

IT

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

2019/HP/0588



BETWEEN:

BWAFWANO GENERAL CONTRACTORS LIMITED

PLAINTIFF

AND

SINOHYDRO ZAMBIA LIMITED

DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 26TH MARCH, 2024 - IN CHAMBERS**

For the Plaintiff : Mr. J. Chimakanta & Mr. M. Chisunka – Messrs. Cholt
Legal Practitioners
For the Defendant : Mr. M. Chibwe – Messrs. Ilunga & Company

JUDGMENT

CASES REFERRED TO:

1. Manela Development Limited V MKP Builders Zambia Limited (1.1.1)
2. Demka Engineering Services Limited V BCB Project Consultants Limited (1.1.2)
3. Transaction Payment Solutions Zambia Limited V Brunelli Construction Company Zambia Limited (1.1.3.8)
4. Zambia Radiological and Imaging Company Limited and Others V Development Bank of Zambia (1.1.4)
5. Konkola Copper Mines PLC V Mitchell Drilling International Limited (Selected Judgment No. 22 of 2015 ZMSC 192)
6. Mitchell Drilling Zambia Limited (2015) 2 ZLR Page 203
7. National Drug Company Limited and Zambia Privatization Agency V Mary Katongo Appeal No. 79/2001
8. Zesco Limited V Edward Angel Kahale Appeal No. 37 of 2020
9. Henry Nsama and Others V Telecommunications Company Limited (SCZ 8 296 of 2011) [2013] ZMSC 29
10. Trollop and Coils Limited V North Western Metropolitan Regional Hospital Board 1973 2 ALL ER 260
11. Hyundai Heavy Industries Company Limited V Papadopoulos (1980).
12. Gator Shipping Corporation V Tran-Asiatic Oil Limited S/A (1978).

LEGISLATION AND OTHER WORKS REFERRED TO:

1. Contract Law Test, Cases and Materials
2. Chitty on Contract 29th Edition, Volume 2
3. Law of Contract 13th Edition Butterworks (1996)

This matter came by way of writ of summons and statement of claim filed on the 12th April, 2019. The record shows that the Plaintiff on the 25th August, 2021 filed an amended writ of summons with leave as well as a statement of claim.

The Plaintiff seeks the following:

1. *Damages for breach of contract entered into between Plaintiff and Defendant on the 1st day of October, 2018 in the sum of ZMW4,000,000.00.*
2. *Payment of the sum of ZMW281,836.79 being monies due for maintaining existing roads and unblocking culverts.*
3. *Payment of the sum of ZMW492,075.00 being the monies due to the cleaning and shaping of the road deviation.*
4. *Interest at the commercial Bank lending rate*
5. *Costs*
6. *Further or any other relief the court may deem fit.*

In the statement of claim the Plaintiff stated that a contract was entered into between the parties. That the same was as a result of the contract between the Road Development Agency and the Defendant. That the Plaintiff was to perform all duties for the Road Development Agency under contract identification RDA/CE/024/014.

That the works included but not limited to maintaining and grading of an existing road for a stretch of 7.5 kilometers, unblocking

existing culverts, clearing dangers for safe traffic such as uprooting and unblocking road side drainages.

The Plaintiff averred that after finishing the first works, the Plaintiff notified the Defendant who inspected the works through its site engineer and a report was submitted. This resulted in the Plaintiff issuing an invoice in the sum of K281,836.79 being the sum due for the initial works.

The Plaintiff averred that the Defendant issued further instructions for the clearing and shaping of a road deviation which work was done and inspected. That the Plaintiff issued another invoice for an amount of K492,075.00. That the money invoiced for has not been paid.

The Plaintiff further averred that the value of the contract that the Defendant terminated was above ZMW4,000,000.00.

The Defendant filed a memorandum of appearance, defence and counter claim on the 7th May, 2019. On the 30th March, 2022 the Defendant filed an amended defence and counter claim. The Defendant agreed that on or about the 1st October, 2018 the Plaintiff entered into a written agreement with the Defendant where it was agreed that the Plaintiff was to carry out some works for the Defendant.

That the Defendant on 28th June, 2017 entered into a contract with the Road Development Agency (RDA) under contract number RDA/CE/024/014 relating to the upgrading of 95 kilometer road between Nchelenge and Chiengi together with 10 kilometers of road in Nchelenge in Luapula Province which contract the Plaintiff is and was at material times not a party to.

That the Defendant and Plaintiff signed a sub-contract agreement wherein the scope of work would be specified in the Bill of Quantities and availed to the Plaintiff by the Defendant from time to time depending on the Plaintiff's capacity and experience.

That the scope of work specified in the Bill of quantities and availed to the Plaintiff by the Defendant pursuant to sub-contract agreement amounted to ZMW1,321,684.59 which works in any event the Plaintiff never fully executed.

That the work done by the Plaintiff was unsatisfactory and the Plaintiff was on more than one occasion instructed to improve the same by the SATRA Infrastructure Management Service Pvt Limited (the Engineer) a consultant engaged by Road Development Agency to supervise and approve the overall works as well as the Defendant.

The Defendant averred that upon inspection of the works which related to maintenance of existing roads the Defendant and the Engineer certified and/or approved the works amounting to ZMW69,922.95 inclusive of Vat. Following pleas by the Plaintiff the

amount was adjusted to ZMW185,206.63 inclusive VAT. An interim payment certification of subcontractor (IPC) was signed by the Engineer and the Defendant to that effect.

It is averred that the Plaintiff refused to sign the said IPC. On 15th May, 2020 a consent judgment was entered wherein, inter alia, the said sum of ZMW185,206.63 due to the Plaintiff was include in an aggregated IPC No. 7 submitted to RDA for payment to the Defendant and all sub-contractors for approved works.

It was averred that the work quantities in the total sub-contract were provisional and estimated ones, with the final paid quantities to be based on actual completed quantities. That overtime the project scope had been varied by RDA from construction and upgrading of the roads up to bituminous standard to grave 1 standard. A fully signed addendum to the contract between RDA and the Defendant reducing the scope of the project was submitted for implementation on 7th December, 2021.

In the Defendant's counter claim it was stated that the Plaintiff has failed and/or neglected to expediate completion of the works to the satisfaction of the Defendant.

That the Plaintiff is well aware that it had contracted to pay the Defendant sums of money in form of liquidated damages of ZMW11,250.00 per day (with a maximum of 5% of sub-contract-

amount). That by reason of the Plaintiff's delay in execution of the works the defendant has suffered loss and damage.

In the circumstances the defendant claims as against the Plaintiff:

- i. An order for payment of liquidated damages in the sum of ZMW225,000.00 being a 5% of the subcontract amount of ZMW4,500,000.00.*
- ii. Interest*
- iii. Any other relief as the circumstances warrant as deemed by the court.*
- iv. Costs of and incidental to these proceedings.*

The Plaintiff was heard on the 16th August, 2023. It was his testimony that he was a Director of Bwafwano General Contractors Limited. That his company was in the business of road construction. That the Defendant company was the main contractor for Nchelenge, Chienge Luchinda road in 2018.

That the Plaintiff company submitted a company profile to the defendant company the result was that the two entered into a contract. The Plaintiff referred the court to the Subcontract Agreement dated the 1st October, 2018 between Sinodydro Zambia Limited NC106 road project (hereinafter called the contractor) and Bwafwano General Contractor (herein after called the subcontractor).

The subcontractor's scope of work was to be provided in the Bill of Quantities for the main contract and was to be assigned to the subcontractor by the contractor based on the subcontractor's capacity and experience.

As for the rate to be paid to the subcontractor, the contract provided that the contractor shall pay the subcontract for the satisfactory performance of the work in the sum of ZMW4,500,000.00 (four million, five hundred thousand kwacha only). The unit price schedule shall be provided to the subcontractor based on the bill of quantities for the main contract. That once the Subcontract Agreement has been signed by both parties the price schedule shall be construed the same as part of this agreement.

That after receiving the Subcontract Agreement from the contractor, the sub contractor was asked to submit 10% of the contractual price of ZMW4,500,000.00 as performance bond and further submit pictures of owned and hired equipment and also pictures of workers and the camp. That this was complied with. The court was referred to pages 7-8 of the Plaintiff's bundle of documents for the said performance bond.

It was his Testimony that on the 05th November, 2018 the subcontractor hired equipment from Zambia National Service and actually made payment for the same. The court was referred to pages 9-13 of the Plaintiff's bundle of documents. The court notes that the exhibit at page 9 is a quotation for the hire of mech horse,

a low bed, another low bed (empty) and a motor grader at the price of K17,241.00. The exhibit at page 10 is a quotation from Zambia National Service dated the 6th November, 2018 for the hire of a motor grader at K5,834.4. The exhibit at page 11 is an official general receipt No. 98117593 dated the 06th November, 2018. An amount of K23,074.40 was received from Bwafwano General being payment for hire of lowbed, motor grader as per attached contract. At pages 12 and 13 exhibited are documents for the application for hire of equipment. The name of the Applicant is Bwafwano General Contractors for the hire of a mech horse, a lowbed, a lowbed empty and a motor grader for the total sum of K17,240.00. The second quotation was for the hire of equipment namely a motor grader at the price of K5,834.4. Both documents contained provision for the agreement procedure.

The agreement was for the upgrading a 7.5km stretch of which in order to do the works the subcontractor hired a bulldozer from Mano N a company from Kitwe, a grader and lowbed from Zambia National Service Mansa beside their own equipment and commenced the works. The court was referred to pages 12-13 of the Plaintiff's bundle of documents an application to the Zambia National Service for equipment. That to achieve what was expected of the subcontractor the company borrowed a sum of ZMW150,000.00 from Fred Kalaba. A sum of ZMW202,500.00 inclusive of 5% monthly interest remains unpaid to date.

That the subcontractor started maintenance works on the existing road on the 16th day of October, 2018 and completed the works on the 15th November, 2018. That the subcontractor issued a tax invoice to the Defendant amounting to ZMW281,836.79 on the 6th December, 2018. The amount sought was ZMW281,836.79. The court was referred to page 17 of the Plaintiff's' bundle for the tax invoice.

That on the 30th November, 2018 the subcontractor wrote to the contract's technical team stipulating the execution plan for quality and site management plan for the Nchelenge-Chiengi road. The court was referred to page 15 of the Plaintiff's bundle of documents. The scope of works that the subcontractor stated may satisfy the contractor and consultants engineer to be included.

- Stage 1 Maintaining and grading of existing road from 00+00-7.5 kilometers road.*
- stage 2 Unblock existing culverts and protect dangerous areas for safety traffics*
- stage 3 Accommodate diversion road with recommended materials by the contractor engineer*
- stage 4 Major reshapping of 14 meters wide road bedding with gravel compacted by roller with compacting machine recommended by the contractor and flagmen to control traffic.*
- Stage 5 Clearing, grubbing completing all scope of works described to upgrade the road between Nchelenge and Chienge*

(D76/D77.95km) scope works issued to the subcontractor proposed by the contractor Sinohydro Zambia Limited. In the letter the subcontract stated that as of 30th November, 2018 they were at stage 3.

That on the 06th December, 2018 and 03rd January, 2019 respectively, the subcontractor wrote letters claiming for payment of a sum of ZMW281,836.79 from the contractor. Evidence of this is to be found at pages 18 and 19 of the Plaintiff's bundle of documents.

That on the 6th January, 2019 and 1st February, 2019 the contractor prepared two interim payment certifications (hereinafter referred to as an IPC) for the benefit of the subcontractor in the sums of ZMW55,383,60, ZMW185,206.49, ZMW162,000.00 and ZMW192,000.00. The witness referred to pages 21 and 23 of the Plaintiff's bundle as proof. That the contractor prepared interim payment certifications (IPC) without following the scope of works done by the subcontractor. That despite the fact that the subcontractor rejected the interim payment the contractor went ahead to transfer a sum of ZMW171,000.00 to the subcontractors bank account. That this was done on the 23rd September, 2019.

That after completing the works, the subcontractor requested for an inspection. A consultant and a site Engineer for the contractor came and inspected the works and issued a report stating that the works were within the required standard. The court was referred to

page 23 for the IPC bearing the contract amount of ZMW4,500,000.00.

That the sub contractor submitted an invoice according to the scope of works amounting to ZMW281,836.76. However, the Defendant decided to prepare an IPC for ZMW55,383.16, the court was referred to page 21 of the Plaintiff's bundle. Further that on 5th March, 2019 the Plaintiff issued a tax invoice to the Defendant amounting to ZMW573,598.68 and to date that money has not been paid. The court was referred to page 16 of the Plaintiff's bundle of document.

The witness denied being away from the site as stated in a letter from the contractor. That what happened was that the sub contractor reduced the number of workers. The court was referred to page 26-27 of the Plaintiff's bundle a letter in response to the warning letter from the site Engineer.

Further that on the 20th March, 2019 seven days after receiving the warning letter, the sub contractor received a letter of termination of the contract. The witness informed the court that the reasons and grounds given were not genuine. The court was referred to page 28 of the Plaintiff's bundle of documents for the termination notice of the contract. The sub contractor responded to the letter of termination in a letter at page 29 of the Plaintiff's bundle of documents.

When cross examined the witness informed the court that the contract in the Plaintiff's bundle governed the relationship between the Plaintiff and the Defendant. The witness identified the scope of work according to the contract. The witness was referred to clause 4 of the contract on the rate in particular clause 4 line 2 stating that the rate was provisional and estimated.

The witness agreed that according to clause 4 the final payment to be paid was for work that shall follow the actual work completed and the quality of work. The witness further agreed that the quality of the work done was to be signed off. With regard to the work period the witness agreed that according to page 2 clause 6 provides that:

“Work period shall be after fourteen (14) days from signing the subcontract agreement until the completion date of the main contract. The subcontractor shall start and complete its work under this Agreement in accordance with such reasonable schedules set forth by the main contractor. The subcontractor shall reimburse the contractor for any costs accumulated or penalties levied against the contractor due to negligence or non performance of the subcontractor and such costs or penalties may be deducted from the amount due to the sub contractor under this Agreement. If delayed, the sub contractor shall suffer from pecuniary penalty as liquidated damages of ZMW11,250/day, this penalty shall be deducted from amount

payable to subcontractor. The maximum liquidated damages is 5% of subcontract amount”.

That paragraph 7.2 specifically dealt with obligations for the subcontractor. The witness acknowledged that there was the provision for mobilization. That according to clause 7.2.3 mobilization was to take place fourteen (14) days after the signing of the contract.

When referred to page six of the Plaintiff's bundle (the execution page) the witness agreed that as Chairman of the sub contractor he signed the document on the 2nd October, 2018.

When referred to page 9 of the same bundle he identified a quotation from Zambia National Service for the hiring of equipment. He informed the court that the quotation he was shown was dated the 5th November, 2018.

The witness was referred to the quotation at page 10 of the same bundle. He agreed that it was dated the 6th November, 2018. As for the document at page 11 he identified that document as a receipt issued by Zambia National Service for the equipment quoted on the quotation of the 06th November, 2018. The same was dated the 6th November, 2018.

The witness was referred to clause 14 and specifically clause 14:1 regarding payments. The clause provided as follows:

“Subcontractor shall adopt monthly statement format provided by contractor to make statement request; contract will collect and submit them from Engineers’ review within 10 working days, after client effecting the payment contractor will transact subcontractor’s statement and effect the payment.”

Lastly the witness was referred to clause 18.4 of the subcontractor agreement. The heading of clause 18 is contract termination. Clause 18:4 which the witness was referred to provides as follows:

“The subcontractor could not submit the human resource, equipment, plant, work program and work method to the contractor within required time or the subcontractor could not mobilize the planned human resource, equipment, plants to site within required time of Agreement”.

PW2 was **Humphrey Kabwe** an employee and supervisor of the Plaintiff’s company. It was his testimony that he was a supervisor during the subsistence of the contract between the Plaintiff and defendant company. That in October, 2018 work began with the maintenance of the existing road. That the site Engineer for the Defendant company was Mr. Miti. Mr. Miti’s role was to guide the Plaintiff’s company on the works that should be carried out.

That the maintenance works were undertaken in October, 2018 and completed in November, 2018. That the works were inspected by a

Mr. Katai and the site engineer Mr. Miti. That Mr. Miti certified the works to be of the required standard.

Other work carried out was the construction of a diversion road. That the role of the site Engineer in these works was to show them where the diversion was supposed to pass. Once these works were completed the Plaintiff company requested that an inspection be carried out. This request was made on the 27th March, 2019. That the Consultant Mr. Katai and the site Engineer Mr. Miti came to the site for inspection on the 28th March, 2019.

That after the inspection was conducted it was discovered that a section of 105 meters was less than 7.5m in width. That his employee was asked to redo that section and it was done.

That another request for re-inspection was sought. The re-inspection was done the same day. It was said that the works were up to the required standard. They were promised that the preparation of an interim payment for the works done would be implemented.

The witness denied abandoning the site until the works were done. That the works were done on the 2nd April, 2019.

When cross examined the witness was referred to page 21 of the Plaintiff's bundle of documents. The witness identified the document as an interim payment certification (IPC) of the sub

contractor. That the same certified work done and what was to be paid. He denied that the document was meant to be prepared by Mpundu Kabwe a person they worked with. However, that the document was prepared in conjunction with someone that the witness worked with and signed by the contractor. The witness confirmed that for an interim payment for works the company needed to show or submit an approved interim payment certificate.

That outside the payment of K55,383.16 reflected on the interim payment certification of sub contractor there was no other payment that was made by the contractor.

The witness informed the court that he understood the terms of the sub contract. When referred to clause 14 of the contract at page 4 of the Plaintiff's bundle of documents Clause 14.1 was read out which clause provides that:

"The paid work quantities by contractor to sub contractor shall be these quantities approved by Engineers, signed and confirmed by contractor".

The witness confirmed that what he read out concerned the works to be paid for. He agreed that the signing was done through interim payment certificate.

Mr. Lyu Juntie testified on behalf of the Defendant. He informed the court that he was the deputy project Manager of Sinchydro

Zambia Limited. It was his testimony that the company he worked for were upgrading the road from Chiyengi to Nchelenge and a further 10km stretch in Nchelenge.

That the Defendant company had a contract with the Roads Development Agency to upgrade a 95 kilometer road from Chiengi to Nchelenge. That they in turn sub contracted the Plaintiff. That the work scope is as stated in clause 3. That is that:

“The sub contractor’s scope of work shall be as specified in the Bill of Quantities for the main contract and will be assigned to the sub contractor by the contractor based on the sub-contractor’s capacity and experience.”

That the scope of work as shown in the Bill of Quantities sheet and attached to the bill of quantities was worth 1.3 million kwacha. That in clause 4 of the sub contract the sum stated was ZMW4,500,000.00 (four million, five hundred thousand kwacha). He went on to state that the contract stated that work paid for should be completed, inspected and approved by the contractor as well as the resident engineer.

It was his testimony that the resident Engineer was one employed by Road Development Agency. Therefore, it was only qualified work that would be included in the interim payment certificate. It was only when this was done that the Defendant would submit to the Road Development Agency clause 18.4 provides as follows:

“The subcontractor could not submit the human resource, equipment, plant, work program and work method to the contractor within required time or the subcontractor could not mobilize the planned human resource, equipment, plants to site within required time of Agreement”. (That termination would kick in).

It was his testimony that the subcontractor delayed in moving to the site and were also absent from the site for eighty (80) days without communication and approval. Apart from the subcontract agreement the clauses already referred to the court was referred to the Bill of Quantities at page 7 of the Defendant’s bundle of documents. The main heading of the document was Sinohydro Zambia Limited Nchelenge-Chiengi road project. The subheading was Sinohydro-upgrading of the road between Nchelenge and Chiengi D76/D77 95 KM) with 10km urban roads in Nchelenge Luapula Province-proposed subcontract works. The document contained information of the works, that is the description of works, the unit, the quantity, the rate and amount for each description of works. The total amount in money for these works was K1,321.684.59.

That as far as this witness knew in 2019 the Road Development Agency and the resident Engineer carried out inspection of works and they approved the works which qualified whose actual payment came to K185,206.49. The certificate date according to the document at page 8 of the Defendant’s bundle of documents was 1st

February, 2019. The subcontractor's name was Bwafwano General Construction Limited. Timothy Miti and Chama Mulenga signed this document. The person who prepared and signed the interim payment certification of the subcontractor was the contract Manager Mr. Chama Mulenga.

That the Plaintiff refused to sign the interim payment certification. Their quantities were later put together with other subcontractors into interim payment certification No. 7 which was submitted to the Road Development Agency. According to this witness that was the obligation of the contractor in order for the Road Development Agency to make payment. In short that the contractors' obligation was to do works and also inspect the work of subcontractors and submit the interim payment certification to the Road Development Agency. It was his testimony that payment came from Road Development Agency and the National Road Fund Agency. That the contractor and resident engineer only inspected and approved qualified works.

That since their role to pay the subcontractor was dependant on payment by Road Development Agency for the Plaintiff to say that the Defendant has money to pay them is not reasonable. That the current status of the project after 2020 was that they signed another addendum with Road Development Agency and the road standard changed from Bitumus to gravel road. That a lot of work in the original contract did not exist after the addendum. The court was referred to clause 18.4 already referred to.

On the 7th May, 2004 the Defendants filed their final submissions. According to the Defendant the issues for determination by this court are two-fold-

- a) *Whether or not there was a breach of the sub contractor agreement by the Defendant.*
- b) *Whether the Plaintiff owes the Defendant sums of money in form of liquidated damages of ZMW11,250 per day (with a maximum of 5% of the subcontract Agreement) being the sum of ZMW225,000.00.*

It was submitted that the scope of work of the subcontract between the Road Development Agency and the defendant relating to the upgrading of the 95 kilometer road with 10 kilometers of roads in Nchelenge Luapula Province was varied to bituminous standard to gravel standard due to financial constraints on the part of the employer.

In terms of payments there has been a variation in the subject matter of the contract. I was referred to clause 4 of the sub-contract agreement. It was submitted that from the onset that the plaintiff's entitlement to payment in accordance with the tenor of the sub-contract agreement was subject to the subject matter remaining the same.

On whether or not there was breach of the sub-contract agreement by the Defendant under the heading mobilization submitted that

the court considers the provision of clause 7.2 of the subcontract agreement. That this clause provides for the obligations of the subcontractor. That the court should note that the subcontractor was to mobilize within 14 days after the signing of the agreement all materials, labour and plant as well as the other obligations provided for in the clause.

The court's attention was drawn to the fact that the subcontract agreement was signed between the parties on 2nd October, 2018 as testified by **PW2** and shown on page 6 of the plaintiff's and defendant's bundle of documents.

That the evidence before court (**PW2**) was that the Plaintiff did not mobilize within 14 days all the agreed materials, labour and plant. That as at 5th November, 2018 the Plaintiff only managed to get a quotation from Zambia National Service. The court was referred to page 9 of the Plaintiff's bundle of documents. It was submitted that the Plaintiff was in breach of the provision in the contract pertaining to mobilization from the beginning.

Under the heading Interim payment certificate the court was first referred to what the Learned Authors of Chitty on Contract the 29th Edition Volume 2 at page 647 paragraph 37-025 explained. That is *"that in most construction contracts the entitlement of the contractor to payment or extensions of time depends on the certificate or decision of the Architect, Engineer or other professional identified in the contract"*.

The court was referred to paragraph 37-142 whose title was interim certificate which provided as follows:

“Interim payments may become payable directly in accordance with the contract conditions; or they may be payable only upon the certificate of the contract administrator. In the latter case the certificate is usually a condition precedent to the right to claim payment”.

It was submitted that it was a condition of the subcontract agreement that the work quantities in the total subcontract amount were provisional and mere estimates. That as the final paid quantities and amount would follow the actual completed quantities as signed and confirmed by Road Development Agency and the Engineer. The court was referred to clause 4 and 14.1 of the subcontract agreement found at pages 1 and 4 respectively of the Defendant’s bundles of documents which provides as follows:

“(4)...the work quantities in the total sub-contract amount are provisional and estimated ones, the final paid work quantities and amount shall follow actual completed (signed and confirmed by the Engineer and the Contractor).

14.1 The paid work quantities by Contractor to Subcontractor shall be those quantities approved by Engineers, signed and confirmed by Contractor”.

The court’s attention was drawn to the fact that the Plaintiff poorly executed two stages out of its proposed five stages of its execution plan. The court was referred to page 15 of the Plaintiff’s bundle of documents. The court’s attention was drawn to the fact that the Plaintiff was still paid for the work executed in the sum of

ZMW185.206,63 as per consent judgment found at page 1 of the Defendant's supplementing bundle of pleadings.

On the issue of termination, the court was referred to the case of *Manela Development Limited V MKP Builders Zambia Limited (1.1.1)*¹ relied on the court's holding in *Demka Engineering Services Limited V BCB Project Consultants Limited (1.1.2)*² in which Lady Justice F. Chishimba held as follows:

“A party wishing to terminate a contract is required to give a notice to the other party asserting that the party is in breach, specifying the breach”.

The court was referred to page 9 of the Defendant's bundle of documents being the letter of termination. That the same was done within the confines of the law. That the reason for the termination was that the Plaintiff abandoned the project without prior communication for more than eighty (80) days and failure to mobilize on site within the required time as ordered by the Engineer pursuant to clause 18.4 of the sub-contract agreement found on pages 1-6 of both the Plaintiff's and Defendant's bundle which provides as follows:

“The subcontract agreement shall be terminated in any of the following instances, contract termination included but not limited to the following:

18.4 The subcontractor could not submit the human resource, equipment, plant, work program and work method from the contract within required

time or the subcontractor could not mobilize the planned human resource, equipment, plants to site within required time of agreement”.

On whether or not the Plaintiff’s claim that they were entitled to a minimum of three warnings before being issued with a notice of termination. The court was referred to clause 18 of the sub-contract agreement which provides as follows:

“The subcontract agreement shall be terminated in any of the following instances, contract termination included but not limited to the following:

18.5 Subcontractor gets three warning letters from contractor due to other issues”.

As regards the counter claim whether the Plaintiff owes the Defendant liquidated damages the court was invited to consider the parties contractual obligation. That in the case of ***Transaction Payment Solutions Zambia Limited V Brunelli Construction Company Zambia Limited (1.1.3.8)***³ the Learned Authors of Chitty on Contracts was quoted on the general rule relating to the performance of a binding contract as follows;

“The general rule is that a party to a contract must perform exactly what he undertook to do”.

Another case I was referred to was ***Zambia Radiological and Imaging Company Limited and Others V Development Bank of Zambia (1.1.4)***⁴ where the Supreme Court quoted Cheshire, Fifoot and Furmstones. The

Learned Authors of **Law of Contract 13th Edition Butterworks (1996) At Page 96** stated as follows:

“Behind all forms of contract, no doubt, has the basic idea of assent. A contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done”.

Further that the Defendant is entitled to liquidated damages from the Plaintiff as a result of the Plaintiff’s breach of the sub-contract. I was referred to clause 6 of the sub-contract which provides as follows:

“The Subcontractor shall reimburse the Contractor due to the negligence or non-performance of the subcontractor and such costs or penalties maybe deducted from the amount due to the subcontractor under this agreement. If delayed, the subcontractor shall suffer from pecuniary penalty as liquidated damages of ZMW11,250/day this penalty shall be deducted from the amount payable to the Subcontractor”.

I was further referred to clause 7.2.4 of the same agreement which provides as follows:

“The Subcontractor shall proceed with the said works expeditiously and punctually to the requirement of the contractor and so as not hinder or delay the work or the portions of the work at such times as the Contractor shall require having reference to the progress or conditions of the main works and shall complete the whole of the said works to the satisfaction of the Contractor and of

the Engineer and in accordance with the requirements of the local and other authorities”.

That the evaluation of the site by the Plaintiff amounted to an express breach of its obligations under the contract. That ***Evan Kendrick*** the Learned Author of ***Contract Law Test, Cases and Materials at Page 24*** pines that:

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

I was also referred to clause 8 of the sub-contract agreement which provides as follows:

“The Subcontractor SHALL inform the Contractor within 14 days of future events or circumstances that may adversely affect the quality of the work, increase the Contract price or delay the execution of the works”.

The Plaintiff’s final submissions in reply to the Defendant’s final submissions referred to documents on record touching on the variation of the contract between the Defendant and the Road Development Agency.

The court’s attention was drawn to the fact that the subcontract Agreement entered into between the Defendant and Plaintiff was executed in 2018. That the defendant then purportedly terminated the Subcontract Agreement with the Plaintiff on the 20th March, 2019.

Further that the rescoping meeting that the Defendant had with Road Development Agency was held on 15th May, 2020. That this is as per the minutes exhibited on pages 10-16 of the Defendant's bundle of documents and further that the addendum (variation) of the contract was signed and executed in December, 2021 as per letter and addendum contained at pages 17-25 of the defendant's bundle of documents. That this is proof that the variation is of completely no effect or consequence to the rights of the Plaintiff under the sub contract and therefore the terms upon which it may claim are as they were on the 20th March, 2020.

It was submitted that the breach of contract by the Defendant was blantant in the matter before me. That the manner in which the Defendant effected the termination of the contract was in breach of the terms.

That a perusal of clause 18 of the contract does prescribe the instances under which the contract can be terminated and that the same is very specific.

It was contended that argument on clause 7.2.1 reproduced by the Defendant was never proven. That the mere fact that the Plaintiff obtained a quotation from Zambia National Service is not an indication of failure.

It was submitted that the Defendant accepted works from the Plaintiff even after the purported breach. That the court ought to

take judicial notice of the fact that the breach of the Plaintiff regarding mobilization was only raised at termination and at no point was there any communication regarding this issue during the period the works were being conducted.

It was contended that the same was an afterthought and completely lacks merit as there is no evidence to support the assertion and that even if the same existed, it goes without saying that the Defendant acquiesced and ratified the works of the Plaintiff substantially waiving their right to refer to the issue as a breach as they inadvertently varied the requirement by their conduct.

With regard to the interim payment certificate, it was contended that the sentiments of the learned authors of ***Chitty on Contract 29th Edition, Volume 2 at page 647 paragraph 37-205*** cited by the Defendant in their submissions was a mere comment and not the established legal principle. The entire statement was not reproduced as it was already contained on page 7 of the Defendant's submission but reproduced the relevant phrase to their submission which is-

"That in most construction contracts..."

That the same fate is applicable to paragraph's 37-142 of the same authority cited at page 8 of the Plaintiff's submissions which said paragraphs are couched in the terms "may" and "usually" as opposed to "shall".

That while they took cognizance of the provisions of clause 4 and 14.1 as properly cited by the defendant, they wished to draw the court's attention to the provision of clause 19.2 which provides for the payments to be effected upon termination of the subcontract and states that:

"After contract termination, the contractor will effect the payment for completed and satisfactory work quantities by the subcontractor by adopting subcontract rate to the subcontractor. Further, any claims put forward due to contract termination, which is the subcontractors risks, by the subcontractor shall not be accepted by the Contractor".

It was strongly contended that upon termination of the subcontract and the Plaintiff issuing invoices for the work done, the Defendant was placed with an obligation to ensure that the necessary interim payment certification was generated and approved in relation to the works done by the Plaintiff at that material time.

On the invoices made by the Plaintiff of amounts due to it from the Defendant in the sums of ZMW282,836.79 and ZMW492,075.00 being sums for the work they allegedly did, which works were never subjected to an assessment by the engineer in accordance with the tenor of the agreement as evidenced at page one of the Defendant's bundle of documents.

It was submitted that a perusal of the Plaintiff's bundle of documents and more particularly pages 16-19 will reveal that indeed the Plaintiff did raise and avail to the Defendant with

invoices and demands for payment of the works, the last of which is 5th March, 2019 long before the termination of the agreement.

That not only were invoices raised by the Plaintiff, it was the Defendant's obligation under the contract to subject the invoices to assessment in accordance with the contract then pay for works done.

That even in the Defendant's own pleadings and evidence there was no assessment of these invoices.

That the Defendant was in an advantageous position regarding the payment and works done. The court's attention was drawn to the case of *Konkola Copper Mines PLC V Mitchell Drilling International Limited⁵ and Mitchell Drilling Zambia Limited (2015) 2 ZLR Page 203⁶* where it was held that:

“A party cannot benefit by taking advantage of the existence of a state of things he himself produced”.

That the assertion that the Plaintiff poorly executed two stages of the five contained in the proposed execution plan could not be further from the truth. The court was referred to a letter at page 15 of the Plaintiff's bundle of documents.

On the counterclaim the Plaintiff submitted that there is no evidence that the alleged failure of the Plaintiff to meet its contractual obligations by purportedly leaving the construction site

for over 80 days. That the Plaintiff remained on site. That the Defendant served the Plaintiff its purported termination of the agreement whilst on site.

That based on the premise that there is no evidence of the Plaintiff abandoning the site the argument on liquidated damages has become otiose. That there was no breach of contract on the part of the Plaintiff therefore the Defendant's consideration is misplaced and lacks merit.

I have considered the claims by the Plaintiff against the Defendant. I have further considered the evidence adduced, the authorities cited and the arguments advanced by the parties' advocates.

I have perused the contract signed by the parties.

The following facts are not in dispute.

- *That the subcontract agreement made on the 1st day of October, 2018 was between Sinohydro Zambia Limited (hereinafter called the contractor) and Bwafwano General Contractors (hereinafter called the subcontractor).*
- *That the client for the road project was Road Development Agency Contract No. RDA/CE/024/014.*
- *That the main contract was for the upgrading of the road between Nchelenge and Chiengi (D76/ D77 95km) with 10 km urban roads in Nchelenge; in the Luapula Province.*

- *That the contract work period for the subcontractor was the completion time for works designated by the contractor fourteen (14) days from the signing of the subcontract agreement until the completion date of the main contract.*
- *That the subcontract rate which the contractor was to pay the subcontractor for the completion and satisfactory performance of the work was the sum of ZMW4,500,000.00 (Four million, five hundred thousand kwacha only).*
- *That the unit price schedule shall be provided to the subcontractor based on the bill of quantities for the main contract.*
- *That the subcontractor's scope of work was to be specified in the Bill of Quantities for the main contract and will be assigned to the sub contractor by the contractor based on the sub contractor's capacity and experience.*
- *That the scope of work specified in the Bill of Quantities and availed to the plaintiff by the Defendants pursuant to the sub contract agreement amounted to ZMW1,321,684.59.*
- *That the scope of work specified in the Bill of Quantities was not fully executed.*
- *That some of the work done by the Plaintiff was unsatisfactory. Proof was in the request to re-inspect the work by the Plaintiff. (Page 35 of the Plaintiff's bundle of documents). However the Plaintiff was asked to re-do some of the works, this was done.*

- *That work quantities in the total sub contract amount were provisional and estimated ones, the final paid work quantities and amount shall follow actual completed quantities (signed and confirmed by the Engineer and the contractor.*
- *That the Plaintiff was paid an adjusted amount of ZMW185,206.63 for works done. This was supported by an interim payment certification.*
- *That as per subcontract agreement the Plaintiff had contracted to pay the Defendant sums of money in form of liquidated damages of ZMW11,250 per day with a maximum 50% of subcontract amount.*
- *That by reason of the Plaintiff's delay in execution of works the Defendants may have suffered loss and damage. That according to clause 4 the final payment to be paid was for work completed and the quality of the work. Further that the quality of work done should be signed off.*
- *That according to clause 18.4 of the Agreement termination was to take effect if the subcontract was unable to submit human resources, equipment, plant, work program and work method to the contractor within the required time (14) days after signing the agreement) or the subcontractor could not mobilise the planned human resource, equipment, plants to the site within the agreed time.*

Issues for determination on the part of the Plaintiff were as follows:

- 1. Whether or not the Plaintiff is entitled to the payment of ZMW4,000,000.00 for breach of contract;*
- 2. Whether or not there was a breach of contract;*
- 3. Whether or not the Plaintiff is entitled to the sum of ZMW281,836.76 due for maintaining existing roads and unblocking culverts;*
- 4. Whether or not the Plaintiff is entitled to the sum of ZMW492,075.00 for the cleaning and shaping of the road deviation.*

The Defendants issues for determination in their counter claim were as follows:

- i. Whether or not it was in fact the Plaintiff who breached the contract*
- ii. Whether or not payment of liquidated damages in the sum of ZMW225,000.00 being a 5% of the subcontract amount of ZMW4,500,000.00 ought to be paid.*

WHETHER OR NOT THERE WAS A BREACH OF CONTRACT ON THE PART OF THE DEFENDANT OR ON THE PART OF THE PLAINTIFF.

Having established that there was a subcontract agreement between the main contractor (Sinohydro Zambia) and Bwafwano General Contractors Limited. The issue was whether or not there

was a breach of contract and who was responsible for the breach. The position of the Plaintiff was that the Defendant breached the contract hence the claim for the payment of ZMW4,000,000.00. The Defendant's position is that the Plaintiff breached the contract. The Subcontract Agreement placed certain obligations on the contractor as well as the subcontractor. The subcontractor agreed to complete the works according to the terms and conditions of the subcontract. The subcontractor according to the Agreement was to work under the contractor who retained overall responsibility for the road project.

The obligation of the contractor was to ensure that the subcontractor was paid for the work done according to the agreed terms in the sub contractor Agreement. That the subcontractor was to be paid based on the quantity and quality of work completed at a predetermined price.

The sub-contract specified the tasks that the subcontractor was to perform as part of a large project. The contractor outsourced the works to the sub contractor which were to be specified in the Bill of Quantities. A bill of quantities is said to be a detailed document that outlines the quantities of material, labour and services, required to complete a project.

The document whose title is Sinohydro Zambia Limited Nchelenge-Chiengi Road Project – upgrading of road between Nchelenge and Chiengi D76/D7795 km with 10km urban roads in Nchelenge

Luapula Province proposed sub contract works was the Bill of Quantities.

The document contained the description of works, the unit, the quality, the rate as well as the amount whose total was ZMW1,321,684.59 meaning the scope of work of the sub contractor was specific and defined.

This document read with the execution plan for quality and site management for Nchelenge-Chiengi road gives one a fair idea of what the Defendant's expectations were and the scope of works as understood by the Plaintiff which were to be executed in five stages (referred to at page 15 of the Plaintiff's bundle and page J9 and J10 of the Judgment).

The Subcontract Agreement placed certain obligations on the contractor as well as on the sub contractor. The sub contractor agreed to complete the works according to the terms and conditions of the Subcontract Agreement. The key characteristics of the sub contract were expressly stated that the sub contractor works under the contractor who retained overall responsibility for the road project.

The obligation of the contractor was to ensure that the subcontractor was paid for the work done according to the agreed terms in the sub contract agreement.

The sub contractor was to be paid based on the quantity and quality of work completed at a predetermined price.

In the case of *National Drug Company Limited and Zambia Privatization Agency V Mary Katongo Appeal No. 79/2001*⁷ the Court observed as follows:

“It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract”.

The Learned Author *P. Richards on Law of Contract at page 113* states as follows:

“Where a person fails to perform their side of the contract then subject to the mitigating factors, they will be in breach of contract. A breach of contract will always give rise to a claim in damages, no matter how minor or serious the nature of the breach”.

Having perused the contract as well as bearing in mind the authorities I have referred to. I am further guided by the holding of the Court of appeal in the case of *Zesco Limited V Edward Angel Kahale*⁸ as follows:

“The general principle is that parties are bound by whatever terms and conditions they get for themselves. As the court, we are bound to enforce contracts which have been freely and voluntary entered into by contracting parties as articulated in Colgate Palmolive Zambia Inc. V Shemu and Others”.

In the case of *Henry Nsama and Others V Telecommunications Company Limited*⁹ cited with authority the case of *Trollop and Coils Limited V North Western Metropolitan Regional Hospital Board*¹⁰ and went to hold in part that:

“The basic principle is that the Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves however, desirable the improvement might be. The Court’ function is to interpret and apply the contract which the parties have made for themselves”.

In arriving at my decision on this point and indeed throughout the writing of this judgment I bore in mind that a valid contract creates reciprocal rights and obligations between the parties to it. Thus, where one party to a contract fails to perform his or her obligation or performs them in a way that does not correspond with the agreement the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy.

On the 07th March, 2019 the site Engineer Mr. Timothy Miti wrote a warning letter to the sub contractor for being absent from site for eighty days. It was pointed out in the letter that this was insubordination and a breach of contract. The sub contractor was instructed to get back to the site and continue executing works as expected failure to do so, may call for costly penalties and possible termination of the contract. The sub contractor denied being absent from the site.

On the 20th March, 2019 the contractor wrote to the sub contractor a letter whose subject matter was sub contract agreement notice of termination. The reason given was abandoning the project without prior communication for more than eighty (80) days, for failure to mobilize on site within the required time, or ordered by the engineer, pursuant to clause 18.4.

On the 22nd March, 2019 the subcontractor responded pointing out that from the 01st October, 2018 to date they have never been away from the site. However, due to heavy rains, they reduced the number of workers.

The Plaintiff claims breach of contract in the manner in which the Defendant effected the termination of the contract. That clause 18 of the sub contract agreement was not followed. That the subcontractor was not removed by the Engineer (clause 18.1). That the subcontractor's work progress and quality does not satisfy the contractor and the subcontractor got three warning (non-compliance) letters from the contractor and the Engineer (clause 18.2) (safety and environmental requirement could not be executed as required in the main contract or the subcontractor is removed by the Engineer or the client or any other local authority due to this issue (clause 18.3). That the subcontractor could not submit the human resource, equipment, plant, work program and work method to the contractor within required time or the subcontractor could not mobilize the planned human resource, equipment, plants to site within required time of agreement (clause 18.4). That the

subcontractor could not submit the performance guarantee as required on time (Clause 18.5). Lastly that the subcontractor gets three warning letters from contractor due to other issues (clause 18.6).

THE DEFENDANT CLAIMS BREACH OF CONTRACT

That in accordance with clause 7.2 obligations for subcontractor:

7.2.1 Except the foresaid contractor's obligations, all obligations undertaken by the Contractor in the main contract signed by the Contractor and the client for the work on site but assigned to the sub contractor shall be undertaken by the sub contractor, including but not limited to the following obligations:

- *Engineers' instruction execution,*
- *Subcontractor camp building,*
- *Land requisition for camp and temporary facilities,*
- *The mobilization and demobilization of equipment and manpower*
- *Reinstatement after work completion and others.*

7.2.2 The subcontractor shall submit the planned human resource, equipment, plant, work program and work method to the contractor within seven (7) working days after signing the Agreement.

7.2.3 *The subcontractor shall mobilize within fourteen (14) days after signing the subcontract agreement all materials, labour and plant in addition to that provided by the contractor for his own required haulage and temporary works, needed to do and perform all obligations and agreements imposed on or undertaken by the Contractor under the main contract in connection with the said works to the satisfaction of the Contractor and of the Engineer, at such time or times and in such manner as the Contractor shall direct or require, observe and perform the terms and conditions of the Contractor. The subcontractor shall not receive any advance payment.*

7.2.4 *The Subcontractor shall proceed with the said works expeditiously and punctually to the requirement of the Contractor and so as not to hinder or delay the work or the portions of the work at such times as the Contractor shall require having reference to the progress or conditions of the main works and shall complete the whole of the said works to the satisfaction of the Contractor and the Engineer and in accordance with the requirements of the local and other authorities.*

7.2.5 *The subcontractor shall mobilize the planned human resource, equipment, plants to site within 28 calendar days after signing the Agreement.*

7.2.6 *During the execution of the agreement, the subcontractor shall notify the Contractor formally of any variation or any*

delay in work schedule which may adversely affect the programme of the main contract.

The Defendant's position was that the Plaintiff did not mobilize within fourteen (14) days all the agreed materials, labour and plant. That the Plaintiff was in breach of the provision in the contract pertaining to mobilization from the beginning.

The contract was signed on the 2nd October, 2018. The mobilization was to take place within fourteen (14) days after signing the subcontract agreement. What this meant was that by the 17th October, 2018 mobilization of all that was needed to execute the job the subcontractor committed to should have taken place. By the 5th November, 2018 the Plaintiff managed to get a quotation from Zambia National Service for the supply of equipment. It was not clear when the mobilization and demobilization of equipment and man power took place.

In a letter dated the 6th December, 2018 to the project Manager Mr. Wu from the subcontractor refers to a meeting held on 12th December, 2018 in connection with a claim for payment on invoice No. 003 in the amount of K281,836.72. The contractor said they had no money to pay back what they owed lending institutions who were holding their property as collateral so that they could continue work. That on 10th December the sub contractor wrote to the contractor requesting to hire their equipment since they were going on industrial break but the contractor refused. This was contrary

to what was agreed in the contract. The fourteen (14) day period given from the signing of the sub contract agreement meant that the sub contractor in line with their obligation contained in paragraphs 7.2 (7.2.1 to 7.2.6) failed the mobilization of equipment and manpower.

What this meant was that if the subcontractor was asking the contractor to give them money to hire equipment or to hire equipment from them, they had breached their obligations at the very early stage of the contract.

The efforts that the subcontractor made according to the documents in the bundle are as follows:

- *At page one is a quotation from Zambia National Service dated the 5th November, 2018 for the hire of equipment valued at K17,241.00. The second document at page 10 is another quotation from Zambia National Service dated 6th November, 2018 to the sub contractor for the hire of equipment.*
- *At page 11 is a general receipt in dated 6th November, 2018 for money in the sum of K23,074.40 to the sub contractor from Zambia National Service. For a low bed motor grader.*

- *At page 12 is an application for hire of equipment by the sub contractor. There is another application for hire of equipment at page 13 by the sub contractor. There is no evidence before me that the application was actualized. There is an agreement at page 14 between the sub contractor and Fred Kalaba of (F.K General Dealers) being a lender. Showing that on the 6th November, 2018 the sub contractor borrowed money from the lender.*
- *On the 30th November, 2018 the sub contractor wrote to the technical team of the contractor indicating that they are now at stage 3 of the execution plan that is to accommodate diversion road with recommended material by the main contractor engineer.*

The termination letters were written on the 20th March, 2019 and the 16th May, 2019. The termination letter written in March was written five months into the contract. The second letter written in May was seven months into the contract. Two reasons were advanced in the termination letters firstly the abandoning of the project for 80 days, secondly failure to mobilize on site within required time as ordered by the Engineer.

At page 35 of the Defendant's bundle is a letter to the project Manager Sinohydro Zambia Limited whose reference is inspection of Division Nchelenge-Chiengi road project. In it the writer Johnson Kabwe the Chairman of the subcontractor referred to mediation that took place on the 19th June, 2019. Where it was agreed that since

the inspection on maintenance of the existing road was done on 07th January, 2019 and the report raised and IPC prepared on 10th January, 2019. It was agreed that the road which was inspected be re-inspected and the report brought to the mediation meeting held on Monday 24th June, 2019 at 14:30 hours. At page 31 of the same bundle is a client inspection request list in which the Engineer comments were that it was observed that the diversion was done mainly in the parameters of the main road, hence making it narrow when the works start on the main road.

In the same client inspection request list, the inspection of works comments and remarks as well as survey and setting it was stated that the shaping of diversion done. The disposal of debris was not good that the same was very close to the main road. That the Diversion of the road had encroached the main road. The request list is dated 2nd April, 2019. The client inspection request list dated 19th June, 2019 and 20th June, 2019 for shaping of diversion did not contain any comments and remarks and it's not clear who signed this document.

The document at page 31 indicates that the Engineer did not approve the works of the subcontractor. The minutes of the mediation held on the 19th June, 2019 would have assisted the court to determine the extent to which the Engineer viewed the works of the subcontractor as well as why the Engineer was dissatisfied with some of the works. It is however worth noting that despite the breach of contract by the Plaintiff the Defendant did not

stop the works in the month of October, 2018 when the breach to mobilize human resource, equipment and plants to the site occurred. The Plaintiffs were left to carry on with the work.

Can it be said by allowing the Plaintiff to continue with the works despite the breach, was affirmation of the contract on the part of the Defendant?

In the case of *Hyundai Heavy Industries Company Limited V Papadopoulos (1980)*.¹¹ The Court held that:

“Affirmation of a contract requires clear and unequivocal conduct by the innocent party”.

In yet another case *Gator Shipping Corporation V Tran-Asiatic Oil Limited S/A (1978)*.¹² The Court ruled that:

“Affirmation can be implied from the innocent party’s conduct, even if they don’t explicitly state their intention to affirm”.

Would it be safe to assume that the Defendant’s waiver of the breach meant they waived their right to claim damages for the initial breach that occurred.

In this case the breach occurred on the 17th October, 2018. Termination took place on the 16th May, 2019 seven months later. There was continued performance of the contract whose affirmation implies that the contractor and sub contractor continued to perform

their obligations under the contract. For this reason, this has made it more challenging for either one of them to claim that the contract had been repudiated. Although there was a breach of contract on the part of the Plaintiff it is a fact that the Defendant allowed the plaintiff to continue works meaning that the Defendant had waived their rights to claim for damages for breach of contract. What remains is whether or not the Plaintiff is entitled to the K4,000,000.00. The answer is no reason being that the Court finds that there was no breach of contract on the part of the Defendant. My role as a Court is to give efficacy to the contract. Clause 19.2 of the contract signed by both parties provides that:

“After contract termination, the contractor will effect payment for completed and satisfactory work quantities by the sub contractor by adopting subcontract rate to the subcontractor. Furthermore, any claims put forward due to contract termination, which is the subcontractor’s risk by the subcontract shall not be accepted by the contractors. Thus, there was no breach”.

Based on the actions of the Defendant that is by allowing the Plaintiff to continue work despite the breach in my view entitles the Plaintiff to some payment. This payment as per clause ought to be for the completed work done satisfactorily.

The plaintiff claims the amounts of ZMW281,836.76 for maintaining existing roads and unblocking culverts. Further the amount of

ZMW492,075.00 for the clearing and shaping of the road deviation both in line with the pricing for works contained in the scope of works provided by the Defendant. Not forgetting that the subcontractor was to start and complete its work under the subcontract agreement in accordance with such reasonable schedules set forth by the contract (clause 6).

On the part of the Defendant whether the contractor is entitled to damages in the sum of ZMW225,000.00 being 5% of the sub contract agreement amounting to ZMW4,500.00.

The breakdown in the scope of works and specifying in the bill of quantities resulted in the clear definition of the work that was to be done. What this meant was that the works to be undertaken at any given time would be accurately measured and priced. The Bill of Quantities that was availed to the plaintiff pursuant to the subcontract Agreement in the amount of ZMW1,328,684.59. Specifying the scope of works in the bill of quantities reduced any ambiguity.

According to the Defendant the scope of work in the Bill of Quantities availed to the Plaintiff in the amount of ZMW1,321,684.54 was never fully executed further, that the work done was unsatisfactory.

The claim for ZMW281,836.79 according to the Plaintiff was as a result of the following works as contained in the Bill of Quantities and scope of work.

1. ZMW131,220.00, 16.02 *overhaul on material hauled in excess of 1.0 km (ordinary overhaul) for Division works.*
2. ZMW87,518.40, 15.01 *Accommodating traffic including all required flagmen and signage.*
3. ZMW13,095, 15.05 *Gravelling and repair of existing 1 km freehaul.*
(Earthworks for routine maintenance of the existing road)
4. ZMW 8,200.97 *major re-shaping of the existing road.*
5. ZMW1,680.00 *cut to spoil.*
6. ZMW1,247.00 *cut and borrow fill – 0.5km freehaul.*

According to the Plaintiff they are entitled to the payment of that sum being a sum due to them for the works of maintaining the existing road and unblocking of the culverts. According to the Plaintiff despite the issuance of the tax invoice the amount of ZMW281,836,79 remains unpaid.

The Defendant acknowledged that the sub contract works schedule and scope on page 7 of the Defendant's bundle and page 38 of the Plaintiff's bundle of documents included temporary culverts, accommodation of traffic, earthworks for diversions as earthworks for routine maintenance of existing road. That when the first inspection was done on the 08th January, 2019, it was discovered

that the Plaintiff had only carried out works with regards to maintaining the already existing road. That the independent engineer employed by RDA and the Defendant certified the work done by the subcontractor.

The evidence of the Defendant in this claim is supported by the provision in paragraph 4 of the subcontract agreement that the work quantities in the total subcontract amount were provisional and estimated ones that the final paid works quantities and amounts shall follow actual completed quantities (signed and confirmed by the Engineer and the contractor).

Paragraph 10 provides in part that the works of the subcontractor shall be certified by the Engineer. Otherwise, the subcontractor shall re-do the works at his own cost if the quality is poor.

The client inspection request list was signed off. That the road maintenance has been achieved. In as far as the surveying and setting that the maintenance of the road had encroached the main road. The Engineer stated that the road maintenance was within the required standard. The resident Engineer in his comments and remarks gave his approval and signed off. The inspection is dated 08th January, 2019. These works are contained under the heading Accommodation of Traffic specifically 15.01, 15.02 (a) 15.02 (b) 15.02 (c) 15.05 and 16.02 of the scope of work. Although the amount minus VAT for these works amounted to K242,962.75. What was signed off as qualified in the IPC was K185,206.49. In

my view that was the amount that was due to the Plaintiff which amount the Plaintiff states was unpaid and should be paid to the Plaintiff.

I am satisfied that despite the termination in accordance with clause 19.2 of the subcontract Agreement the Plaintiff is entitled to the payment of K281,836.79 having proven that the work was completed to the satisfaction of the site Engineer and contractor.

The claim for the sum of K492,075.00. The Plaintiff stated that the sum claimed was for works relating to the clearing and shaping of the road deviation in line with the pricing for works contained in the scope of works according to the breakdown contained in the tax invoice dated 5th March, 2019. The claim was broken down as follows:

- i. ZMW191,982.56 for the clearing and grubbing including all trees less than 1 meter in girth.*
- ii. ZMW157,200.75 fell under the earthworks for diversions and was specifically for cutting and borrowing to fill – 0.5 km free haul.*
- iii. ZMW44,069.25 for shaping of diversions*
- iv. ZMW14,568.75 to cut and spoil*
- v. ZMW17,336.87 Blading diversions and existing roads used as diversions by road grader.*
- vi. ZMW69,323.44 for the watering of diversions.*

The total in the tax invoice was subtotal ZMW494,481.00 plus VAT 79,117.66 making the total K573,598.68.

According to the Plaintiff the works done were upto standard. That on the 05th April, 2019 the Plaintiff prepared an invoice which was wrongly dated 05th March, 2019 for an amount of ZMW492,075.00 exclusive of VAT and that the Defendant company decided and prepared an interim payment certifications of sub contractor for ZMW40,000.00 in September, 2019. That the amount being claimed as payment by the Plaintiff is ZMW573,598.68 inclusive of VAT though the amount indicated on the writ of summons is ZMW492,075.00. There is no evidence that an application was made to amend the amount claimed.

The tax invoice at page 16 should be read with the scope of works for what the Plaintiff referred to as proposed subcontract works at page 38 of the Plaintiff's bundle. The amount claimed in the description of work are found in paragraph 17.01. Paragraph 15.02(b) 15.02(a) 15.02(b) 15.07 and 15.06(a) under description of works accommodation of traffic, earthworks for diversion and cleaning grubbing including all trees less than 1m in grith.

The tax invoice at page 16 should be read with the document at page 15 that in the execution plan for quality and site management for Nchelenge-Chienge road a letter written by Johnson Kabwe the Chairman of the subcontractor for the ATTENTION OF ENGINEER

Timothy Miti. The works are referred to in stage 4 and 5 in the scope of works (dated 30th November, 2018).

Proof that the work of shaping of diversion took place is found in a document titled: CLIENT INSPECTION REQUEST LIST. This document is proof that the works were inspected on the 02nd April, 2019. The findings were that the shaping of diversion was done. That the disposal of debris was not good as the same was done close to the main road. That the diversion road has encroached the main road. Further that it was observed that the diversion was done mainly in the parameters of the main road, hence making it narrow when the works starts on the main road. The client inspection request list dated 19th June, 2019 and 20th June, 2019 for shaping and diversion was signed on 19th June, 2019 by the site Engineer. At page 35 is proof of the re-inspection a letter from Mr. Johnson Kabwe for the sub contractor. The amount for this work specifically according to the document at page 38 was ZMW494,481.62.

I am satisfied that despite the termination in accordance with clause 19.2 of the subcontract agreement the Plaintiff is entitled to the payment of K494,481.62 having proven that the work was completed to the satisfaction of the site engineer and the contractor.

The Defendant in their counter claim stated that the Plaintiff has failed and or/neglected to expediate completion of the works to the satisfaction of the Defendant. That it was in fact the Plaintiff who breached the contract. I dealt with this issue from pages J41 to

J48. The Defendant did not claim any reimbursement, costs accumulated or penalties levied against the subcontractor due to negligence or non performance of the subcontractor. As stated earlier the subcontractor did not mobilize within the 14 day period after signing the Agreement. The Defendant accepted works from the Plaintiff even after the breach. It's worth stating and I agree with the Plaintiff that with regards to mobilization there was no communication regarding the issue of breach raised at the time. That this issue was only raised at termination when work done was agreed to and ratified. Doing so meant the Defendant substantially waived the right to refer to the issue as a breach. In my view there was no breach.

I agree with the Defendant that there was a provision in the subcontract Agreement that the Plaintiff had contracted to pay the Defendant sums of money in form of liquidated damages of ZMW11,250.00 per day with a maximum of 5% of subcontract amount.

The last part of clause 6 of the sub contract Agreement provides as follows:

"If delayed, the sub contractor shall suffer from pecuniary penalty as liquidated damages of ZMW11,250.00/day this penalty shall be deducted from amount payable to sub contractor. The maximum liquidated damages is 5% the subcontract amount".

According to clause 4 of the subcontract Agreement the contractor was to pay the subcontractor for the satisfactory performance of work the sum of ZMW4,500,000.00 (Four million five hundred kwacha only). This amount represented the full value of the contract between the contractor and the subcontractor for the full work period that is until the completion date of the main contract.

However, there is a provision in clause 6 that the subcontractor shall start and complete its work under the Agreement in accordance with such reasonable schedules set forth by the contractor. Further in clause 4 that the unit price schedule shall be provided to the subcontractor based on the Bill of Quantities for the main contract. Clause 4 further provided that:

“Once the subcontract Agreement has been signed by both parties, the price schedule shall be construed the same as part of this Agreement”.

Further that:

“The work quantities in the total subcontract amount are provisional and estimated ones, the final paid work quantities and amount shall follow actual completed quantities (signed and confirmed by the Engineer and the contractor) multiply subcontract rate signed by both parties, then subcontract the other due deductions such as equipment, plant cost, material

cost, labour cost etc. Furthermore, the contractor shall recover 10% of the unit price as overhead.

I am satisfied that the completion of the works that I have ordered the Defendant to pay the Plaintiff for work that was signed off and confirmed by the Engineer and the contractor.

The provision in clause 6 provided for reasonable schedules set forth by the contractor. That based on the subcontract Agreement as well as the scope of work specified in the Bill of Quantities and assigned to the Plaintiff by the Defendant for the first lot of work done in the amount of ZMW1,321,684.59.

Having decided that there was no breach of contract based on the conduct of the contractor fourteen days after the signing of the contract. Further acknowledging that the contract amount was K4,500,000.00. Accepting that the breakdown, the scope of the Bill of Quantities is not unusual in road construction Agreement. Would the court be in order to grant an order for payment of liquidated damages in the sum of ZMW225,000.00 being 5% of the subcontract amount of ZMW4,500,000.00. This coupled with the fact that the scope of works amount was ZMW1,321,684.59.

I found that since there was no communication regarding the breach of contract at the very beginning of the contract the Defendants slept on their right to terminate the contract when they had an opportunity to do so and can now not make a claim in

accordance with clause 6 of the subcontractor Agreement for any delay they suffered.

The general rule is that the losing party pays the winning party's costs. However, there are instances where parties may bear their own costs. I found that both parties have some success in their claims or defences. The decision on costs is typically at the discretion of the Court. I find in this case that fairness and justice demands that each party bears their own costs.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA ON THIS 05TH DAY OF MAY, 2025.


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G.C. CHAWATAMA
HIGH COURT JUDGE