

IN THE HIGH COURT FOR ZAMBIA

2019/HP/0918

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

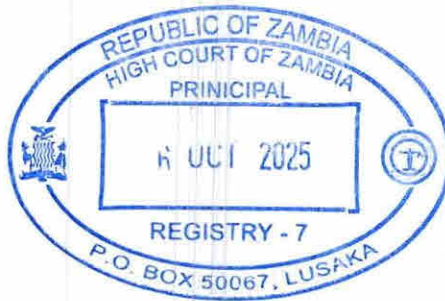
(Civil Jurisdiction)

BETWEEN:

DR. CHIDONGO PHIRI

AND

DR. EMMA SITAMBULI



PLAINTIFF

DEFENDANT

Before the Honourable Mrs. Justice R. Chibbabbuka on the 6th day of October, 2025

For the Plaintiff: Mr. M. Mulele, Messrs GM Legal Practitioner

For the Defendant: Mr. Osborn Ngoma & Ms. Maggie Mwape, Messrs Lungu Simwaya & Company

JUDGMENT

Cases referred to:

1. *Cutter Vs Powell* 1795 16TR 320
2. *Bolton Vs Mahadeva* [1972] 1 W.L.R at page 1009

Other works referred to:

Black's Law Dictionary, Ninth Edition, Bryan A. Garner, Thomson Reuters, 2009

Contract Law in Zambia, S.P Ng'ambi and C. Chungu, Second Edition, 2021, Juta and Company (Pty) Ltd at pages 9 to 10

Treitel on the Law of Contract, Edwin Peel 13th Edition, 2011

1.0 Introduction

1.1 By a writ of summons and statement of claim taken out on 17th June, 2019 the plaintiff sought, the following reliefs;

- (i) The sum of USD14,112.00 due to the plaintiff for consultancy services rendered on the Gender Support Inquiry Assignment under the Swedish Embassy;
- (ii) Damages for breach of contract;
- (iii) Interest on the amounts in (i) and (ii) above;
- (iv) Costs of the action; and
- (v) Any other relief the court may deem fit.

2.0 The Statement of claim

2.1 In his statement of claim, the plaintiff avers that sometime in late 2018, the defendant contracted him to be part of a team to undertake a Gender Support Inquiry Assignment under the Swedish Embassy in Lusaka. It was an express condition by the Swedish Embassy in Lusaka, Zambia that the team to conduct the assignment had to consist of 2 consultants with relevant knowledge in the field and at least one of them should have possessed a University Degree of relevance. Although both the plaintiff and the defendant possessed various qualifications up to PHDs, the defendant did not possess a university degree of relevance but the plaintiff did. The contract with the Embassy was therefore clinched on account of the plaintiff possessing the relevant University Degree.

2.2 The contract to provide the services was fully executed on the 7th November, 2018 with the defendant signing on behalf of the team as Team Leader. It was an express term of the contract under clause 4a that the defendant would be remunerated in the sum of USD19,008.00 while the plaintiff would be paid the sum of USD14,112.00. The defendant and plaintiff proceeded to provide consultancy services to the Swedish Embassy up to the end of the contract on 31st May, 2019.

2.3 The Swedish Embassy transferred the amounts referred to above to the defendant on the 31st May, 2019. Following receipt of payment, the defendant became elusive and, on the 2nd June, 2019 claimed that she had not been paid by the embassy and declined to pay the plaintiff. By letter dated 10th June, 2019 he demanded for payment of his dues in the sum of USD14,112.00 to be paid within 48 hours. The defendant did not accede to his demand but attempted to buy time through a letter written by her lawyers asking for nearly 2 weeks to seek instructions and revert to him.

2.4 He executed his duties to the satisfaction of all the parties concerned as evidenced by various emails to be produced at trial and as such he earned his dues under the contract with the embassy. The defendant is truly indebted to the plaintiff in the sum of USD14,112.00 and has no defence.

3.0 The Defence

3.1 The defendant averred that the contract to undertake a Gender Support Inquiry Assignment was entered between the Swedish Embassy in Lusaka and the defendant to the exclusion of the plaintiff. The plaintiff and the defendant possess various qualifications but the defendant also possess the relevant masters degree, which enabled her clinch the contract. The contract to engage the plaintiff to undertake the Gender Support Inquiry Assignment was terminated on 25th March, 2019 long before the completion of the Assignment. As such the plaintiff did not play a significant role in the carrying out of the Assignment as well as the final completion of the Assignment on the 31st May, 2019.

3.2 The payment to the plaintiff if any, was performance based in terms of the quality of work and the number of days covered on duty, hence the plaintiff is not entitled to the payment of the sum of USD14,112.00 as claimed. The plaintiff's services were terminated through an e-mail dated 25th March, 2019 and he was paid a sum of K60,000.00 for his belated contribution and therefore

the defendant does not owe the plaintiff any money whatsoever. The defendant did not accede to the plaintiff's demand and states that the plaintiff's assertion that the defendant attempted to buy time through a letter written by her lawyers, asking for nearly 2 weeks to seek instructions and revert to him is highly defamatory, unprofessional and unfounded as they are based on malicious assumptions and opinions which are highly regrettable.

3.3 The performance of the plaintiff was unsatisfactory, as the contract was premised on three deliverables, payment benchmarks, being an Inception Report, a learning event report and an end of assignment report, without which the Swedish Embassy was not going to pay. Further, most of the tasks or duties were performed by the defendant, which led to the approval and completion of the Assignment. The defendant does not owe the plaintiff any money amounting to USD 14,112.00.

4.0 The Plaintiff's Reply

4.1 In response to the defence, the plaintiff averred that: The contracting parties were the Swedish Embassy and the defendant. The plaintiff was not excluded from the contract because according to the terms of reference in the advert, issued by the Swedish Embassy, it provided for "A Team" consisting of 2 consultants with relevant knowledge. The defendant did not possess the relevant Bachelor's degree and it was on account of the plaintiff possessing the Bachelor's degree that the said contract was clinched.

4.2 The defendant did not terminate the plaintiff's services on the 25th March, 2019 or any date at all. On the 26th March, 2019, the defendant even asked the plaintiff to make a written commitment that he would write a learning event report. He made the written commitment and wrote the report. The schedule of the WEE workshop held at Swedish Embassy on the 27th and 28th March, 2019 will be exhibited at trial. The contract with the Swedish Embassy did not allow

the defendant to terminate the services of the plaintiff or to replace him without the written consent of the Embassy.

4.3 The plaintiff covered all the work and tasks assigned to him for the entire duration of the contract, hence the Swedish Embassy assigning the sum of USD14,112.00 to him in the contract and at the point of payment for the services rendered. The defendant was not paid the sum of K60,000.00 as alleged. The plaintiff executed all the works assigned to him by the defendant as team leader and the works were approved by the Swedish Embassy without corrections. This fact was communicated by the defendant to the plaintiff via e-mail dated 11th April, 2019 in which the defendant wrote “Dear Chidongo, Cecilia has approved all our last two reports as there are no comments or corrections!! We give all the glory to God almighty. Cheers.” The plaintiff fulfilled all his obligations under the subject contract and is due the sum of USD14,112.00 which the defendant has illegally kept to herself.

4.4 Save as expressly admitted, the plaintiff denied each and every allegation in the defence as if the same were set out and traversed seriatim.

5.0 At the trial

5.1 The plaintiff and the defendant each called one witness.

5.2 The Plaintiff's Evidence

5.2.1 PW was the plaintiff himself who testified as follows: He and the defendant were contracted by the Swedish Embassy on the 7th November, 2018 to work on a project called Gender Issues which project deals with gender issues. The defendant signed the said contract on behalf of the team which contract was for consulting services. The parties to the contract are the Swedish Embassy whose contact person was Cecilia Brumer while Dr Emma Sitambuli was also the contact person for the consultancy. Dr. Emma Sitambuli is the defendant in this

matter who signed the contract on behalf of the team as team leader. The team constituted the plaintiff as team member and the defendant as team leader which information appears under remuneration in the contract that indicates the number of days and the remuneration.

5.2.2 From inception, the defendant contacted him to inform him that there was an advert from the Swedish Embassy that indicated that the team shall consist of two consultants and that at least one member should have a University Degree of relevance. After looking at the advert, he agreed that they should team up as they could do a good job based on the requirements, as he had the degree which the defendant did not have and she had other requirements that he did not have. The terms of the remuneration were already agreed upon by the time they went to sign the agreement itself. The remuneration for the defendant was US\$19,008.00 and US\$14,112.00 for him.

5.2.3 After execution of the contract, they worked together as a team though they divided the work. The Swedish Embassy guided them to look for their own stationery which he sourced, after obtaining some money from his friends as the Embassy did not have the money at the time. The total value of the stationery he purchased was approximately K3,000.00. He was asked to define all the gender concepts, download all the videos and to edit whatever the defendant wrote and send it back to the defendant for her to do the research on current issues regarding gender. The defendant also required him to send emails to certain members. Together they visited all the fourteen partner organizations that the Swedish Embassy has under the Swedish International Development Agency (SIDA). They held workshops in these organizations that they visited, where he presented the concepts and videos. The defendant also asked him to write notes as people were asking questions in these workshops. He presented statistics, in the form of pie charts which he would send to the defendant via e-mail so that she could marry the same with what she had. At times the defendant would return the work to him re-do for not being well done. The last workshop that they

held from the 27th to the 28th March, 2019, they were together where he presented the video explaining the concepts and the defendant would come in to give examples from the field to try and illustrate the technical concepts.

5.2.4 He generated statistical presentations, known as statistical work analysis in a report on knowledge sharing. He generated this report and sent it to the defendant for her to marry it with what she had written. After he sent this report, the defendant sent him an email on the 11th April, 2019, stating that their report had been accepted. Thereafter they started waiting for the money from SIDA through the Swedish Embassy. On the 30th May, 2019 he contacted the defendant asking for the money and whether she had been paid. The defendant responded on the same date of 30th May, 2019. He phoned her and she refused to pay him as she said “you can go to hell! I am not going to pay you.” The initial response he received was sometime in May, 2019 and it was on the 6th June, 2019 when she told him that she was out of office and that she was not going to pay him. The reason for this statement according to the defendant was that his work was insignificant. The defendant told him that she had not been paid, and so he decided to find out from the Embassy, whom confirmed that they had made all the payments to the defendant in the sum of US\$23,970.75 which was paid to the defendant’s account. From this amount he was supposed to get US\$14,112.00 and the defendant was to get US\$19,008.00. The defendant signed the said invoice on the 16th April, 2019 which she had prepared.

5.2.5 Thereafter he consulted his lawyers so that court action could commence and a letter of demand was written on the 10th June, 2019 for the defendant to pay him the sum of US\$14,112.00 within 48 hours. A response came from Messrs Lungu Simwanza and Company on the 12th June, 2019 requesting that the plaintiff wait up until the 25th June, 2019. His lawyers wrote back indicating that the plaintiff could not wait until the 25th June, 2019 and that they were going to commence legal action. After he commenced legal action, the defendant filed a defence but her curriculum vitae (CV) shows that when they applied for

this project, she was still pursuing a university degree, meaning that she didn't have one, as her CV states Bachelor of Arts in Anthropology (in progress).

5.2.6 He received an email terminating his services on the 25th March, 2019 to which he wrote back and stated that he could only respond on the termination, if he got a response from the Embassy as according to clause 4.3 of the contract the consultant could not replace the team member. That is why he responded the way he did to the defendant because of the Terms and Conditions for the Consultancy services of 2015. He never received any notification from SIDA through the Embassy that his services had been terminated. On the 26th March, 2019 the defendant asked him to write an event report and he responded to her letter on the 26th March, 2019.

5.4.7 Both he and the defendant participated in the learning event that was held from the 27th to the 28th March, 2019 as is indicated in the schedule of activities that was generated by the Swedish Embassy where both their names appear. He and the defendant worked very well together until the issue of payment arose, that is when they differed. Regardless of the email that she wrote to him where she fired him, she actually did not and that is why they did the last event together. Contrary to the defendant's position in her defence, where she states that she paid him everything, he was never paid anything and he has received nothing.

5.4.8 He wants the court to award him the sum of US\$14,112.00, as well as damages for breach of contract, interest on these amounts and costs for the action.

5.3 Cross examination of PW

5.3.1 In cross examination PW responded as follows: The balance that he was referring to in his email to the defendant dated 25th March, 2019 was K800.00 that was for fuel. He had borrowed K1,000.00 from the defendant, and this was

a personal thing, as they did not have money. The defendant did not pay him the K60,000.00 in cash and no one witnessed this. If she paid him then it was to his account. In the email he wrote to the defendant on the 4th June, 2019, he was trying to explain to the defendant the amount of money that she owed him being the sum of US\$14,112.00 and the rate should have been K9.00 or K8.00. There is nowhere where he wrote that he wanted the balance. Although he did not have any money to show that he borrowed K1,000.00 for fuel, the defendant knew about this.

5.3.2 It was agreed that all monies would be transferred to his account although he did not have this document. He could not confirm that the parties to the contract are the Swedish Embassy and Emma Sitambuli. His name was not appearing on the contract and he did not have any written contract between him and the defendant. The contract that he and the defendant had with the Swedish Embassy indicates that two consultants were needed, the defendant signed on behalf of the two of them and under the provision for remuneration it is stated there. He does not remember writing to the Embassy requesting for the second payment phase on the 31st May, 2019, as so many emails were generated.

5.3.3 He was not aware that his weaknesses and misdemeanors that he referred to in his letter dated 26th March, 2019 made his work insignificant. He did submit the only report he wrote titled Knowledge Sharing learning event, to the defendant as Team Leader as per the agreement. It was the defendant's responsibility to re-do the report he submitted and the Embassy stated that his work and her work were favourable because they worked as a team. It was not the defendant who wrote to him to state that his work was favourable but the Embassy. The report that was submitted to the Embassy came from the defendant on behalf of the team, as he did not have authority to submit the same. The defendant sent him the report to edit, which he did on his computer and the defendant acknowledged to the Embassy that he edited the report. The report that the defendant submitted is different from his poorly written report.

He wanted to be paid for his poorly written report as well as for the defendant's work which he edited.

He was not aware that there was a final report that was written by the defendant, as she sent him an email informing him that their reports had been accepted. The payment is for the entire period and he participated through the editing as he even edited the final report, although he was not aware that the defendant submitted it. The final edited report is the same one that he has on his computer, which is also reflected in his emails, although he has not brought those emails to court.

5.3.4 The contract indicated that he had 48 days to work on the project which would entitle him to US\$14,112.00. His name does not appear on the time registration form. Only Emma Sitambuli's name appears on the time registration form with a total number of 740 hours and 92.5 days. In the contract the total number of hours for the defendant is 52 and for him 48 which brings the total to 92 hours. He does not have a time sheet to show the number of hours that he worked, and the time sheet before the court depicts all the activities that he participated in and what the defendant did which included coaching and writing the final report which culminated into 92.5 hours. The payment was not made in relation to the time sheet because this was not stipulated in the contract. The time sheet was only generated after he made queries. He did not have authority to submit to SIDA the type of service that he carried out as required in the general terms and conditions of SIDA, but he did submit the same to the defendant. He did not submit a time sheet to the defendant because it was her duty, as the document states that all work done will have been taken to have been done by the team leader. The time sheet on page 176 of the plaintiff's bundle of documents does not encompass all the 92.5 days.

5.3.5 There is no bachelors degree mentioned on the qualifications required in the tender issued by the Swedish Embassy on page 6 of the defendant's bundle

of documents, and neither is a masters degree mentioned but a higher degree was required. The degree appearing on page 214 of the defendant's bundle of documents is a degree in the Doctor of Philosophy, but this is not a Bachelors Degree. On page 215 of the defendant's bundle of documents is a Degree of Master of Science, which is also a university degree. He has a Bachelor's degree in Anthropology, while the defendant has a Doctor of Philosophy in Anthropology and she also has a Masters Degree in Science. The conditions in the tender state that at least one of them should have a degree of relevance.

5.3.6 Although he did not have the email that he wrote in response to the defendant where he stated that she could not terminate his services, he did write it. Clause 4.3 of the contract does not state that the consultant may not terminate the persons who are to carry out the assignment as specified in the contract without prior written consent from SIDA, it states that the consultant may not replace the said persons. There was no notification of replacement from the Embassy but the termination is there. He cannot confirm that since his contract was terminated on the 25th March, 2019, he is not aware of the Final report. This is because on the 27th to the 28th March, 2019 the activity sheet was generated and his name is there because the defendant did not have the power to terminate his services.

5.3.7 It is not written anywhere in the contract that the payments that were due to him were performance based, only the number of days was provided for. He was a sub-consultant so there is nowhere where it was written. As such even if the work was poorly done or below par, the Embassy would pay.

5.4 Re-examination of PW

5.4.1 In re-examination PW clarified that the K800.00 related to a personal arrangement between him and the defendant, and had nothing to do with the K60,000.00 that the defendant purportedly gave him. He has never received any part payment of K60,000.00 relating to the said project. He did not have any

agreement with the defendant to be paid via his account, because when the defendant signed the contract on their behalf, it was stipulated how much they would each be paid and along the way she asked him to submit his account details to her, which he did but no money was transferred into his account for the work done.

5.4.2 He could not confirm the parties in the contract as the defendant was the contact person in the contract, although his name appears at page 50 of the plaintiff's bundle of documents. The other contact person is Cecillia Brumer. He did not execute a written contract with the defendant because it was already stipulated how they were going to operate, as she was simply the Team Leader. His weaknesses, misdemeanors and misgivings did not constitute insignificant work, as the defendant asked him whether he was going to write the report and to which he said he would. The words that he used should not be blown out of proportion as he was simply trying to explain himself as a colleague by giving her a pat on the back as a supervisor. If the defendant found that his work was insignificant, she should have followed procedure and informed the Swedish Embassy, which she did not.

5.4.3 His report does not speak to his inadequacies, because whatever he wrote is what he sent to the defendant and she would submit portions of what he wrote in the report to the Swedish Embassy, which in turn stated that whatever he wrote was good, although maybe to her it was not good. The quality of the reports were excellent as the defendant confirmed the same to him, as they had been accepted without corrections which information she gave him by way of an email dated 11th April, 2019. His role was to research and put the same together which he would then send to the team leader. The team leader was his supervisor and he was her junior. It was the team leaders' role to generate the timesheets as his supervisor, as guided by the Embassy. He should be paid for what he worked for according to what was stipulated by the Embassy.

5.4.4 A bachelors degree was essential to getting the contract and not just any other degree, as in academia no one is a graduate without a first degree. This is the basis why the defendant contacted him as she did not have a bachelors degree. One can be a professor but if they do not have a bachelors degree, they are not a graduate. He disputed the termination of his services by way of a text the following day, as he got a letter from the defendant to confirm his commitment to write the report and that is why he disputed the email as it was contradictory to his earlier message. Termination and replacement are the same and he disputes that he was replaced or that his services were terminated. His payment was not performance based. It was indicated that as a team they must work together to the satisfaction of the organization. It is not written anywhere that the payment was performance based and that is why he dismissed it. The Swedish Embassy was looking at their work as a team and it was not below par.

5.5 The defendant's evidence

5.5.1 DW was the defendant herself who testified as follows: She is a Gender and Evaluation Consultant running a firm called Gender Research, Evaluation and Training Services Consultancy. She graduated from NRDC in 1992 in Agricultural Management and started work with the Ministry of Agriculture in 1993. She was posted to Ndola where she was recruited as a Provincial Women in Development Officer. Her responsibility was to work with women in the Copperbelt province to help them in their development under the Agriculture Cooperative.

5.5.2 The tender that brought in this consultancy was a competitive tender as it was sent to seven Gender experts including herself. It was a closed tender as it was not advertised in the newspaper. The selection was done by way of choosing consultants that could handle the assignment. The Swedish Embassy sent the terms of reference which her firm received on the 20th September, 2018. She looked at the terms of reference to check that she complied with the criteria that

they were looking for as they indicated seven elements. One of them was that they wanted two consultants to do the job and secondly that one of the consultants must have a university degree in Social Sciences or Political Science or any degree of relevance. The third element was that the consultant must have 10 years' experience in mainstreaming Gender Equality. The fourth element was that the consultant must have experience in mainstreaming Gender at Project level working directly with men and women on the ground. The fifth element was that the consultant must have experience in mainstreaming Gender at an organizational level. The sixth element was excellent writing skills and analytical skills. The seventh element was the consultant must have a very strong command of written and spoken English. That for one to qualify as a consultant, they should have had all these criteria and she qualified for all of them.

5.5.3 She decided that she wanted to bid because she felt that she was competitive enough, so she prepared the technical proposal as a document to be assessed as well as the budget. The technical proposal described one's understanding of the assignment and how it would be executed, that is the methods, as well as the time frames, the team that would be involved, their qualifications and how these qualifications aligned with the terms of reference and work schedule time lines. For preparation of the budget she looked at the kind of work that was being asked for, as there were ten tasks in the terms of reference, and she would weigh how much time would be assigned to each task, then calculate the professional fees.

5.5.4 She submitted the technical proposal and budget on the 5th October, 2018 as the deadline was on the 7th October, 2018. She got a letter from the Swedish Embassy congratulating her for writing a high quality, technical proposal and that she had gotten the assignment. The letter from the Swedish Embassy suggested that they have a meeting on the 23rd October, 2018 for clarification on certain things like the number of workshops, as she had put three which they thought was too much, so they removed one. The terms of reference had four

payments which were based on the inception report, a needs assessment report, a learning event report or workshop and a final consulting report. The contract was signed which set out the conditions on how the assignment was going to be managed and what was required. She signed the contract as she was the team leader. The parties in this contract were the Swedish Embassy and herself. She was the one responsible for this assignment and the said contract was signed on the 7th November, 2018.

5.5.5 The first task was the Gender Training which was the introduction of the consultant to the fourteen organizations that the Swedish Embassy was financing in Zambia. Then there was the preparation of the inception report which is the document that described the workplan, that is how the consultant would work with the organisations. It also described the jobs that the consultant would do, which workplan was to be approved by the Swedish Embassy. She submitted the inception report on the 22nd November, 2018 for approval and it was returned with a few comments that she had to correct. After the corrections were done, she was told to submit the invoice of 35% of their budget.

5.5.6 On the 4th December, 2018 the Swedish Embassy wrote to her explaining that they had stopped paying individuals, and that they could only make the payment to a company. She had a company called Mutusunge Development Associates and she opened a bank account with FNB and provided the Embassy with bank details and the invoice, together with the time sheet that showed the number of hours she had worked on from the time the assignment started to the inception phase. She waited for the payment which delayed because of the Christmas break and the funds were paid to her account on the 3rd January, 2019. It was about US\$23,000, actually it was about US\$11,000.00.

5.5.7 She called the plaintiff and the following day on the 4th January, 2019 they went to the bank, FNB Industrial branch at 09:00 hours. As the money was in dollars she inquired on the exchange rate which was 11.3 and after calculating 35% of US\$14,112.00 as there were reimbursements for fuel, communication

and stationery which the sub-consultant bought for the workshop held in November, the total was US\$370.00. 35% of US\$14,112.00 amounted to US\$4,939 together with the amount of US\$370.00 this came to US\$5,309.20 which was due to the consultant. Converting this amount in kwacha at the rate of 11.3 it came to K60,000.00. Together they withdrew K60,000.00 from the bulk till and went to a special room where the money was disbursed in cash.

5.5.8 Before she gave the plaintiff the money, she removed K2,000.00 because the sub-consultant had borrowed K1,200.00 which he used for fuel and he was to re-pay the same in October and she got K800.00 as interest on the sum of K1,200.00 as such he went home with K58,000.00 although he complained about the K800.00 by way of an email that he had written to her on the basis that she had given it to him.

5.5.9 The next phase on the contract was the coaching and or meeting process. Based on the terms of reference, each organization was given three days. Four things were to be done for each of the fourteen organizations. The title was “Support to improve the mainstreaming of Gender in the partner organizations of the Swedish Embassy, in agriculture and energy”, such as solar. The four things were: desk review of the documents and policies so as to identify the gaps, providing oral input into the results of the organization by way of feedback on what was missing and what was not doing so well, assisting the organization in developing gender entry points and gender indicators, and helping each of these different organizations come up with a gender action plan.

5.5.10 The mentoring activity took place from January and ended on 7th March, 2019. Midway during the process, the Swedish Embassy in mid-February requested for a draft of the consultancy report as a way of a progress report. She assigned the plaintiff as he had not prepared any other report. The said report was due on the 18th March 2019 but when she saw that by the 10th March, 2019 the plaintiff had not written anything as he failed to do so, she wrote the report and submitted it. This is the document that was used for planning.

5.5.11 She considered that she was now doing this job alone, as she realized that the plaintiff was not doing anything to add value to this assignment. On the 25th March, 2019 she wrote a letter that she was terminating the plaintiff's contract as she was not seeing any value from him. The plaintiff pleaded with her and so she wrote another letter, to give him a final task where she told him that she was not happy with his work so far. She told him that she would give him a last chance, and that he had to write the learning event report which took place on the 27th and 28th March, 2019 at the Swedish Embassy. In that event, she presented the overall reflection of the assignment, tasks and whether she had successfully executed the assignment. All the fourteen organizations were also asked to present what they had learnt from the process. At the end of the event, she asked the plaintiff to write the event learning report.

5.5.12 The report written by the plaintiff was unsatisfactory and mediocre, as the English, grammar and font were different and were cut and paste. The report did not follow the structure of a good report which needs to have an introduction, narrating the story. It was poorly written, the grammar was wrong and sentences were inconsistent. The report was of a very low standard and it was difficult to understand what he was trying to convey. When she saw that the report was substandard, she wrote to the plaintiff giving him her observations which included the following: the title was wrong, the table of contents was manually done, the grammar was very poor, the sentence construction was also very poor, there were different font sizes, the pictures were downloaded from the internet with no acknowledgments which is plagiarism, the tables were running over one page which distorted what was being portrayed, and there was no list of figures. She asked the plaintiff to rewrite the report but he refused, so she had to rewrite it and started afresh.

5.5.13 In the letter that she had written to the plaintiff, she told him that his final payment would be based on him writing a high-quality report and he wrote acknowledging and accepting responsibility to write a high-quality report. For

someone with a PHD, the expectation is very high but the plaintiff failed to write a high-quality report.

5.5.14 She rejected his report and since he refused to improve on it, she rewrote it. Her report was accepted by the Swedish Embassy and the next phase was to finish off with the consultancy report. The report which she rewrote was the Learning Event Report and it was a very important Report together with the Final Consultancy Report as they were tied to 65% of the payment. The Final Report covered everything from the start to the end which Report she wrote. She submitted the said reports on the 4th April, 2019. On the 5th April, 2019 the Swedish Embassy wrote back to her indicating that they had accepted both reports which reports were high quality ones.

5.5.15 The Swedish Embassy also asked her to submit the final invoice and as per their requirements, she presented her time sheets covering 92 days from January to end of March 2019. The whole assignment was 102 days and she did 92 days on the main part of the assignment which represented 65%. She also included 20 days from the inception of the report, so in total she had 112 days meaning that she successfully completed the assignment on her own. She was paid the 65% and the funds hit her account on the 31st May, 2019.

5.5.16 The plaintiff was misleading himself when he stated in paragraphs 4 and 5 of his statement of claim that she clinched the contract with the Swedish Embassy on the basis that he has a degree of relevance. This is because she has a Master of Science Degree in Development Policy, Processes and Practice from the University of Redding. She also has a Doctor of Philosophy Degree in Anthropology from Rhodes University in South Africa. The requirements by the Swedish Embassy were not just in education. The plaintiff did not have the other qualifications that she has, which made her qualify and win the tender.

5.5.17 She did recruit the plaintiff to be part of this assignment and he was part of the contract, however, he was unable to perform any of the tasks in the terms

of reference that she signed for. If the plaintiff had worked on the 48 days that were allocated to him at a fee of US\$294 per day, he should have given her a time sheet indicating what he did on each of those days at each organization, and what the results were. However, he had not done so to date. He had not shown the four outputs or whether he assisted each of the fourteen organization how to prepare an action plan, how to identify gender entry points and gender performance indicators. He also did not provide any oral inputs in the gaps identified for purposes of them reporting to the Swedish Embassy. As such the plaintiff did not submit a time sheet with all these deliverables. He also did not submit the field notes which is the raw data that is collated every time they visited the organisations. The plaintiff refused to submit this information to her which would have been the evidence of what he did at each organization. The time sheet would have been like a balance sheet, which would show what he had done and the time spent on the tasks.

5.5.18 At page 176 of the plaintiff's bundle of documents, is the monthly time registration form which shows the hours and the description of duties performed. It reflects how many hours one spent on the duties they performed aligned to the tasks described in the contract. The Swedish work time is 8 hours a day and she worked for 92 days. This was her true registration form and the plaintiff was supposed to produce his, which he never did. On the 9th April, 2019 she wrote to the plaintiff by way of a WhatsApp message requesting for his time sheet as indicated in the contract, but the time sheet never came.

5.5.19 She gave the plaintiff US\$5,000.00 plus and she told him that she was paying him this amount even though he had not done the work fully. The 35% was the first payment and the second payment was to be the 65%. The 35% was K60,000.00 which translated to US\$5,000.00. The first payment was made after the Inception Report and the second payment was to be paid after the Learning Event Workshop and the Final Consulting Report which three reports she wrote alone. On page 51 of the defendant's bundle of documents is an email written by

the plaintiff to her confirming that he did not write anything, and that she had not paid him the full amount. This email was following her request for the field notes. As the plaintiff wrote in that email that she had not paid him in full, he was acknowledging that she had paid him something which was the K60,000.00. This is evidenced by her bank statement at page 17 of the defendant's bundle of documents which shows that she withdrew K60,000.00 on the 4th January, 2019. On the 3rd January, 2019 she sent a WhatsApp message to the plaintiff informing him that the funds were in her account which is reflected at page 15 of the defendant's supplementary bundle of documents. The plaintiff also went on to write to the Swedish Embassy over the second phase of the payment, so although he claims not to have been paid, this query reflected at page 27 of the defendant's supplementary bundle of documents shows that he was asking for the second payment in this letter.

5.5.20 The payments from the Swedish Embassy were based on an hourly rate, for 8 hours in a day as per clause 6.2 of the contract. That is why she needed the time sheet from the plaintiff because the submission of any claim was tied to the contract and she did not have the plaintiffs' time sheet specifying the number of hours that he worked.

5.5.21 Although the plaintiff stated that she did not have any authority to replace him without informing the Swedish Embassy, as a team leader she had all the right to terminate his contract as he was sub-contracted and she did not need to inform the Swedish Embassy. However, if she was replacing him, she needed to have informed the Swedish Embassy and identify someone with similar qualifications.

5.5.22 It was not the Swedish Embassy that prepared the budget but her. She allocated the plaintiff 48 days based on the tasks in the terms of reference which the plaintiff did not do at all. In paragraph 10 of the defence in the excerpt of an email that the defendant wrote to the plaintiff, the word 'our' used there refers to Mutisunge Company and not the plaintiff, as he did not do the work.

5.5.23 In relation to the plaintiffs' claim that he should be paid US\$14,112.00 and damages for breach contract, if the plaintiff had performed, he was going to be paid in full. The contract was performance based and if she had not written and submitted the Inception Report that was approved, no money would have been paid. The next Report was the Learning Event Report that was combined with the Final Consulting Report. The bench marks were indicated in the terms of reference. The key statement in the contract was approved in writing, if this was not written then she could not have submitted an invoice. If the plaintiff had participated in all these Reports, he would have been paid, but she submitted them alone. Despite the fact that he did not perform, she still paid him and she did indicate to him that he had not performed any of the required tasks. In the email at page 133 of the defendant's bundle of documents in paragraph (A) she wrote to the plaintiff indicating that although she had given him 35% of the payment, he needed to improve for him to be paid the balance. There is no evidence to show that he was not paid the K60,000.00.

5.5.24 On pages 58 and 59 of the defendants' bundle of documents, she wrote to the plaintiff for him to commit to writing the Learning Event Report. When the plaintiff saw the statement on the balance of the fees, he replied accepting that he would write the Learning Event Report. In the said letter at page 59 of the defendant's bundle of documents dated the 26th March, 2019, the plaintiff wrote to her acknowledging all his misgivings and misdemeanors. The email on page 133 of the defendant's bundle of documents shows her explanation to the plaintiff particularly in paragraphs (C) and (D) on the type of information and the kind of Reports that needed to be written by him.

5.6 Cross examination of DW

5.6.1 In cross examination, DW replied as follows: The number of assignments that she executed with the Swedish Embassy, that is with Cecilia and Mbalala were three. Although Cecilia was working with a consultancy firm before she got the job at the Embassy, so altogether they were five. According to the terms of

reference issued by the Swedish Embassy, the number of consultants required to undertake this assignment were two.

5.6.2 She could confirm that when submitting the technical proposal to the Embassy she submitted it with the plaintiff, which appears on page 9 of the defendant's bundle of documents. The said technical proposal indicates that it was submitted by the plaintiff and the defendant as Independent Gender Consultants. She did submit the financial proposal together with the technical proposal because they go together and she wrote them. Page 21 of the defendant's bundle of documents shows that the financial report was submitted by the defendant and the plaintiff as Independent Gender Consultants.

5.6.3 Out of the seven qualifications required by the Embassy for one to undertake this assignment, the plaintiff only had one of them which was on the education part. Although the table on page 12 of the defendant's bundle of documents shows that the plaintiff had three competencies, that was the assumption at the beginning, but at the end it was proved that they were false. The plaintiff never wrote the Inception Report although she had asked him to do so, which he never did so she wrote it herself. There is a copy of a poorly written draft in the bundles. On page 29 of the defendant's bundle of documents, there is an Inception Report – Draft submitted by the plaintiff and the defendant. The plaintiff submitted the report in his capacity as sub-consultant while she submitted the report in her capacity as team leader. The plaintiff was put there as the contract indicated that there were two consultants.

5.6.4 According to clause 4.3 of the contract, where it states personnel, she was forbidden as team leader from replacing the sub-consultant without the consent of the Embassy, as it states that the consultant may not replace. As per clause 5 of the said contract as a team leader she was responsible for the work of the sub-consultant, as it was her own work. In the contract that she executed with the Swedish Embassy, 48 days were allocated to the plaintiff which translated to US\$14,112.00. The contract was not amended to do away with the plaintiff as

sub-contracted on this assignment. He was given 48 days for the task and he was being paid US\$294 per day which gave a total of US\$14,112.00 It was a performance-based contract and so she wrote a termination letter to the plaintiff although the contract between herself and the Swedish Embassy was not amended.

5.6.5 On the 3rd January, 2019 she did inform the plaintiff that she had received the funds in her account and on the 4th January 2019, she met the plaintiff at her house and then they drove in her car to the bank. The proof of the meeting was the message she sent to the plaintiff. She did not have any proof of the meeting before the court, although the plaintiff did go to her house. She wrote the message appearing on page 15 of the defendant's supplementary bundle of documents which states that "funds are in my account dear". She wrote the message on the 3rd January, 2019, at 5:32 p.m. The plaintiff is the one referred to as dear. She did receive a response from the plaintiff stating that he was at the gym and whether he could come over at that time. There is no written message that shows that she met the plaintiff the following day. She called him on the phone as the banks were closed.

5.6.6 The amount of K60,000.00 was too big to be given over the tellers' counter, so they went to the bulk center where big amounts were issued. Her statement correctly indicates that the transaction of withdrawal was teller cash and this was one of the ways of her proving that she paid the plaintiff K60,000.00 on the 4th January, 2019. The plaintiff acknowledged receipt of this amount by email, he did not sign on the statement that he had received the K60,000.00.

5.6.7 She did terminate the sub-contract on the 25th March, 2019, although the plaintiff pleaded. She did not write a letter to the plaintiff to expressly terminate his sub-consultancy agreement, as page 54 of the defendant's bundle of documents shows that she wrote an email. On the 26th March, 2019 she did write to the defendant asking him to commit to writing the Learning Event Report which he did commit to do. She did indicate to the plaintiff in her letter, that he

needed to write a high-level report, but he wrote a mediocre poorly written report that could not be submitted to an international organization. Although she confirms that the plaintiff wrote a report it was poorly written.

5.6.8 The report appearing on page 91 of the defendant's bundle of documents, was submitted by Mtisunge Development Associates (MDA) Ltd, because the Swedish Embassy changed the regulations as they could not pay an individual. That is why Mtisunge Development Associates had to come on board to submit the report. She made the decision to submit the report in the name of Mtisunge Development Associates, as she was writing the report alone at this point and a company name was needed to tally in the system for the payment. Mtisunge Development Associates Ltd is registered under PACRA and a certificate is exhibited in the bundle of documents. The request for the report to be submitted by a company was made by the client and not her. As such all the documents had to be amended to indicate the company. There is a letter from the client making this request, on official document. There was no contract effecting this amendment. The final report under the name of Mtisunge Development Associates Ltd was accepted by the Swedish Embassy, and that is why they were paid. Two reports were submitted under Mtisunge, being the Learning Event report and the Final report.

5.6.9 She did write the email dated 19th April, 2019 on behalf of Mtisunge, appearing on page 19 of the plaintiff's bundle of documents where she stated that Cecilia had approved their last two reports. The final 65% payment was dependent on the two reports. Mtisunge submitted the Learning Event Report as indicated on page 64 of the defendant's bundle of documents. The mediocre report written by the plaintiff is on page 145 while the Final Consultancy report is on page 91 which was submitted under Mtisunge.

5.6.10 On pages 141 to 144 of the defendant's bundle there is a letter that she wrote dated 10th June, 2019, where she agreed that she edited the plaintiff's poorly written work. The assignment with the Swedish Embassy had come to an

end as at that date of the 10th June, 2019. The assignment ended when she submitted the two reports and the payment was received which was on the 31st May, 2019. She submitted the final report on the 4th April, 2019. She wrote the letter on the 10th June, 2019, after the plaintiff had written to the Swedish Embassy complaining about non-payment of his funds. Before the plaintiff wrote to the Swedish Embassy she did in a confidential online assessment form, communicate to the Swedish Embassy about the plaintiff's mediocre performance. This form is not before the court and according to the contract, the sub-consultant was not part of it and the Embassy was not involved. She filled out the confidential report on the 1st June, 2019. She was not obliged to communicate to the Embassy about the plaintiff's mediocre performance as it was between him and her. Before the conclusion of this assignment on the 4th April, 2019, she did not inform the Embassy about the plaintiff's mediocre performance because he was not recruited by the Embassy, she was the one that was recruited by the Embassy.

5.6.11 She did receive a letter of demand for the sum of US\$14,112.00 from the plaintiff's attorney. The letter she wrote to the Swedish Embassy was in response to a letter that the plaintiff had written to the Embassy, it was not in any way trying to justify why the plaintiff should not be paid. The plaintiff wrote a letter to the embassy which is on page 137 of the defendant's bundle of documents. At page 26 of the plaintiff's bundle of documents, which makes reference to clause (d) coaching process, she confirms that she did write that the plaintiff did visit all the 14 local organizations but that at most of the meetings, he did not ask questions or take any notes. There were 3 days allocated to each of the organizations for work to be done, and not just to be present and the total number of days for visiting these 14 organizations was 42. She could confirm that 6 days were allocated for writing field notes which field notes she did not have. 42 days and 6 days gives 48 days which justifies the US\$14,112.00 to be paid to the plaintiff.

5.6.12 The issue of the time sheet is indicated in the plaintiff's statement of claim, but the number of days is referred to in paragraph 5 of the defence, although the term time sheet is not specifically in her defence. The term time sheet is in the SIDA terms under clause 2. The communication from the plaintiff to her on page 51 of the defendant's bundle of documents, indicates that he was stating that even last time she did not pay him the whole amount as it was short of eight hundred kwacha (K800.00) which he accepted because of technicalities. There is no indication of 35% in that communication although it can be implied. The email she wrote to the plaintiff where she indicated that she had paid the plaintiff K60,000.00 is on pages 132-133 of the defendant's bundle of documents. The plaintiff did not object or refuse what she had written in the said letter as he even acknowledged this position in the email that he wrote to the Swedish Embassy on the 5th June, 2019.

5.6.3 After the letter of the 4th June, 2019, the plaintiff did take the issue to the lawyers. On page 24 of the plaintiff's bundle of documents it is stated that the work she and the plaintiff did with the Swedish Embassy's partners in the private sector went very well. She confirms that at all material times, she took the plaintiff's work to be her own.

5.7 Re-Examination of the DW

5.7.1 In re-examination, the defendant clarified that on page 25 of the plaintiff's bundle of documents, paragraph (b), she asked the plaintiff to write the Inception report which he failed to write. He also failed to write the Learning Event report and he was editing his own poorly written reports and not her reports that were high quality and were approved. The plaintiff did write to the Swedish Embassy as indicated on page 137 of the defendant's bundle of documents and she responded as is indicated on pages 141 to page 144 of the said bundle. She responded to the queries by giving her side of the story as the plaintiff had made some allegations. So, in her response she was explaining how the consultancy

went, as the plaintiff was claiming that he did a lot of work. She was explaining about his poor performance and that she did the assignment on her own.

5.7.2 On pages 64 and 71 of the defendant's bundle of documents are the two reports that Mtisunge Development Associates submitted. Initially when she submitted these two reports, she got a letter from the Embassy indicating that they were no longer paying individuals, and that the Embassy needed to deal with a company. So, she submitted her certificate of incorporation and bank details in the name of the consultancy firm. From then on for purposes of auditing and for the payments, the documents had to bear the company name of Mtisunge Development Associates as the payments needed to be in the name of the company that they were paying the works for.

5.7.3 She called the plaintiff on his mobile phone on the 3rd January, 2019, who did not pick the call but wrote to say that he was in a meeting. She told him that the funds were in her account and he wrote to ask if he could come over now. He called her to arrange for them to go to the bank the following day. The plaintiff went to her place and they then went from her place to FNB, using her car and they got the money from the bulk teller on the 4th January, 2019, and K60,000.00 was paid to the plaintiff. She deliberately withdrew K60,000.00 as she did not want any problems.

5.7.4 In the 48 days that were allocated to the plaintiff, there was work that was to be performed and there were results to be achieved. Work was to be done at each partner organization it was not just a matter of being present and ticking the box for attendance. The client hired the plaintiff to perform specific tasks, and they expected the performance to improve gender mainstreaming at each organization. They did not have any proof of these results from the plaintiff. She asked the plaintiff to submit the field notes, which notes would inform them on what he did and the support that he gave to the organization. The plaintiff was unable to do this as he was going to these organizations without a notebook or a pen, he was not asking questions or helping the organizations to come up with

gender mainstreaming and a gender action plan, which he did not have. The 48 days were for work to the satisfaction of the team leader and the client. As per requirement in the contract, the plaintiff needed to prepare a time sheet for the hours worked as part of the invoicing as part of the work done. The 48 hours were not verbal but needed to be substantiated through the time sheets.

5.7.5 The contract specified that there was a list of documents which guide how to submit an invoice, and one of these documents is the SIDA terms for consulting service. It is in these terms where the time sheet is mentioned. Payment could not be received without submitting a time sheet which shows the actual number of hours worked by each consultant as is indicated on page 238 of the defendant's bundle of documents, in clauses 5 and 6.2. On the 25th March, 2019 the plaintiff wrote a letter where he pleaded with her indicating that he was going to improve his performance and that is why she wrote to make him commit to writing a high-quality Learning Event report, which communication appears on page 58 of the defendant's bundle of documents. The plaintiff accepted to write a high-quality report.

6.0 The Plaintiff's Submissions

There were no submissions filed by the Plaintiff.

7.0 The defendant's Submissions

7.1 The defendant filed submissions on the 5th May, 2022, wherein counsel argued that the central dispute in this matter borders on the principle of partial or incomplete performance of a contract as well as underperformance. That this gives rise to a question whether a person who has partially performed a contract in a very unsatisfactory manner due to underperformance can be entitled to full payment of the whole contract? Counsel in answering this question submitted that such a person is not entitled to full payment of a partially executed contract, as his payment will only be determined by the amount of work executed within a certain hourly period. It was counsel's further argument that in some

jurisdictions, a person who partially executes a contract is not entitled to any payments at all. That a person who breaches a contract cannot be paid remuneration for a partially executed contract. To buttress this argument reference was made to the case of **Cutter Vs Powell**¹ where it was held as follows:

“Where parties conclude an express contract, no terms can be implied into the contract. On the facts, the contract between the parties expressly provided that the payment was conditional upon the completion of the voyage and only payable after the ship arrives. Thus, under the express terms of the contract, the sailor was entitled to receive the payment if the whole duty of the contract was performed and not entitled to any payment if the contract was only partially performed. The Court noted that the contract made payment conditional on performance of the full voyage as a form of insurance for the employer. Accordingly, even though the sailor was not to blame for failure to perform the contract, the express terms of the contract renders payment conditional on the full performance of the contract. Thus, on a construction of the express terms of the contract, no payment was due for partial performance.”

7.2 On the strength of the above authority, counsel submitted that the plaintiff is not entitled to the full payment of US\$14,112.00 due to the fact that, he did not complete the 48 working days chargeable at US\$294.00 per day. Counsel argued that there was no evidence on record by the plaintiff, that he worked for 48 days on the project to warrant the payment of US\$14,112.00. Further that the payment of US\$14,112.00 was conditional, or subject to the plaintiff effectively executing his duties within 48 days as stipulated in the contract. Counsel contended that the plaintiff however, underperformed and did not even complete the 48 working days in the contract. That as such, the plaintiff was only paid K60,000.00 commensurate to 16.8 days as the rest of the days were largely taken over by the defendant, who executed the duties and assignments

on behalf of the plaintiff. On the basis of the foregoing, counsel urged this court to adopt the principle of law highlighted in the **Powell** case.

7.3 In relation to the time sheets, counsel firmly submitted that payment for the work done by the consultant, was based on the number of days and hours worked. That this was as per clause 4 (a) of the contract between the defendant and the Swedish Embassy on pages 48 to 52 of the plaintiff's bundle of documents, as well as in clause 6.2 of the SIDA General Terms and Conditions for consulting services 2015, which are part of the contract between the defendant and the Swedish Embassy, as indicated in clause 2 of the said contract. Counsel argued that the defendant did submit her monthly timesheet stating the duties performed as is indicated at page 176 of the plaintiff's bundle of documents, whereupon the defendant was paid her dues. That to the contrary, the plaintiff did not prepare his time sheet for the work done and even during trial, he failed to provide evidence that he worked on the project as a consultant for 48 days. It was counsel's submission that the plaintiff is not entitled to any remuneration for failure to complete the 48 days allocated to him, as he only worked for 16.8 days for which he received payment of K60,000.00, though at law in terms of the **Powell** case, he should have been entitled to nothing.

7.4 Counsel went on to argue that the failure by the plaintiff to complete 48 days to provide consultancy services successfully, for which he was engaged by the defendant amounted to a breach of contract, due to underperformance as well as non-completion of the working days. For this argument reference was made to **Treitel on the Law of Contract**, where they wrote as follows:

"A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing."

7.5 It was submitted that the plaintiff claims are unjustifiable and unfounded as the plaintiff failed to work for 48 days, as stipulated in the contract and that

his performance was defective and unsatisfactory and below par. That against this background, the defendant is on firm ground to refuse to pay for underperformance and the uncompleted work of the plaintiff. To buttress this argument, reference was made to the learned authors of **Treitel's Law of Contract at page 530** where they stated the following:

“One party to a contract is entitled to refuse to perform his part if the other has failed to perform a condition precedent on a concurrent condition.”

That on the strength of the above, it was counsel's submission that the evidence on record shows that the performance of the plaintiff throughout this project was below par as depicted on pages 25 to 28 of the plaintiff's bundle of documents as well as on pages 51, 52, 54, 58, 60 to 62, 132 and 133 of the defendant's bundle of documents. It was counsel's submission that from the pages cited there is evidence that the plaintiff was paid K60,000.00 for his scanty and poorly done work in 16.8 days as opposed to 48 days, and that therefore the claim for US\$14,112.00 is unfounded.

7.6 On the basis of the foregoing arguments, counsel prayed that this Court dismisses the plaintiff's claims with costs.

8.0 The Decision of the Court

8.1 I am indebted to counsel for the submissions and arguments which I have taken into consideration.

8.2 The undisputed facts are that:

1. The defendant entered into a contract with the Swedish Embassy on the 7th November, 2018, to provide consultancy services to the Swedish Embassy which contract ended on the 31st May, 2019.
2. By this contract, the defendant was allocated 54 days under the contract at the rate of US\$352 per day translating to a total of US\$19,008.00. While

the plaintiff was allocated 48 days at the rate of US\$294 per day translating to a total of US\$14,112.00.

3. Full payment of the sums of US\$19,008.00 and US\$14,112.00 were made to the defendant on the 31st May, 2019.

8.3 The facts in dispute are:

1. The nature of the position of the plaintiff in the primary contract and whether there was a sub-contract between the plaintiff and the defendant.
2. The plaintiff's performance under the primary contract.
3. The plaintiff's remuneration under the primary contract.
4. Whether there was a breach of the sub-contract.

8.4 The nature of the position of the plaintiff in the primary contract and whether there was a sub-contract between the plaintiff and the defendant

8.4.1 It is not in dispute that the defendant entered into a contract for consultancy services with the Swedish Embassy on the 7th November, 2018 which contract was to end on the 31st May, 2019. The plaintiff averred that the defendant sometime in late 2018, contracted him to be part of the team to undertake a Gender Support Inquiry Assignment under the Swedish Embassy. That it was an express condition by the Swedish Embassy that for the team to conduct the assignment, it had to consist of two consultants with relevant knowledge in the field and that at least one of them should have a university degree of relevance. The plaintiff testified that the defendant signed the said contract on behalf of the team, as team leader as the team constituted the plaintiff as team leader and him as team member.

8.4.2 The defendant testified that the plaintiff was sub-contracted by her as a sub-consultant, but that the plaintiff was put in the contract between herself and the Swedish Embassy as a consultant as the contract indicates that there are two consultants.

8.4.3 A perusal of Annexure B of the contract at page 6 of the defendant's bundle of documents reveals that, the number of consultants that were to form the team that was to execute the contract between the defendant and the Swedish Embassy were two. The said two consultants were the plaintiff and the defendant. This position is reflected in the contract at page 26 of the defendant's bundle of documents, where the defendant is indicated as team leader while the plaintiff is a team member. The parties to the contract however are reflected on page 24 of the defendant's bundle of documents as the Embassy of Sweden as the client and Dr. Emma Sitambuli as the Consultant.

8.4.4 Upon assessment of the foregoing evidence, I find that the Swedish Embassy and the defendant were the parties to the contract while the plaintiff was not. Although the terms of reference required that the team that was to work on the assignment required two consultants, it was the defendant that entered into the contract with the Swedish Embassy and not the plaintiff. The plaintiff was engaged by the defendant to be part of the team, as a consultant under the contract.

8.4.5 This then leads me to address the question whether a sub-contract existed between the plaintiff and the defendant. According to **Black's Law Dictionary**, a sub-contract is defined as:

"A secondary contract made by a party to the primary contract for carrying out the primary contract."

Upon a perusal of the evidence before this court, it is evident that there is no written agreement reflecting the terms of the agreement between the plaintiff and the defendant. The plaintiff does however aver in his statement of claim in paragraph 3 as follows:

"The plaintiff will aver that sometime in late 2018, the defendant contracted him to be part of the team to undertake a Gender

Support Inquiry Assignment under the Swedish Embassy in Lusaka, Zambia.”

The defendant in her defence in paragraph 2 states that:

“The defendant admits the contents of paragraph 3 of the plaintiff’s statement of claim and will aver that the contract to undertake a Gender Support Inquiry Assignment was entered between the Swedish Embassy in Lusaka and the defendant to the exclusion of the plaintiff.”

8.4.6 Further, an email dated 6th June, 2019 from the Swedish Embassy to the plaintiff explained the relationship of the plaintiff in the contract as it states:

“With all our consultancies, the contract is signed between the Embassy and Team Leader of the assignment and in the case of companies, with the designated signatory within the organization. The Embassy does not sign contracts with all the team members specified in the document, neither do we pay team members separately. In terms of the ways of working and the payments, this is left to the team of consultants to deal with. That is why even in your case, Emma signed the agreement, she was the main contact for the assignment and she submitted the final report and invoice. With regard to payment, it was/is her responsibility for her to pay you based on what the two of you agree (ideally through a written contract). This is in accordance with our guidelines which state “unless otherwise agreed between the parties, the Consultant (in this case Emma) is responsible for payments to the Sub-consultant (Chidongo).....

We believe that this is a problem between Emma and yourself which has nothing to do with the Embassy. That said, you are at

liberty to take the steps that you deem necessary. We certainly hope that the two of you can resolve the matter amicably.”

8.4.7 In response to this email, the plaintiff in part stated that:

“... Am now at peace that you have clarified my position as “sub-consultant” and that Emma’s role was to ensure she pays what was specified in the contract.”

From the foregoing excerpts, it can be gleaned that the plaintiff was sub-contracted by the defendant to be a consultant, in the contract that she entered into with the Swedish Embassy. The nature of the said contract is a verbal one and I find accordingly.

8.4.8 Notwithstanding, it is trite that a verbal contract which is also known as an express contract is a valid contract. For a contract to be valid whether oral or written it must have the following essential elements as outlined by the learned authors of **Contract Law in Zambia, S.P Ng’ambi** and **C. Chungu**. They state the elements as being; an agreement - made up of an offer and acceptance; lawful consideration - which is a value or benefit given by the other party; capacity - being the legal competence for one to contract; and an intention to create a legal relationship - that is to be legally bound.

8.4.9 The said verbal contract constituted of an offer by the defendant which the plaintiff accepted to provide consultancy services to the Swedish Embassy, as stipulated in the primary contract. According to the primary contract, the plaintiff was assigned 48 days, meaning he had to do some work on each of these 48 days. Further, the consideration was the remuneration under the primary contract between the Swedish Embassy and the defendant which the Swedish Embassy paid out in full. Having established that there existed a verbal sub-contract between the defendant and the plaintiff, I will now address the next fact in dispute.

8.5 The plaintiff's performance under the primary contract and the sub-Contract

8.5.1 The plaintiff avers in his statement of claim, that he and the defendant provided consultancy services to the Swedish Embassy up to the end of the contract on the 31st May, 2019. That he executed his duties to the satisfaction of all the parties concerned and as such he earned his due under the contract with the embassy. The defendant however avers in her defence that the contract to engage the plaintiff was terminated on 25th March, 2019, long before the completion of the assignment as such the plaintiff did not play a significant role in the carrying out of the assignment as well as the final completion of the assignment on the 31st May, 2019. The defendant also avers in her defence that the performance of the plaintiff was unsatisfactory, as the contract was premised on three deliverables, as payment benchmarks, being an Inception report, a learning event report and an end of assignment report, without which the Swedish Embassy was not going to pay and that most of the tasks or duties were performed by the defendant which led to the approval and completion of the assignment.

8.5.2 For purposes of the primary contract, Annexure B of the contract at pages 4 and 5 of the defendant's bundle of documents provides the methodology and scope of work of the consultants. In particular at page 5, the reports that were to be produced by the consultants are outlined being the Inception report, short needs assessment, the learning event report and the results report at the end of the assignment. The defendant testified consistently that the plaintiff failed to render any report that was satisfactory. That she submitted the inception report on the 22nd November, 2018, and after it was finally approved and the first phase of 35% paid for, the next phase was for the team to undertake the meetings and coaching of the stakeholders which exercise took place from January to 7th March, 2019. That midway through this process, the Swedish Embassy requested for a progress report which she assigned the plaintiff to do, as he had

not yet written any report, which report was due on the 18th March, 2019. The defendant testified that by the 10th March, 2019 the plaintiff had not written the said progress report, so she wrote it and submitted it.

8.5.3 The defendant went on to testify that she considered that she was now doing this job alone and, on the 25th March, 2019, she wrote a letter to the plaintiff, terminating the plaintiff's contract, as she was not seeing any value from him. That the plaintiff pleaded with her and so she wrote him another letter, to give him a final task to write a learning event report for the event that took place on the 27th and 28th March, 2019 at the Swedish Embassy. However the report was unsatisfactory and mediocre and she asked the plaintiff to rewrite the report but he refused, so she had to rewrite it. She submitted the learning event report with the final report which were tied to 65% of the payment. The Swedish Embassy accepted the said reports and requested the defendant to submit the final invoice. The defendant testified that she submitted her time sheet covering 92 days which represented 65% and the initial phase she also worked for 20 days which meant that she had spent a total of 112 days on the assignment.

8.5.4 In contrast the plaintiff testified that he and the defendant worked together as a team, though they divided the work. His duties included purchase of stationery, downloading videos, editing and sending it to her to research on the current issue, regarding gender, sending emails to certain stakeholders, visiting the fourteen partner organizations, holding workshops where he presented concepts and videos, and statistics. That he would send the statistics to the defendant for her to work on, but that at times the defendant would return the work to him to re-do for not being well done. That the last workshop they held from the 27th to the 28th March, 2019 he and the defendant were together, where he presented a video explaining the concepts and the defendant would come into give examples from the field to try and illustrate the technical concepts.

8.5.5 The plaintiff testified further that he generated statistical presentations, known as statistical work analysis in a report on knowledge sharing and sent it to the defendant for her to marry it with what she had written. That after he sent this report the defendant sent him an email on the 11th April, 2019 indicating that their report had been accepted and they started waiting for the payment. The plaintiff testified that on the 30th May, 2019 he contacted the defendant asking for his payment but she refused to pay him on the basis that his work was insignificant.

8.5.6 In assessing the performance of the plaintiff's work under the primary contract, it is apparent that in accordance with Annexure A of the contract, being SIDA's general terms and conditions for consultancy services, 2015 at page 238 of the defendant's bundle of documents, it states that the consultant, in this case the defendant, would be responsible for any work performed by a sub-consultant, in this case the plaintiff, as if it were their own work. The said clause 5 states as follows:

"5. SUB-CONSULTANT

The Consultant may not hire a sub-consultant without prior written consent from SIDA. The Consultant is responsible for any work performed by a sub-consultant as if it were their own work. Unless otherwise agreed between the parties, the Consultant is responsible for payments to the sub-consultant."

8.5.7 The defendant clearly testified that the plaintiff's work was poor and mediocre and she had to re-do his work. The plaintiff confirmed this position in his evidence that some of his work the defendant sent back to him to re-do for not being well done. Additionally, the evidence on record at page 50 of the defendant's bundle of documents, shows that in an email to the plaintiff from the defendant on the 24th March, 2019 the defendant explained that their report could be rejected if the workmanship was below par. The defendant also requested for the notes that the plaintiff had in his possession for the meetings

held. In response on the 25th March, 2019, the plaintiff responded in an email at page 51 of the defendant's bundle of documents among other things, that he was a learner to this process as he stated the following:

Please receive my comments on the notes, though most of them were done by you because of the trust that I had about you and the learning process on my part.....Regarding the final report per say, since what was submitted was accepted, I will simply crop what will come from the deliberations and submit to you whether you refuse what I will submit or not because it seems your measure of performance is different from mine. For me I don't teach learners with threats and psychological bullying at all. My psychological approach to learners and beginners is soft friendly and progressive.

8.5.8 In response to his email the defendant in an email dated 25th March, 2019 on page 52 of the defendant's bundle of documents, replied pointing out the flaws in the plaintiff's work that he had submitted so far and outlining what she expected him to achieve. According to the said email the defendant stated that:

"Dear Chidongo,

I have sent you notes written by two consultants that facilitated one meeting for you to see that there are differences. I am not expecting you to reproduce what you did not work on but write your own notes as you heard them.....

Write your own notes and not reproduce my notes and claim they are yours – PLAGARISM at its best.....

Call me a "bully" a "show off" a "know it all" at the end of the day my point is that you have not written according to what is expected of you...Please take this assignment as seriously as you can and there is obviously a lot of money involved.

.....

KINDLY NOTE THAT:

- 1. I AM EXPECTING DELIBERATIONS/NOTES FROM ALL THE MEETINGS YOU ATTENDED WITH ME OR ALONE. DO NOT REPRODUCE MY NOTES AS THAT IS PLAGARISM. AS A PROFESSIONAL/LECTURER YOU KNOW IT IS WRONG TO CLAIM ANOTHER PERSONS WORK AS YOURS.*
- 2. I AM EXPECTING YOU TO SEND ME COMMENTS/OBSERVATIONS ON ALL THE PROJECT DOCUMENTS SENT BY ALL THE 14 PARTNERS. YOU HAVE ALL THOSE BUT NEVER TOOK TIME TO READ.*
- 3. AS AGREED, I ALSO EXPECT YOU TO SEND ME YOUR DRAFT FINAL REPORT. IT SHOULD BE A COMPLETE REPORT EXACTLY THE WAY, YOU HAD WRITTEN IT WITH NOTHING COPIED FROM MY DRAFT REPORT. AVOID PLAGARISM AS YOU KNOW IT IS WRONG TO CLAIM SOMEONE'S WORK AS YOURS.*
- 4. NO ONE IS GIVING A PSYCHOLOGY TEST BUT EACH CONSULTANT HAS TO CLEARLY DEMONSTRATE THEIR OWN INDIVIDUAL SKILLS AND EXPERTISE THROUGH WRITING. YOU JUST HAVE TO WRITE MY DEAR IF YOU WANT TO BE PAID.*
- 5. I AM VERY WILLING TO GO AND PRESENT YOUR PLAGARISED WORK IN COURT TO PROVE THAT YOU JUST COPIED. I HAVE SHOWN YOU EXAMPLES OF WORK WRITTEN BY TWO CONSULTANTS THAT INTERVIEWED ONE PERSON. ALL THAT WILL BE PRESENTED IN COURT THAT IT IS POSSIBLE FOR TWO PERSONS TO WRITE DELIBERATIONS/NOTES ON ONE MEETING AND STILL BE PROFESSIONAL – NO PLAGARISM.*

I REPEAT THIS ASSIGNMENT HAS A LOT OF MONEY – FOR ME IT’S THE HIGHEST I HAVE EVER EARNED, HENCE LETS NOT FAIL TO DO WHAT IS REQUIRED OF US.....”

8.5.9 The foregoing evidence shows that the plaintiff was given set targets to achieve which he failed to do as no evidence was tendered by the plaintiff to prove that he did in fact meet the targets and requirements set out by the defendant. Counsel for the defendant argued that based on the evidence on record, the plaintiff’s performance under the sub-contract was defective and unsatisfactory and below par. In agreeing with this position, the evidence as alluded to in the email above exposes the plaintiff’s inability to perform under the primary contract as expected. The plaintiff actually admits that he was a learner in this whole process and as such, it is no wonder that he was unable to deliver to the required standard albeit him holding himself out to be qualified for the role.

8.5.10 On that front, I must make mention that the plaintiff alleged that the contract was clinched by the plaintiff due to his qualifications. The defendant denies this assertion and also claims that the contract was clinched on the basis of her being qualified for the assignment. In addressing this issue, it is not in dispute that the defendant and the plaintiff were awarded the contract by the Swedish Embassy based on their qualifications which the defendant submitted, and as such the arguments advanced as to whose qualification clinched the awarding of the contract is otiose. Rather, what is fundamental is the performance under the said sub-contract, and clearly in as much as the plaintiff possess’ qualifications that met the requirements of the Swedish Embassy, his performance based on the evidence on record did not attain the required professional standard as expected of him by the defendant who had engaged him as a sub-consultant. Accordingly, I find that the plaintiff’s performance under the sub-contract was below par as it did not meet the required professional standard of a consultant.

8.6 The plaintiff's remuneration under the primary contract

8.6.1 The primary contract clearly provides for the remuneration of the plaintiff as is shown at page 50 of the plaintiff's bundle of documents. It provides that the plaintiff was entitled to US\$294.00 per day for 48 days which translated to a total of US\$14,112.00. The plaintiff testified that he was entitled to be paid the total sum of US\$14,112.00 as he did his part under the primary contract. The defendant however, testified that the plaintiff did not do his work well and as such she had to re-do most of the plaintiff's work in addition to her own work. Further the defendant testified that the plaintiff did not submit a time sheet to show the time that he spent on the work given which time sheet would be used to invoice the client. That this time sheet was to be given as per requirements of the contract, and as such the plaintiff needed to prepare a time sheet for the hours worked as part of the invoicing, to show the work done. The defendant testified further that payment could not be received without submitting a time sheet.

8.6.2 The SIDA's general terms and conditions for consulting services, Annexure B in the contract, at pages 238 to 239 of the defendant's bundle of documents provides under clause 6.2 on remuneration as follows:

"Remuneration and costs

The Consultant is only compensated for the actual number of hours worked by persons specified in the Contract, and for costs actually incurred. Compensation will not be paid for costs that are explicitly recoverable in accordance with the Contract; these are included in the remuneration.

Remuneration will be calculated per whole hour worked. For work based on weeks or months, one week shall correspond to 40 hours and one month to 160 hours. The Consultant may charge a maximum 8 hours per day and 40 hours per week...."

8.6.3 From the foregoing excerpt, while the responsibility of invoicing the client was for the defendant being the team leader or lead consultant, the plaintiff being a team member and sub-consultant was required to submit a time sheet to the lead consultant, for her to be able to compile the information to be submitted for purposes of the invoice. This is because clause 7 of the said SIDA's general terms and conditions for consulting services, Annexure B in the contract, at page 239 of the defendant's bundle of documents provides that:

“.....

The invoice must include: invoiced amount excluding VAT, VAT amount per VAT category, type of service carried out, whether it is the Consultant or a sub-consultant who has carried out the service, and the name of the individual, the number of hours worked, the account to which payment is to be made, the contract number, date and number of the invoice, the consultant's corporate identity number (or personal identity number, if the Consultant does not have a corporate identity number), as well as the Consultant's VAT registration number.”

(Underlining mine for emphasis)

8.6.4 The plaintiff did not furnish the court with any proof that he submitted to the defendant either a time sheet or a record of how much time he spent on each of the assignments that he was given to work on by the defendant. As such the defendant did not have any information to justify the 48 days that the plaintiff claims he is entitled to be paid, as he did not provide the information for the defendant to compile the information as proof of the assignments that the plaintiff not only worked on and completed, but also the number of hours and or days that he actually worked on the said assignments. As such I find that the plaintiff is not entitled to be paid the amount of US\$14,112.00 for the 48 days, as the plaintiff did not and has not provided proof in terms of either a time sheet or a record indicating that he worked for the said period and which assignments he worked on.

8.6.5 Notwithstanding the foregoing, it is evident from the record that the plaintiff did do some work, albeit it not being to the required professional standard. To acknowledge this effort, the defendant claims that she paid the plaintiff the sum of K60,000.00 which in dollar terms was US\$4,939.00 representing 35% of the total amount of US\$14,112.00 that was due to the plaintiff under the primary contract had he performed for the full 48 days. The plaintiff on the other hand denies having received this amount. A perusal of the evidence before this court is that an amount of K60,000.0 was withdrawn by the defendant from her account at FNB on the 4th January, 2019. The defendant also made reference to paying the plaintiff 35% of the amount due to him which in kwacha terms translated to K60,000.00 as is indicated at pages 132 to 133 of the defendant's bundle of documents in an email from herself to the plaintiff, dated 5th June, 2019. This testimony was not shaken in cross examination of the defendant. Further, the plaintiff did acknowledge that he had received some money, in an email dated 25th March, 2019 appearing at page 51 of the defendant's bundle of documents as he stated as follows:

"Even last time, you did not pay me fully the whole amount, but 800 kwacha short and I accepted because of technicalities."

8.6.6 Additionally, in an email appearing at page 27 of the defendant's supplementary bundles of documents, the plaintiff wrote to the Swedish Embassy inquiring over the second phase of the payment. He stated as follows:

"Inquiring on payment of the Gender main steering project"

Sorry that I have to write to you instead of the lead consultant on the above issue am inquiring on the second phase of payment since completion of the project, as according to the lead consultant Dr. Emma Sitambuli, we are supposed to be paid by now".

The foregoing clearly shows that the plaintiff received the first payment under the first phase of the primary contract which was 35%, of the total amount due to him.

8.6.7 To fortify this position, the defendant in her evidence in chief, testified that:

She called the plaintiff and the following day on the 4th January, 2019 they went to the bank, FNB Industrial branch at 09:00 hours. As the money was in dollars she inquired on the exchange rate which was 11.3 and after calculating 35% of US\$14,112.00 as there were reimbursements for fuel, communication and stationery which the sub-consultant bought for the workshop held in November, the total was US\$370.00. 35% of US\$14,112.00 amounted to US\$4,939 together with the amount of US\$370.00 came to US\$5,309.20 which was due to the consultant. Converting this amount in kwacha at the rate of 11.3 came to K60,000.00. Together they withdrew K60,000.00 from the bulk till and went to a special room where the money was disbursed in cash.

Before she gave the plaintiff the money she removed K2,000.00 because the sub-consultant had borrowed K1,200.00 which he used for fuel and he was to re-pay the same in October and she got K800.00 as interest on the sum of K1,200.00 as such he went home with K58,000.00 although he complained about the K800.00 on the basis that she had given it to him by way of an email that he had written to her.

8.6.8 The foregoing evidence was equally unshaken in cross examination of the defendant and by the plaintiff's message above he confirms that he received a payment less K800.00, which according to the defendant was interest that she charged for the amount of K1,200.00 that the plaintiff had borrowed from her.

8.6.9 Accordingly, I find that the plaintiff was paid the sum of K60,000.00 which was equivalent to the sum of US\$4,939.00, being 35% of the total amount of US\$14,112.00, which would have been paid in full to the plaintiff had he done his work in full, as assigned.

8.7 Whether there was a breach of the sub-contract

8.7.1 The final issue to address is whether there was a breach of the sub-contract by the defendant. The plaintiff has claimed damages for breach of contract, on the basis that in the primary contract, he was entitled to be paid US\$14,112.00 for services rendered to the Swedish Embassy. According to the primary contract, the plaintiff was awarded 48 days at the rate of US\$294 per day. As I have already found earlier in this judgment that the plaintiff did not furnish any proof before this court that he submitted a record to the defendant, showing the assignments that he worked on and the number of hours totaling to the required 48 days as per the primary contract, there is no basis for his claim that the defendant has breached the sub-contract.

8.7.2 Counsel for the defendant referred this court to the learned authors of **Treitel on the Law of Contract**, where they state that:

“A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing.”

On the basis of the foregoing text and the evidence before this court, it is apparent that it is in fact the plaintiff who was in breach of the sub-contract as he failed to perform his duty under the same. By his own admission, found in an email dated 25th March, 2019 at page 51 of the defendant’s bundle of documents, from the plaintiff to the defendant, the plaintiff states as follows:

“Please receive my comments on the notes, though most of them were done by you because of the trust that I had about you and the learning process on my part. As for comments by most organizations on gender policy, I find their demand a repetition as the notes specifically states where they are lacking. Am not good and making repetitions. Am not willing to send any of my comments to anyone because I do not believe we have reached a disagreement about it at all. Concerning the 27th and 28 workshop, unless am wrong but the embassy has provided what they expect, and experience with them has shown they want it done their way. I shall prepare what I will be told to do. Regarding the final report per say, since what was submitted was accepted, I will simply crop what will come from the deliberations and submit to you whether you refuse what I will submit or not because it seems your measure of performance is different from mine. For me I don’t teach learners with threats and psychological bullying at all. My psychological approach to learners and beginners is soft friendly and progressive.”

8.7.3 As such while the plaintiff did do some work, the same could not amount to substantial performance. In the case of **Bolton Vs Mahadeva**² a key principle was established that a contract is only discharged by exact performance. In that case the brief facts were that:

“P contracted to install a central heating and hot water system in D’s house for £560. He installed the system but it did not heat the house properly and gave out noxious fumes. The cost of remedying the defects was estimated at £174. D refused to pay the agreed price. The Court of Appeal held that P could recover nothing. The contract was not substantially performed.”

8.7.4 Consequently, on an analysis of the foregoing evidence, as well as on the totality of the evidence on the record before this court, coupled with the guidance in the above mentioned authorities, I find that the defendant was not in breach of the sub-contract and accordingly the claim for damages for breach of contract fails.

8.7.5 The upshot of the matter is that the plaintiff's claims fail in totality and accordingly, the cause of action is hereby dismissed.

Costs are for the defendant to be taxed in default of agreement.

Delivered at Lusaka this day of 2025

fb *Order*
REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
03 OCT 2025
R. CHIBBABBUKA, J.
P.O. BOX 50007
LUSAKA

R. Chibbabbuka
HIGH COURT JUDGE