2.14 In **cross-examination**, PW averred that corrective works could only be undertaken after completion. He was aware that the defendant complained about the plaintiff's works and it also carried out remedial works. PW was not aware that the defendant repaired the plumbing or re-plastered the walls. The plaintiff did not include the incomplete works on its final invoice to the defendant.

2.15 In **re-examination**, PW maintained that the plumbing works were not tested because there was no water in the building. He was aware that the defendant installed four small toilets in the building.

3. **Submissions**

3.1 Both learned counsel for the parties undertook to file written submissions. However, submissions were only received from the defendant's advocate, Mr. L. Mwamba on 27th March 2019. He averred that the issue before Court was whether the plaintiff's works were satisfactorily performed on the defendant's property? He went on to submit that the plaintiff's works were shoddy or defective

according to the definition of such works by the learned author Hudson's Building and Engineering Contracts who says:

"It should be made clear that in clauses of this kind the word "defects" will today usually be held to indicate any deficiency in the quality of the work, whether structural on the one hand or merely decorative on the other, and whether due to faulty material or workmanship, or even design or performance if that is a part of the contractors obligation..."

3.2 Counsel further submitted that a contractor's work was considered defective if the construction was of poor quality in terms of design, material and/or workmanship. He reverted to Hudson's Building and Engineering Contracts (supra) on the indicators of quality as follows:

"In a construction context, the essential element of the function of design is choice, that is, the selection of the appropriate work processes and materials to meet the indicated or presumed requirements of the owner. The due discharge of the design obligation, therefore, will depend upon and be measured by the suitability of the work and materials for their required purpose once completed and in place. In more sophisticated contracts, whichever party may be contractually responsible for design, these requirements can be expected to be covered by detailed descriptions in the specifications and drawing, both in regard to materials and to work processes, and it is self-evident that the work will have to comply exactly with those descriptions if breach of contract is to be avoided....."

3.3 Counsel next submitted that where an employer of a contractor showed that a contractor had breached obligations in an agreement, an employer could terminate the contract/agreement. He then cited the learned authors of **Halsbury's Laws of England 4th Edition, Reissue Volume 4(3)** who state that:

"A defect commonly means that some of the work or materials does not conform with the requirements of the contract and thus the contractor is in breach of contract in that respect."

3.4 Counsel went on to assert that the defendant's evidence of defective works was cogent as the cracks in the walls and leakages in the plumbing system in the defendant's building were obvious. In addition, substandard materials were used for most of the works and the tiles had visible cracks. Thereafter, counsel referred the court to the case of **Sanderson v National Coal Board**[1], where the Court stated that:

"A patent defect is not latent when there is no-one to observe it. The natural meaning of the word "patent" is objective. It means "observable" and not "observed". A patent defect must be apparent on inspection, but is not dependent on the eye of the observer, it can blush unseen. In this case, although the defect was in darkness, it was patent. Had the plaintiff or his mate shone their lamps on it at the relevant moment, they would have seen it."

3.5 According to counsel, the defects in the works which were patent were only cured by the defendant's remedial works. Relying on the case of **Ruxley Electronics & Construction Ltd. V Forsyth**[2], counsel averred that the plaintiff breached the oral agreement and the defendant as the innocent party was entitled to claim damages.

3.6 On consequential loss, counsel argued that the plaintiff's poor performance delayed the rental of the defendant's stores at K65,000 per month. Thus, the loss incurred calculated at six months during the remedial works was K448,000 and the remedial works were K58,820.

4. **Appointment of Referee**

4.1 After I retired to draft the judgment, it became apparent that I could not make pertinent findings on the matter without invoking my powers under Order 23(1) of the High court Rules by referring it to a referee. The referee's role was to thoroughly investigate and assess the contentions of the parties. The power vested in the Court under Order 23 (1) of the High Court Rules on inquiries and accounts is as follows:

> **"1. In any civil cause or matter in which all parties interested who are under no disability consent thereto, and also, without such consent, in an civil cause or matter requiring any prolonged examination of documents or accounts or any scientific or local examination which cannot, in the opinion of the Court or a judge may, at any time, on such terms as it or he may think proper, order any question or issue of fact, or any question of account arising therein, to be investigated or tried before or tried before a referee, to be agreed on between the parties or appointed by the Court or a Judge."**

4.2 After a number of status conference and giving the parties an opportunity to agree on a referee, that is from 6th June 2019, they failed to utilize the opportunity. On 4th November 2019, the Court decided to appoint Mr. Henry Mbele Musonda FCIArb a civil engineer by profession as referee.

4.3 In terms of process, Mr. Musonda consulted both parties on their positions and investigated the defendant's claims. Mr. Mbele only submitted his report to the Court on 8th January 2020 and thus, the late delivery of this judgment.

5. **Determination**

5.1 Having considered the pleadings, evidence adduced, the submissions filed and authorities cited herein, it is indisputable that the parties entered into an oral agreement on 28th October 2011 for the renovation of Radian Retail Park building, stand no. 8357, along Great North Road Lusaka. The agreement did not set out key terms such as the scope of work, drawings or completion date. However, during the span of the agreement, the defendant occasionally varied the scope of works in writing.

5.2 The contract payments were verbally agreed and the plaintiff was expected to perform structural steel works, fix the floor, tiles, aluminium doors and the roof, undertake plumbing works and to clear the grounds. By October 2012, the plaintiff completed most of the works and when the defendant inspected them, it averred that some of the works were poor and unsatisfactory. It asked the plaintiff to undertake remedial works, which it also averred were poor. It eventually repudiated the oral agreement and thereafter, performed remedial works at its cost. What this Court distills for determination is

Whether the plaintiff breached the oral agreement thereby entitling the defendant to a claim of damages and consequential loss?

5.3 In support of its case, the defendant contended that the plaintiff's works were of poor quality and it used substandard materials. Further, the works were not performed within a reasonable period and it complained to the plaintiff about the shoddy works. It further alleged that the plaintiff's remedial works were poor as there were leakages in the plumbing system. Also that the tiles and aluminium doors were poorly fixed.

5.4 In addition, there were cracks in the walls, while a lot of debris was left on the defendant's premises. On account of the plaintiff's shoddy works, the defendant averred that it incurred additional cost of K58,820 for the remedial works and suffered consequential loss of ZMW 448,000 because the building was not leased on time.

5.5 In rebuttal, the plaintiff argued that it was employed to carry out works on two floors of the defendant's building. It completed the works on the ground floor satisfactorily and the defendant's tenants timely moved into the stores. The plumbing works on the second floor were

not tested, but instead unilaterally and abruptly repudiated the contract. As such, the plaintiff denied that it breached the agreement nor that it owed the defendant money.

5.7 After reflecting the rival positions, it is necessary that I should say a little on some uncontroversial propositions of the law.

5.8 The learned authors of **Halsbury's Laws of England 4th Edition Volume 4(2)** say at paragraph 360 on the standard by which a contractor can be held accountable that:

"360. Duty to complete. Most contracts provide that the contractor is to carry out and complete the works described in the contract. Even where it is not so stated then, if the extent of the work is defined, a duty to complete the work is implied, the contractor having a correlative right to complete the work. Without a right to omit part of the work contracted fir the employer cannot, without breaking the terms of the contract, carry out any part of the contract works himself or, it seems, exercise a power to omit to have the work carried out by another."

5.9 Stated differently, a contractor is expected to carry out and complete works that are described in a contract. Even if a contract does not state so, the duty to complete works as specified can be implied. Therefore, a contractor who fails to fulfill this duty can be deemed to have broken the terms of contract.

5.10 At paragraph 374 of the learned authors of **Halsbury's Laws of England (supra)** say:

"374. Obligations as to workmanship and materials. The drawings and the specification or bill of quantities will normally specify the quality and type of materials to be used, the workmanship to be employed and sometimes also the method of work to be adopted. They may also specify the purpose or purposes for which the completed works are to be fit. The contractor may thereby become under an express obligation to furnish or be responsible for the design of the works. Such a specification is sometimes called a 'performance specification', particularly for mechanical, electrical or other engineering works or services but also for building works generally."

5.11 The significance of the cited authority is that drawings or the specifications or bills of quantities will normally define the quality and type of materials to be used in building works. They may also provide the workmanship to be employed and sometimes the method of work to be adopted. Thus, where the obligation as to workmanship and materials is put in question, the standard to benchmark performance will be against those technical documents.

5.12 In this case, the defendants' fate was sealed when it failed to enter into a written contract with the plaintiff defining the scope of works and quality of works. The problem, as I will demonstrate later, was compounded by the absence of a bill of quantities and inventory of works done and defects.

5.13 The learned authors of **Halsbury's Laws of England (supra)** at paragraph 464 further state that where breach of contract occurs an employer has a right to damages as follows:

"In general an employer's claim will be for breach of the contractor's single obligation to complete the works in accordance with the contract. An employer may also be able to recover damages for breached which occur

earlier than completion. If the contractor wholly fails to complete the work the measure of damages is the additional cost of completing the works beyond that which would have been payable or paid to the contarctor. Similarly, if the contractor fails to complete part of the works or purports to complete it but with defective work or materials the damage recoverable is the diminution in value measured normally by the cost of completing or putting right the work.
The cost of reinstatement will be reasonable even if the work produces a better building and no allowance or deduction is generally made on account of betterment. If however, a claimant chooses to build to a higher standard than is strictly necessary, there will be a deduction in respect of betterment."

5.14 It follows that an employer can recover damages for breach of contract which occurs earlier than the completion date. If the contractor wholly fails to complete the work, damages are measured by the additional cost of completing the works beyond that which would have been payable or paid to the contractor. If a contractor fails to complete part of the works or purports to complete works with defects or by the use of inappropriate materials, the damages recoverable are of diminutive value and measured normally by the cost of completing or putting right the work.

5.15 If however, an employer chooses to build or renovate work to a higher standard than is strictly necessary, damages due in respect of extreme betterment are deductible. This principle of law was also stated in the case of **Hadley v Baxendale**[3], where the English Court stated that:

"the measure of damages is such as may be fairly and reasonably be considered a rising from the breach itself or such as may be

reasonably contemplated by the parties at the time the contract was made and a probable result of such breach."

5.16 It is trite therefore, that a claim for an award of damages in a case of breach of contract is subject to mitigation of loss. A claimant must only be placed as far as possible in the same position as he would have been had the breach complained of not occurred.

5.17 In the present case, I find that although the defendant contended that the plaintiff breached the oral agreement, it did not provide any material to the Court. Mr. Musonda prepared a report which he submitted to the Court on 8th January 2020, wherein, he disclosed that he visited the defendant's building on 20th December 2019. He was not availed any records of the defective work complained of or remedial works undertaken by the defendant.

5.18 He observed that the remedial works identified by the defendant, that repairs of wall cracks, plastering and painting were on the first floor, and not part of the plaintiff's scope of works. Further, he stated that the plaintiff only performed works on the ground floor. As far as this Court recollects, when PW gave his testimony, he stated that the plaintiff only worked on the ground floor. Afterwards, its works were halted by the defendant and it never returned to the site.

5.19 I therefore, find that the defendant failed to provide evidence showing that the plaintiff's works were poor. Further, the first floor of its building where the defects were observed was not part of the plaintiff's scope of works and it was not allowed access to the first floor. In addition, there was no evidence adduced by the defendant by way of photographs, receipts or other information documenting the plaintiff's poorly performed works. In fact, Mr. Musonda in his report, observed that the defendant had no records of any of the woks undertaken by the plaintiff.

5.20 The defendant's fate was further exacerbated by the absence of key terms in the oral agreement to benchmark the standard upon which the works would be assessed or drawings or professional reports to provide a basis/standard upon which the plaintiff would be held accountable. In the circumstances, the Court is unable to determine whether the plaintiff's works were of poor standard or that it employed poor methods, or used substandard materials.. In my view, the defendant's employees who are not experts in the construction industry were not appropriately placed to give an opinion of the plaintiff's works.

5.21 Admittedly, latent defects constitute a breach of contract and a contractor will normally be held liable for damages arising from such defects within a reasonable period. It matters less that the parties

have not reached any agreement on whether a contractor will rectify latent defects discovered after termination of an agreement. However, in order for the obligation to set in, an employer is under obligation to inform a contractor of his grievances.

5.22 From the material before me, the defendant has not shown any evidence that the latent defects complained of post termination of the oral agreement were communicated to the plaintiff so that it could carry out remedial works. In any case, I find that the defendant did not challenge PW1's evidence that after the termination, it never returned to the site. As such, the court finds it difficult to appreciate whether the latent defects were attributed to the plaintiff's workmanship in the absence of documentation such as proof of purchases of cement, blocks, taps, doors, frames, tiles, paint, roofing materials or labour costs for the purported defendant's remedial works.

5.23 I am not satisfied that this case can be determined on the basis of the matrix produced in its defendant's bundle showing a tabulation for costs. The net of my findings and consequent holding is that the defendant's claim for its remedial works lacks merit and accordingly fails.

5.24 I am mindful that the defendant also pleaded that the parties oral agreement was time based. From the material record, I find that there was no evidence adduced to show that the parties agreed on the date of completion of works. Further, none of the defendant's witnesses testified that time was of the essence in the parties agreement. If the parties intended to be bound by time, they would have expressly stated the term in their agreement. In addition, if the defendant desired to be compensated for loss of business or rentals as a consequence of the plaintiff's delays, it should have made a specific statement.

5.25 In the absence of such key terms, my finding is that the defendant's claim for consequential loss, which was not provided for or reasonably contemplated by the parties has no basis. Accordingly, I hold that the defendant's counterclaim lacks merit and is hereby dismissed.

6.0 **Final Orders**

These are the final orders of this court:

1. The improvised construction cost of ZMW 28,082.00 for the re-constructed walls, cost of cement and blocks at ZMW 30,000.00, loss of rental earnings at ZMW 390,000.00, claim for damages and interest are dismissed for lack of merit.

2. Costs are awarded to the Plaintiff to be taxed in default of agreement.

Dated this 23rd day of March 2020.

M. Mapani Kawimbe
HIGH COURT JUDGE