**IN THE SUPREME COURT OF ZAMBIA**
**HOLDEN AT KABWE**
(Civil Jurisdiction)

**APPEAL NO. 004/2013**
**SCZ/8/361/2012**

**BETWEEN**

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| **BANK OF ZAMBIA** | **APPELLANT** |
| **AND** | |
| **VOTEX REFRIGERATION COMPANY** | **1ST RESPONDENT** |
| **DOCKLAND CONSTRUCTION COMPANY LIMITED** | **2ND RESPONDENT** |

Coram: Chibomba, Malila and Kaoma, JJS.

On 4th November, 2014 and on 22nd December, 2016.

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| For the Appellant: | Ms. B. Lungu, Legal Counsel, Bank of Zambia. |
| For the 1st Respondent: | Mr. G. Madaika, J and M Associates. |
| For the 2nd Respondent: | Ms. Annie Chungu, Christopher Russel Cook and Company. |

# JUDGMENT

**Chibomba, JS, delivered the Judgment of the Court.**

**Cases referred to:**

1. **MuvumaKambanjaSituna vs. The People (1982) ZR 115.**
2. **Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) ZR 172.**
3. **Attorney General vs. Peter Mvaka Ndhlovu (1986) Z.R. 12.**
4. **Phillip Mhango vs. Dorothy Ngulube and Others (1983) Z.R. 61.**

**Other materials referred to:**

1. **Daniel Davidson's Business Law Principles and Cases, Second Edition.**
2. **Oxford Dictionary of Law, Fifth Edition.**
3. **Keating on Building Contracts, Fifth Edition.**

The Appellant appeals against the Judgment of the High Court at Lusaka, which held *inter-alia,* that the 1st Respondent was entitled to the

sum of K277,552,174.45, being the balance of the contract price for works and the cost of the variation works done at the Appellant's office premises in Ndola.

The facts leading to this Appeal are that the Appellant contracted the 2nd Respondent as a main contractor to do certain construction works at its office in Ndola. The Appellant advertised for tenders for the supply and installation of air conditions and ventilation system at the said office. The 1st Respondent's bid was successful and the Appellant awarded the contract to the 1st Respondent. The agreed contract price for the said works was K229, 782,982. On the advice of the Appellant's project consulting engineers and for purposes of harmonising the terms of the contract between the Appellant and the 2nd Respondent, the 1st and the 2nd Respondents signed a subsequent sub-contract through which the 1st Respondent became a sub-contractor of the 2nd Respondent, while the 2nd Respondent was the main contractor of the Appellant. The 1st Respondent began performing the works until completion and the Appellant accepted the works.

The 1st Respondent, however, alleged that although it successfully did the works, it encountered a lot of problems on ground that the critical components of the ventilation system, namely, the return air ducting was missing from the original drawings and specifications provided by the Appellant's project consulting engineers and that despite informing both

the Appellant and the 2nd Respondent, the project consulting engineers failed to rectify the drawings. The 1st Respondent also claimed that the cost of the return air ducting was not included in the Bill of Quantities and that this compelled the 1st Respondent to prepare a variation design and to obtain and install at its own cost, the return air ducting at an additional cost of K215,642,840, which brought the total cost of the works to K479,644,681.60. The 1st Respondent also claimed that out of this total sum, it only received the sum of K167,873,647.55 leaving the balance of K311,771,034.00 outstanding and that, despite several demands, the sum outstanding has remained unpaid thereby compelling it to commence an action in the High Court in which the following relief was sought:-

> **"1.The sum of K311,771,034.00.**
> **2. Damages for breach of contract.**
> **3. Interest at the Commercial Bank lending rate.**
> **4. Any other relief the court may deem fit.**
> **5. Costs."**

Both the 2nd Respondent and the Appellant disputed liability in the respective defences filed. The 2nd Respondent also filed a counterclaim against the 1st Respondent in which the following reliefs were sought:-

> **"1. Damages for breach of contract.**
> **2. The payment of the sum of K97,142,887.14 plus Value Added Tax as per contract for non completion of installation.**
> **3. The payment of 10% of the 1st Defendant's contract sum which has been withheld by the client, Bank of Zambia.**

4. **Interest on amounts due above.**
5. **Any other relief the court may deem fit.**
6. **Costs."**

The learned trial Judge heard evidence from the respective parties which he considered and analysed. In the Judgment appealed against, he found in favour of the 1st Respondent and entered judgment in the sum of K277,552,174.45 against the Appellant. He, however, dismissed the 2nd Respondent's counter-claim on ground that it was not supported by the evidence on record.

Dissatisfied with the judgment in question, the Appellant has appealed advancing three Grounds of Appeal as follows:-

"1. **The Court below erred in law and in fact by disregarding undisputed evidence that the Appellant had paid the sum of K168,555,919.85 to the 2nd Respondent as final payment for all the sub-contractors including the 1st Respondent and holding that the Appellant was liable to pay the amount of K277,552,174.45 to the 1st Respondent.**
2. **The Court below erred in law and in fact by holding that the Appellant was not entitled to charge liquidated damages for the delay in the completion of the project.**
3. **The Court below erred in law and in fact by disregarding evidence on the effect and import of the final account."**

The learned Counsel for the Appellant, Ms. Lungu, relied on the Appellant's Heads of Argument filed and responded to the questions that were put to her by the Court. In the Heads of Argument, Counsel began by re-stating the facts of this case which we have already reflected

above. Suffice to add the contention that during the execution of the project, it was brought to the attention of the Appellant's consulting engineers that there was need for variation of the design but that however, the completion of the project was delayed by the 1st Respondent's absence from site as the project was completed 82 weeks later contrary to the agreed 15 weeks completion period.

Further, that it was a term of the contract that the Appellant would levy liquidated damages for delay in completion of the works and that after completion of the project, the 2nd Respondent tendered the final claim, which included the claims of all the sub-contractors, including the 1st Respondent, to the Appellant's project consultants, Messrs Lisulo Bwalya Architects. And that the final claim included the claim for variations occasioned by the change in the design in the sum of K215, 642,840.00 and that the project consultants reviewed this in the final claim and prepared the final account wherein certain claims were discounted and liquidated damages were charged.

It was further argued that the final account for the project required the Appellant to pay the sum of K168,555,919.00 to the contractor leaving the sum of K92,641,714.74 due to the 1st Respondent and that the 2nd Respondents signed the final account on behalf of the 1st Respondent signifying acceptance of the sum due. Further, that the

Appellant paid the sum of K167,873,647.55 to the 1st Respondent through the 2nd Respondent as part of the settlement of the contract sum.

In support of Ground 1 which attacks the learned trial Judge for disregarding undisputed evidence that the Appellant had paid the sum of K168,555,919.85 to the 2nd Respondent as final payment to all the sub-contractors including the 1st Respondent and for holding that the Appellant was liable to pay the sum of K277,552,174.45 to the 1st Respondent; it was argued that the court below misdirected itself when it apportioned the entire liability on the Appellant only when the 2nd Respondent had admitted in the pleadings and during the trial that it had received the sum of K92,641,714.74 on behalf of the 1st Respondent. Counsel argued that the relationship between the parties was governed by the nominated sub-contract whereby the main contractor was responsible for the sub-contractor. And that under the nominated sub-contract, the 2nd Respondent was responsible for receiving payment from the Appellant and disbursing it to the sub-contractor.

In support of this contention, we were referred to Clause 3 of the nominated sub-contract which provides as follows:-

> **"The Main Contractor hereby agrees to pay the sub-contractor in consideration of the supply and installation execution, completion and maintenance of the works the contract price and any additional amounts**

**worked out due to final measurements when the main contractor will receive the payment from the client."**

It was pointed out that the 1st Respondent was aware of this relationship and hence, the reason why it did not sue the Appellant in the initial proceedings as the Appellant was only joined to the action after the 2nd Respondent stated in its defence that it had not yet received payment from the Appellant. Further, that at trial, the 2nd Respondent's evidence was that it did not pay the amount due to the 1st Respondent because of its counterclaim against the 1st Respondent. And that it was on this basis that Counsel for the Appellant submitted that having dismissed the counter-claim, the court below should have addressed its mind to the amount that the 2nd Respondent had received on behalf of the 1st Respondent and should accordingly have held the 2nd Respondent liable for that amount. Therefore, that the court below fell into grave error when it failed to consider all the evidence before it before apportioning the entire liability on the Appellant.

To buttress the above contention, the case of **Muvuma Kambanja Situna vs. The People**[1] was cited in which it was held that the judgment of a trial court must show on its face that adequate consideration was given to all relevant material that has been placed before it. This was repeated in **Wilson Masauso Zulu vs. Avondale Housing Project Limited**[2].

It was argued that the above cited cases provide some insight into this issue as this Court stated that the trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. That this Court went on to hold that a decision which, because of uncertainty or want of finality, leaves doors open for further litigation between the same parties can and should be avoided.

Counsel took the position that since the trial Judge did not consider the Appellant's evidence that a portion of the 1st Respondent's claim had been paid through the 2nd Respondent, then he failed to determine with finality, the issue of the final payment to the 2nd Respondent. As such, the trial Judge's decision on this aspect requires the Appellant to litigate in order to recover the monies paid to the 2nd Respondent which is not only undesirable, but also unjust. And that in light of the above authorities and the circumstances of this case, Ground 1 of this Appeal should be upheld.

In support of Ground 2, which criticises the court below for holding that the Appellant was not entitled to charge liquidated damages for the delay in the completion of the project, Counsel submitted that the contract between the Appellant and the 1st Respondent provided for the charging of liquidated damages in the event of delay in the completion of

the works being occasioned by the 1st Respondent as the project was for a fixed period of 15 weeks. That in this matter, it was common cause that in February, 2006 it became apparent to the parties that there was need for a variation to the design to be done in order to comply with the manufacturer's demands and that it is also true that the variation works were delayed. However, that although the 1st Respondent attributed the delay to the failure by the project engineers to provide the drawing or design for the variation, the evidence on record does not support this position. In pursuing this point, Counsel referred to the emails on record, which, she contended, show that the 1st Respondent was not attending meetings called by the project engineers to discuss the variation. And that the final account shows that the 1st Respondent was absent from site for 13 weeks and that in fact, the 1st Respondent's witness conceded that its absence from the site contributed to the delay in completion of the work. Further, that the evidence shows that the 1st Respondent's work was generally so unsatisfactory that the project consultants tried to terminate the contract.

It was further argued that although the court below correctly found that because there was a variation to the project design, the date for completion ceased to be applicable, the court nevertheless erred as the evidence on record shows that the 1st Respondent was granted an

extension of time within which to complete the project and that in fact, the 6 weeks extension was given when the 1st Respondent only requested for 4 weeks and that the 1st Respondent's witness admitted under cross-examination that an extension was granted.

Counsel, therefore, argued that the finding by the trial court that the parties did not sit down to negotiate the time within which the additional works would be done is a misdirection and an incorrect finding, as the evidence clearly shows that a period of 6 weeks was granted for the additional works.

Counsel further argued that the finding by the court below that time for completion was not agreed and therefore, the Appellant could not levy liquidated damages is absurd, as it would mean that the 1st Respondent was at liberty to complete the project at its leisure when the project was set for completion within 15 weeks and when an extension period of 6 weeks for variation was given. Therefore, that the delay of 82 weeks was unreasonable and excessive and is attributed to lack of cooperation by the 1st Respondent and therefore, the Appellant was justified to levy liquidated damages against the 1st Respondent. Hence, that Ground 2 of this Appeal should succeed.

In support of Ground 3 which takes issue with the trial Judge for disregarding the evidence on the effect and import of the final account,

Counsel submitted that the evidence on record shows that the Appellant paid the full amount reflected on the final account. And that the Appellant's witness, DW3, outlined the process for the preparation of the final account as his evidence was that at the end of the project, the main contractor (the 2nd Respondent), prepared the final claim for all the contractors which was reviewed by the project consultant and that the project consultant referred the final account to the project engineers for further review; and that the reviewed final account was referred back to the 2nd Respondent who was expected to consult the sub-contractors. And that once the final account was signed, the payment certificate was prepared.

It was submitted that DW3 told the court below that once the payment was made, the contract was satisfied and that his evidence in this respect was not disputed. Therefore, it was surprising that the court below did not consider this evidence nor make a determination on the issue. Further, that PW1's evidence under cross-examination, shows that the 1st Respondent was aware that the Appellant disallowed certain amounts from the claim and that the procedure for processing the final account provided an opportunity for the 1st Respondent to raise issues on the deductions through the 2nd Respondent and that if the 2nd Respondent did not avail the 1st Respondent an opportunity to see the

final account, then it is the 2nd Respondent that should be accountable for the consequences of its lapse. And that whilst it is true that the 1st Respondent submitted a claim of K215,642,840.00 for the additional works, the amount that was agreed in the final account was K87,205,500.00 and that this amount was paid to the 2nd Respondent and the procedure for coming up with the final account suggests that the amount claimed by the contractors was not necessarily the amount that was due for payment as the amount due was subject to agreement by the parties.

It was, therefore, Counsel's position that the court below fell into error by disregarding this evidence and ordering the Appellant to pay the amount claimed as the signing of the final account by the 2nd Respondent signified acceptance of the amounts due to each of the sub-contractors, including the 1st Respondent and that once the Appellant settled the final payment certificate, the contract stood discharged as it is trite that one of the ways of discharging a contract is by performance. Counsel referred to the learned authors of **Daniel Davidson's Business Law Principles and Cases, 2nd edition at page 252**,where the learned author stated that:-

> **"When parties contract with one another, they naturally assume that each party will perform according to the terms of the agreement. Consequently whenever the parties do what the contract calls for, we say that their duties under the contract have been discharged.**

**Discharge of a contract involves the legally valid termination of a contractual duty."**

Therefore, that by effecting the final payment certificate the Appellant performed its obligations under the contract completely and had no more contractual obligations to the 1st Respondent and therefore, ignoring the import of the final account by the learned Judge was a gross misdirection and that this Ground should therefore be upheld.

We wish to state that although Counsel for the Appellant quoted from the learned authors of **Daniel Davidson's Business Law Principles and Cases,2nd edition at page 252,** a copy of the said bookwas not provided and our search in the library proved futile, hence, we were not able to verify the reference.

In opposing this Appeal, the learned Counsel for the 1st Respondent, Mr. Madaika, also relied on the 1st Respondent's Heads of Argument. Counsel adopted the 2nd Respondent's submissions as to when the appellate court may overturn the findings of fact of a lower court and the case law cited. He submitted that the trial Judge's findings are well founded and should be upheld in toto.

In response to the argument relating to Ground 1, concerning the holding that the Appellant was liable to pay the sum of K277,552,174.45 to the 1st Respondent, Mr. Madaika submitted that Ground 1 lacks merit

as the court below was *terra firma* in not apportioning the liability between the 2nd Respondent and the Appellant. He submitted that it was pertinent for the court below to apportion the liability based on the evidence tendered and the findings of fact arrived at.

Counsel contended that the court below was also on firm ground when it found that the Appellant was liable to pay the sum awarded as it was undisputed that the Appellant paid only the sum of K168, 555,919.85 to the 2nd Respondent whilst the evidence of both DW2 and DW3 was that this sum was to be disbursed to all contractors on the project. However, that as was submitted at trial, this fell short of the 1st Respondent's final claim for the additional works done and that this sum was the focus of the trial.

In response to the Appellant's argument that the court below erred by apportioning the entire liability to the Appellant on the premises that the 2nd Respondent had admitted in the pleadings and evidence to receiving the sum of K92,641,714.74 outstanding to the 1st Respondent, Counsel argued that this assertion overlooks the fact that in paragraph 14 of its defence, the 2nd Respondent had stated that the full amount it received from the Appellant was K168,555,919.00 which was to be disbursed to all contractors under the project of which K167, 873,647.55 was paid to the 1st Respondent. And further that the sum of K92,

641,714.74 is what the 2nd Respondent counterclaimed against the 1st Respondent in the court below but that the counterclaim was rejected by the court below and therefore, the Appellant's assertion in this regard lacks merit.

It was further contended that the main contract was between the Appellant and the 1st Respondent and therefore, it was the Appellant's responsibility to pay the full contract price including the amounts due for extra works and that this responsibility cannot be shifted to the 2nd Respondent because the 2nd Respondent was not the employer in the strict sense, but was only a contractor engaged by the Appellant. And that it is immaterial that the Appellant was only joined to the action after the 2nd Respondent stated in its defence that it had not received payment from the Appellant. Counsel contended that the 1st Respondent discharged its obligations under the contract and hence, the Appellant was obliged to pay the full contract sum including the sum due for additional works done and that this is what the trial Judge found in his judgment. Hence Ground 1 of this Appeal should fail.

In response to Ground 2, it was argued that the contract with the Appellant allowed for levying of liquidated damages in the event of delay being occasioned by the 1st Respondent. However, this term of the contract was only valid for as long as the contract was performed as

initially agreed in 15 weeks but that the moment there was a variation of the project design, the date of completion ceased to apply.

In response to the Appellant's argument that the emails on record show that the 1st Respondent was not attending meetings called by the project engineers to discuss the variation of the design, Counsel argued that this argument is contrary to the evidence on record as DW2 confirmed under cross examination that he was aware of the correspondence between the 1st Respondent and the project engineers concerning the variation of the works. And that the variation order list on record was only issued on 16th October, 2008. And that this was despite notice of the defect in the drawings and specifications having been brought to the attention of the Appellant and the Appellant's project consulting engineers in February, 2007, 17 months earlier.

As regards the assertion by the Appellant that the 1st Respondent's witness, PW1, conceded that the 1st Respondent's absence from the site contributed to the delay, it was argued that this assertion has no basis and is misguided as the evidence on record was to the effect that the 1st Respondent only moved off site after having completed the works. And that this was so during the period of awaiting for the project consulting engineers to vary the design, the drawings and

specifications. Therefore, that it was misleading for the Appellant to claim that this evidence amounted to an admission as argued.

As regards the argument by the Appellant that the trial court's finding that the Appellant could not levy liquidated damages was misguided as the evidence on record clearly demonstrates that the period for completion was not in contention at the trial, Counsel countered that the learned trial Judge pointed out a number of undisputed facts which had arisen out of the pleadings and the evidence. And that the 15 weeks period was one of the issues that the learned trial Judge pointed out as being undisputed and therefore, the claim that the court below found that time for completion of the contract was not agreed upon lacks merit and should not be entertained. Therefore, the court below was terra *firma* when it held that the Appellant was not entitled to charge liquidated damages for the delay in the completion of the project and for the above reasons, Ground 2 of this Appeal should also fail on account of want of merit.

In response to Ground 3, it was submitted that the evidence of DW3 under cross-examination, on the applicable procedure for claims for payment was not disputed or challenged and that this evidence shows that the 2nd Respondent had the responsibility to prepare the final account which would reflect all the claims from various contractors on

the project. However, PW1's evidence shows that the sum claimed by the 1st Respondent for the variation work is not reflected on the final account presented to the Appellant as shown at page 376 of the Record of Appeal. Therefore, that the court below was on firm ground when it held the Appellant entirely liable for the amounts owed to the 1st Respondent because whatever the flaws or failures that ensued in the contract between the Appellant and 2nd Respondent, these did not in any way affect the Appellant's liability to pay the 1st Respondent the full contract amount plus any amounts found due for any additional works as was found by the trial Judge.

It was argued that if the Appellant felt aggrieved by the manner the 2nd Respondent performed or failed to perform its contractual obligations, the Appellant should have sued the 2nd Respondent. And that the Appellant cannot, therefore, raise the so called failures on the part of the 2nd Respondent in its obligations to the 1st Respondent as a reason or basis for refusing to pay the 1st Respondent as the duty and liability to pay the 1st Respondent lay with the Appellant whom the 1st Respondent contracted with.

Counsel also argued that if the Appellant has suffered loss on account of any purported failures of the 2nd Respondent, that should be a subject of a separate action between the Appellant and 2ndRespondent

as it cannot be a defence or shield for the Appellant to escape its liability to the 1st Respondent under the contract which is separate and distinct from the contract with the 2nd Respondent.

On the other hand, in opposing this Appeal, the learned Counsel for the 2nd Respondent, Ms. Chungu, also relied on the 2nd Respondent's Heads of Argument. We note that in its Heads of Argument, the 2nd Respondent only responded to Grounds 1 and 3 of the Appeal and did not specifically respond to Ground 2. We, therefore, assume that the 2nd Respondent did not oppose Ground 2 of this Appeal.

In response to Ground 1, Ms. Chungu submitted that the trial court was on firm ground when it apportioned the entire liability on the Appellant as the undisputed evidence on record was that all the money the 2nd Respondent received from the Appellant was paid to the 1st Respondent. And that the 2nd Respondent did not hold on to any monies on account of the counter- claim as the only deductions done were those that were a direct consequence of the discounted claims and liquidated damages charged by the Appellant.

Counsel contended that the court below made a finding of fact that the payment of K168,555,919.85 that was made through the 2nd Respondent to the 1st Respondent did not include the additional or variation works as supported by the evidence of both PW1 and DW1.

And the evidence on record which was unchallenged shows that the 2nd Respondent was not aware of the need for variation of the works as this fact was never communicated to it by the 1st Respondent. And that the variation was not discussed during the site meetings held with the Appellant and attended by both the 1st and 2nd Respondents.

It was submitted that the learned Judge made a finding of fact that there were defects in the drawings and specifications for the works prepared and generated by the Appellant's consulting engineers and that the Appellant's project consulting engineers authorized the variations and hence, the delay and consequential additional works should be on the Appellant. Further, that the Appellant has not adequately demonstrated why this Court should fault the findings of fact made by the trial Judge.

In support of the above arguments, Counsel cited the case of **Attorney General vs. Peter Mvaka Ndhlovu**[3] which sets out the conditions upon which an appellate court can interfere with the findings of fact or credibility made by a lower court. These principles are based on the earlier case of **Phillip Mhango vs. Dorothy Ngulube and Others**[4] in which we guided on when the appellate court will reverse findings of fact made by the trial court.

It was contended that from the above decided cases, this Court as the appellate court, cannot reverse findings of fact by the trial court if the findings are made on sound evidence and are neither perverse nor made on a misapprehension of the facts. Therefore, that Ground 1 of this Appeal is void of merit and should accordingly be dismissed.

In response to Ground 3, it was contended that the 2nd Respondent was not aware, at the time the final account was submitted to the Appellant, of the variation of the works or of the additional works as this information was never communicated to it by the 1st Respondent. That, however, the Appellant, knowing fully well that the quantum in the final account excluded the cost of variation of the works, nevertheless, went ahead and certified the cheque of K167,873,647.53 to the 1st Respondent. And that the trial court found that the 2nd Respondent paid the 1st Respondent all the money received from the Appellant. Therefore, the contention that the finding by the trial Judge was erroneous and the suggestion that the 2nd Respondent must share liability equally with the Appellant on the basis of the 2nd Respondent's unsuccessful counter claim, cannot stand. According to Counsel, this is so because the trial court made a finding of fact that the Appellant's consulting engineers owed a duty to the Appellant to ensure that the design was fit for the intended purpose and to also supervise the work

by the 1st Respondent in order to ensure that it conformed to the design and specifications. That there was breach of that duty by the Appellant's consulting engineers.

In addition, it was contended that the Appellant, having conceded that the 1st Respondent in fact submitted a claim for K215, 642,840.00 for additional works, the Appellant is estopped from hiding behind the errors on the final account. And that in any event, the Appellant held meetings with the 1st Respondent, without informing the 2nd Respondent. Consequently, Ground 3 of this Appeal is deficient of merit and must too be dismissed.

In summing up, it was submitted that this Appeal should be dismissed with costs as there is no basis for upsetting the decision of the trial court.

We have seriously considered this Appeal together with the Grounds of Appeal, the Heads of Argument filed on behalf of the respective parties and the authorities cited. We have also considered the judgment by the learned Judge in the court below. To avoid repetitions, Grounds 1 and 3 will be considered together as they are inter-related.

Ground 1 criticises the learned trial Judge for disregarding what the Appellant terms 'undisputed' evidence that the Appellant had paid the sum of K168,555,919.85 as final payment to all sub-contractors including the 1st Respondent and for finding that the Appellant was liable to pay the sum of K277,552,174.45 to the 1st Respondent whilst Ground 3 challenges the learned Judge for disregarding the evidence on the effect and import of the final account.

Before we proceed to determine the issues raised under Grounds 1 and 3 of this Appeal, it is imperative that we restate the salient facts of this case which must be borne in mind together with the contractual relationship between the parties. These are that the 2nd Respondent was the main contractor of the Appellant over the rehabilitation of the Appellant's office in Ndola whilst the 1st Respondent was a sub-contractor of the 2nd Respondent. The works which the 1st Respondent was engaged to carry out involved the supply and installation of air conditioning and ventilation system at the Appellant's said office. The agreed contract price was K229,782, 982 and therefore, this was a lump sum contract.

We must also state that although there was an earlier contract between the Appellant and the 1st Respondent for the said works, it later became necessary for the 1st Respondent to enter into a sub-contract

with the 2nd Respondent who was the main contractor of the Appellant over the same works. So the Appellant also had a direct contract with the 1st Respondent over the same works which the Appellant awarded to the 1st Respondent after it successfully bid to do the works.

As regards the relationship between the parties in this matter, it is common practice in the building industry for the owner of the project, who is commonly known as the employer, to usually engage or have his own technical team of engineers and/or architects to design and oversee the implementation of the project. The law recognises and allows this. The learned authors of **Keating on Building Contracts, 5th edition, at page 2** have described the technical team of the engineers and architects by stating thus:-

> **"In an engineering contract the person who carries out the duties and occupies a position similar to that of an architect in a building contract is normally termed the engineer."**
>
> **"The term is ordinarily used to describe the person who is engaged by the employer to carry out the duties of an architect ...In the broadest sense his duties are to prepare plans and specifications and supervise the execution of the works on behalf of employer so that they may be completed in accordance with the contract. He is therefore the agent of the employer and owes him a contractual duty of professional care."**

In the current case, the Appellant had the project consulting engineers to design and supervise the works.

The evidence on record which the trial Judge accepted is that although the 1st Respondent began performing the works, it incurred problems as the critical components of the system, namely, the return air ducting was missing from the original design and specifications provided by the Appellant's consulting engineers. This required a redesign of the system and rectification of the drawings. The 1st Respondent claimed that the cost of the return air ducting was also not included in the bill of quantities and that despite several attempts, the Appellant's consulting engineers did not timely prepare the variation to the design thereby compelling the 1st Respondent to obtain and install at its own cost, the return air ducting at an additional cost of K215,642,840. This brought the total cost of the subcontracted works to K479,634,681.60 and that the 1st Respondent only received the sum of K167,873,647.55 which left the balance of K311,771,034 outstanding.

Further, that although the project was supposed to be completed within the agreed period of 15 weeks, it was only completed after 82 weeks because of the Appellant's consulting engineers' failure and/or delay in approving the variation and the failure to provide changes to the design so that the works could be fit for the intended purpose.

The 2nd Respondent's position was that the works which the 1st Respondent did were not carried out as per the conditions of the

contract. And that although the 2nd Respondent was the main contractor, it was not informed by the 1st Respondent about the missing return air ducting on the original drawings and specifications provided by the Appellant's project consulting engineers and that the cost of the variation was not included on the bill of quantities prepared by the Appellant's project consulting engineers. The 2nd Respondent also claimed that it was unaware of the need for extension of the time for completion of the works. Therefore, since the 1st Respondent designed and installed the air ducting without the consent of the project consulting engineers through the main contractor (the 2nd Respondent) the 2nd Respondent could not be held liable for the cost of the extra works which were not within the terms of the contract.

On the other hand, the Appellant claimed that the delay in completion of the works was because the 1st Respondent was absent from site. And that it was a term of the contract that the Appellant would deduct liquidated damages for delay in the completion of the works. Further, that after completion of the project, the 2nd Respondent submitted a final claim which included the amounts owing to all the sub-contractors including the 1st Respondent and that this also included the claims for variation occasioned by the defect in the design in the sum of K215,642,840 and that the Appellant paid the sum of K168,555,991 to

the 2nd Respondent which left only the sum of K92,641,714.74 outstanding to the 1st Respondent.

From the above contentions, the major question that arises is whether the payment of the sum of K168,555,919.85 to the 2nd Respondent by the Appellant included payment for the extra works that the 1st Respondent did and which the Appellant accepted? In other words, was the amount claimed by the 1st Respondent included in the final account and/or payment as argued by the Appellant?

The gist of Ms. Lungu's arguments in support of Grounds 1 and 3 is thatit was a misdirection for the court below to ignore the evidence that the Appellant paid the sum of K168,555,919.85 to the 2nd Respondent as final payment to all the sub-contractors. And that the court below erred by apportioning the entire liability on the Appellant despite the 2nd Respondent's admission in the pleadings and during trial that it received the sum of K92,641,714.74 on behalf of the 1st Respondent which the 2nd Respondent did not pay to the 1st Respondent because of the counterclaim it had made against the 1st Respondent. Therefore, that since the court below dismissed the 2nd Respondent's counterclaim, the court should have found the 2nd Respondent liable to pay the amount that it received on behalf of the 1st Respondent but withheld it.

Counsel also argued that since the 2nd Respondent as the main contractor prepared the final claim for all the sub-contractors on the project, the signing of the final account by the 2nd Respondent after it was reviewed by the Appellant's project consultant signified acceptance of the amounts due to each of the sub-contractors including the 1st Respondent. As such, once the Appellant settled the final payment certificate, the contract stood discharged and the Appellant had no further obligations to the 1st Respondent.

The kernel of Mr. Madaika's arguments in response to Grounds 1 and 3 on behalf of the 1st Respondent was that the court below was on firm ground when it found the Appellant liable in the sum awarded to the 1st Respondent. According to Counsel, this was so on ground that the sum of K168,555,919.85 which the Appellant paid to the 2nd Respondent for disbursement to all sub-contractors on the project fell short of the 1st Respondent's final claim for the additional works done. Hence, the Appellant's responsibility to pay the full contract price, including the amounts for the extra works remained, as the 2nd Respondent was not the employer in the strict sense but only a contractor engaged by the Appellant.

Further, that the 2nd Respondent was responsible for preparing the final account of all claims from various contractors on the project and

that the evidence on record shows that the sum claimed by the 1st Respondent for additional works was not included on the final account presented to the Appellant. And that the failures of the 2nd Respondent cannot be a defence or shield for the Appellant to escape its liability to the 1st Respondent under the contract.

In the same vein, the core of Ms. Chungu's arguments in response to Grounds 1 and 3 on behalf of the 2nd Respondent was that the Appellant has not adequately demonstrated why this Court should fault the findings of fact by the trial court which led the court below to apportion the entire liability on the Appellant as the evidence on record shows that all the money that the 2nd Respondent received from the Appellant was paid to the 1st Respondent. And that only amounts relating to discounted claims and liquidated damages charged were deducted. And that the sum of K168,555,919.85 that was paid to the 1st Respondent through the 2nd Respondent did not include payment for the additional works as the 2nd Respondent was not aware of the need for variation of the works or of the additional works done at the time it prepared and submitted the final account. And that since the Appellant admitted receiving the claim for K215,642,840.00 from the Appellant for additional works and yet went ahead and certified the cheque of K167,873,647.53 to the 1st Respondent based on the final account which

excluded the cost of the additional works, the contention that the 2nd Respondent must share liability equally with the Appellant on account of the 2nd Respondent's unsuccessful counter-claim cannot stand as the Appellant is estopped from hiding behind the errors on the final account to meet its obligations towards the 1st Respondent.

We have considered the above arguments. Before we proceed to determine the issues raised above, it is imperative to define what extra or additional work is and when it is payable. The learned authors of **Keating on Building Contracts,5th edition, at page 81**, have stated as follows on extra works:-

> **"There is no generally accepted definition of extra work, but in a lump sum contract, it may be defined as work not expressly or impliedly included in the work for which the lump sum is payable. If work is included in the original contract sum the contractor must carry it out and cannot recover extra payment for it, although he may not have thought at the time of entering into the contract that it would be necessary for the completion of the contract."**

As regards when a contractor may recover payment for varied work, the same authors at page 80-81, have stated that:-

> **"A contractor frequently carries out, or is asked to carry out, work for which he considers he is entitled to payment in excess of the original contract sum. To recover such payment he must be prepared to prove:**
>
> **(1) that it is extra work not included in the work for which the contract sum is payable;**
>
> **(2) that there is a promise express or implied to pay for the work;**
>
> **(3) that any agent who ordered the work was authorised to do so; and**

**(4) that any condition precedent to payment imposed by the contract has been fulfilled.**

**If he cannot prove these requirements, or those of them which are in dispute and are relevant, he may be able to recover payment if he can rely upon an architect's final and conclusive certificate or an arbitrator's award in his favour."**

Applying the above principles to the current case, we find that it is not in dispute that the Appellant paid the sum of K168,555,919.82 to the 2nd Respondent for disbursement to all sub-contractors on the project including the 1st Respondent. This sum was based on the final account which the 2nd Respondent prepared. The evidence which the learned Judge accepted shows that at the time the 2nd Respondent submitted the claim for works done by the 1stRespondent, this did not include the payment for the extra work which the 1st Respondent did. The learned Judge also accepted the 2nd Respondent's claim that it was not aware that the 1st Respondent had done extra works as the defect in the design and specifications and the resultant additional works done to rectify the defect in the design and specifications was not brought to its attention. The learned Judge also accepted the evidence that the approval of the variation to the works by the Appellant's project consulting engineers came very late. This was after completion of the works. And that this was despite the fact that the 1st Respondent had brought the defect in the design and specifications and the need for variation of the works to the attention of the Appellant's project consulting engineers much earlier

as evidenced by the letter on record from the 1st Respondent to the Appellant's project consulting engineers. The relevant portions of the letter read as follows:-

> **"February 12, 2007**
>
> **NORTH ATLANTIC**
> **CONSULTING ENGINEERS**
> **LUSAKA.** **BY HAND**
>
> **Dear Sirs**
>
> **Sub : CURRENCY OFFICE & BANKING HALL-Project at Regional Offices, Bank of Zambia, Ndola**
>
> **We refer to your email and advice that we can install the ducting as per your request at your risk and we will not be held liable, as the units will not be effective due to flaws in design and drawings...**
>
> **If you persist to say that your drawing is correct as it is ...**
>
> **Yours faithfully**
> **VORTEX REFRIGERATION CO LTD.**
> **(Signed)**
>
> **cc: Asst. Director, Procurement & Maintenance, BOZ, Lusaka."**

As rightly observed by the learned Judge, the above letter shows that the Appellant's project consulting engineers were aware of the flaws in the design and specifications before the 15 weeks contract period expired. It is also clear from the tone of the letter that the issue of the flaws in the design and specifications had previously been discussed between the 1st Respondent and the Appellant's project consulting engineers before 12th February, 2007 when the letter was written.

In view of the above, we are not persuaded by Counsel for the Appellant's argument that the learned Judge disregarded relevant evidence. We are equally not satisfied that the sum of K168,555,919.82 paid by the Appellant to the 2nd Respondent as final payment to all the sub-contractors including the 1st Respondent, was inclusive of the payment for the additional works done by the 1st Respondent. The defect in the design and specifications caused the necessity for variation of the works which the 1st Respondent had to do and did at an additional cost so as to ensure that the subcontracted works were fit for the intended purpose. In fact, the Appellant accepted the works done. Therefore, prima facie, the 1st Respondent was entitled to payment for the extra work done.

Further, the learned trial Judge attributed the defects in the design and specifications and the delay in authorising the additional works to the Appellant's own project consulting engineers who only approved the variation after the final certification of the works. This is because the consulting engineers performed the function of making the design and specifications and were responsible for supervision of the subcontracted works. Therefore, the project consulting engineers owed a duty of care to the employer (the Appellant) and a duty to give timely approval of the variation. The delay in giving approval resulted in completion of the

subcontracted works to take 82 weeks instead of the originally agreed period of 15 weeks. Therefore, the learned trial Judge cannot be faulted for finding that the Appellant could not levy liquidated damages as the evidence on record clearly shows that the delay in completion of the works was not caused by the 1st Respondent but by the Appellant's project consulting engineers.

As regards the argument that the learned Judge disregarded the evidence on the effect and import of the final account, it is our firm view that this assertion is not supported by the evidence on record. As observed above, the evidence on record shows that the cost of the additional works that the 1st Respondent did, as a result of the variation to the subcontracted works, was caused by the defect in the design and specifications by the Appellant's own project consultants. No evidence was adduced to show that the 2nd Respondent included the cost of the additional works in the final account. On the other hand, and as found by the learned trial Judge, it is clear that the 1st Respondent did not discuss the issue of the defect in the design and specifications and the need for the variation of the works with the 2nd Respondent as this was done with the Appellant and its project consulting engineers. Therefore, there is no basis upon which we can fault the learned trial Judge for coming to the conclusion that the 2nd Respondent was not aware of the

need for variation that resulted into the additional works for which the 1st Respondent was entitled to payment. We too fail to see how the 2nd Respondent could be held liable or how liability could have been apportioned between the Appellant and the 2nd Respondent when the latter was not aware of the need for the extra works that were done when this was not communicated to the 2nd Respondent by either the sub-contractor or the employer or the employer's project consulting engineers.

Therefore, since the final account did not include the cost of the varied works which the 1st Respondent performed at its own cost so as to ensure that the subcontracted work was fit for the intended purpose, the learned trial Judge was on firm ground when he found that the 1st Respondent was entitled to full payment of the contract price plus the sum claimed as the cost of the additional works. The submission by Counsel for the Appellant, forceful as it was, that the learned trial Judge disregarded the relevant evidence and the import of the final account, has no basis.

Further, both Grounds 1 and 3 attack findings of fact made by the learned trial Judge. In **Phillip Mhango vs. Dorothy Ngulube and Others**[4],we made it clear and guided that:-

> **"The court will not reverse findings of fact made by a trial judge, unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or**

**that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."**

In the current case, the Appellant has not shown that the findings of fact made by the trial Judge that the 1st Respondent was entitled to full payment of the contract price and the cost of the additional works done on ground that the delay in the completion of the works was caused by the Appellant's consulting engineers was either perverse or made in the absence of any relevant evidence or that it was a finding which was made on a misapprehension of the facts. As observed above, approval of the variation was only given by the Appellant's own consulting engineers after the certificate of commissioning and hand over of the project was done. As stated above, the final account did not include the cost of the additional works done. The findings of fact by the learned Judge were supported by the evidence on record.

As regards the Appellant's argument that under the nominated sub-contracting system which governed the relationship between the parties, the 2nd Respondent as the main contractor was responsible for the sub-contractor and for receiving payment from the Appellant and disbursing the same to the sub-contractor (the 1st Respondent), our brief response is that although there was a sub-contract between the 1st and 2nd Respondents, the evidence on record shows that the 1st Respondent was dealing directly with the Appellant and its project consulting

engineers as regards the defect in the design and specifications and the need to rectify the defects. This is what resulted into the need for additional works so that the works done are/ were fit for the intended purpose. The 1st Respondent cannot be faulted for communicating the defect in the design and specifications directly to the Appellant and its project consulting engineers because the Appellant and the 1st Respondent had a direct contract over the works which the 1st Respondent was awarded after its bid was successful. This contract was not nullified despite the 1st and 2nd Respondent entering into another sub-contract over the same works. The Appellant and its project consulting engineers did not object to the 1st Respondent directly communicating the defect in the design and specifications and the need for variation of the works. The Appellant cannot thus escape liability to the 1st Respondent for additional works done which the Appellant acknowledged and accepted by simply hiding behind the claim that the main contractor was responsible for receiving payments and disbursing them to all the sub-contractors of the project more so here where the main contractor was not aware of the need for variation.

For the reasons stated above, we find no merit in both Grounds 1 and 3 of this Appeal. We dismiss them. We uphold the judgment by the court below on this aspect.

As regards the issue of the sum of K92,641,714.74 that was to be paid by the Appellant to the 1st Respondent through the 2nd Respondent but not disbursed by the latter, we shall deal with this issue in detail under Ground 2 which deals with the issue whether or not liquidated damages were payable.

Ground 2 attacks the trial Judge for finding that the Appellant was not entitled to charge liquidated damages for the delay in the completion of the project.

The gist of Ms. Lungu's arguments in support of Ground 2 was that since the contract between the Appellant and the 1st Respondent provided for the charging of liquidated damages in the event of delay by the 1st Respondent in completing the works; and since completion of the works by the 1st Respondent took 82 weeks instead of the agreed period of 15 weeks plus the additional 6 weeks which was given by the Appellant to the1st Respondent, the trial court ought not to have found that the Appellant was not entitled to charge liquidated damages. Counsel argued that the delay was caused by the 1st Respondent's absence from the site for 13 weeks.

The kernel of Mr. Madaika's arguments in response to the above submission was that the court below was on firm ground when it held that the Appellant was not entitled to charge liquidated damages for the delay in the completion of the project as the term for levying of liquidated

damages was only valid if the contract was performed in 15 weeks as agreed. That in this case, the date of completion ceased to apply when there was a variation of the project design.

Ms. Chungu did not advance any arguments in response to Ground 2.

We have considered the above arguments. In determining this Ground, it is relevant to first define what liquidated damages are. **Oxford Dictionary of Law, 5th edition**, defines liquidated damages as:-

> **"a sum fixed in advance by the parties to the contract as the amount to be paid in the event of breach. They are recoverable provided that the sum fixed was a fair pre-estimate of the likely consequences of a breach, but not if they were imposed as a penalty."**

From the above, it is clear that liquidated damages are only payable where there is breach of a term of the contract agreed by the parties and provided for in their contract. In the current case and in view of our finding above that the 1st Respondent was not to blame for the delay in the completion of the works, our conclusion is that the Appellant was not entitled to deduct or levy liquidated damages from the 1st Respondent's account.

As already stated, the Appellant's consulting engineers were aware of the need to vary the design and specifications of the subcontracted works to be performed by the 1st Respondent but they chose not to act until on 27th October, 2008 when they gave the

authorisation for the variation of the drawings and specifications. This was a month after the certificate of completion and hand-over of the project was done. Therefore, although liquidated damages were provided for under the 1st Respondent's subcontract with the Appellant, these were not deductible from the 1st Respondent's outstanding payments because as observed above, the delay in completion of the project was not caused by the 1st Respondent but the Appellant's own project consulting engineers. The Appellant cannot benefit from its own default or the default of its own agents by deducting liquidated damages for the delay caused by its agent who delayed in giving authorisation of the additional works resulting from the defect in the drawings and specifications.

Counsel for the Appellant also argued that it was erroneous for the court below to find that time for completion was not agreed by the parties after it became apparent that there was need to vary the design. We, however, do not agree with this argument because even assuming that a 6 weeks extension period was given as argued by Counsel for the Appellant, there is no basis upon which it can be concluded that the subcontracted works could have been concluded within the extended period. This is so because for as long as approval for the variation had not been given by the Appellant and its project consulting engineers, the period for completion remained open ended. Therefore, the learned trial

Judge was on firm ground when he held that the agreed completion period became ineffective because of the need for approval of the variation which came long after the alleged 6 weeks extended period had expired.

Having found that liquidated damages were not deductible against the 1st Respondent, there is however evidence on record by the 2nd Respondent's witness, DW1, under cross-examination by Counsel for the Appellant and Counsel for the 1st Respondent which clearly shows that the 2nd Respondent withheld the sum of K92,641,714.74 as liquidated damages due to the Appellant against the 1st Respondent. The relevant portions of the evidence are as follows:-

"...

**Ms. Banda:** **Has this amount been paid to the plaintiff, the 92 million which is reflecting as being due to the plaintiff on the certificate? Did you receive it from the second defendant?**

**A. We received.**

**COURT:** **Yes.**

**Ms Banda:** **Have you paid the plaintiff what is due to him?**

**A:** **According to the certificate we prepared by the second defendant, he is owing us.**

**Ms Banda:** **The question is simple, have you paid this amount?**

**A. Minus certificate, there is nothing owing.**

**COURT:** **would you please just answer the question, did you pay that amount to the plaintiff?**

**A. No...**

| | |
|---|---|
| Q. | **You were referred to page 19 of the first Defendant's bundle of documents. I am particularly interested in theK92,641,714.74. The amount which is reflected as due to Vortex refrigeration. Why didn't you pay this amount to the plaintiff?** |
| A. | **There is some expense, liquidated damage from that Vortex payment according to the article of the agreement to be signed particularly page 70 item 6...** |
| Q. | **So, is that, are you saying that was the reason for you not paying that 92 million plus?...** |
| A. | **Yes. The payment for signing the contract for15 weeks but they paid 82 weeks."** |

Having stated above that liquidated damages were not deductible against the 1st Respondent, and since the sum of K92,641,714.74 was withheld by the 2nd Respondent from the 1st Respondent's entitlement as liquidated damages, our firm view is that it would be unconscionable for the 2nd Respondent to keep this sum. It also amounts to unjust enrichment if the 2nd Respondent was allowed to keep that money when the counterclaim which was the basis for withholding the money was not successful. We, therefore, order that the 2nd Respondent refunds the sum of K92,641,714.74 to the Appellant together with interest at the short term bank deposit rate from the date of the counterclaim to the date of the judgment of the court below, thereafter at the current bank lending rate as determined by the Bank of Zambia until final payment.

The sum total is that this Appeal has failed except to the extent reflected above. The 1st and 2nd Respondents shall have their costs to be taxed in default of agreement.

H. Chibomba
**SUPREME COURT JUDGE**

M. Malila
**SUPREME COURT JUDGE**

R. M. C. Kaoma
**SUPREME COURT JUDGE**