Emmanuel Mdala t/a OX-Enterprise v Zhejiang Communications Construction Group Ltd.

Ruling/Judgment

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice C.W.M Malonda
Cause Number:	Commercial Case No 259 of 2019
Date of Judgment:	September 08, 2025
Bar:	Ndalama and Sato, Counsel for the Claimant Sitima, Counsel for the Defendant

INTRODUCTION

1. This matter concerns a commercial dispute arising from subcontracting arrangements between the Claimant, Mr. Emmanuel Mdala trading as OX Enterprise, and the Defendant, Zhejiang Communications Construction Group Ltd, a Chinese construction company operating in Malawi. The Claimant alleges breach of contract and seeks payment for construction works allegedly performed under three contracts. The Defendant denies liability and

counterclaims for the value of materials allegedly taken by the Claimant.

2. Specifically in 2017, the Defendant entered into a contract with Roads Authority for the Maintenance and Rehabilitation of parts of the (M1) Road Project in Malawi. The contract with the Roads Authority stipulated that 10% of the total contract value shall be subcontracted to the local construction companies.

3. Consequently, the Defendant subcontracted part of the works to the Claimant trading as OX Enterprise which undertakes different activities such as building contractors, catering services, ICT services and general suppliers.

BRIEF FACTS

4 . The Defendant was awarded a contract by the Roads Authority for the periodic maintenance and rehabilitation of the Karonga/Songwe (M1) Road. In compliance with contractual obligations to subcontract 10% of the works to local contractors, the Defendant engaged the Claimant under three separate contracts dated 10 August 2018, 4 November 2018, and a third undated agreement.

5. The total contract sum across all three agreements was MK32,560,000. The Claimant alleges he performed works valued at MK78,990,080 and, after deducting material costs of MK7,597,790, claims MK71,392,290. The Defendant

disputes this and asserts the Claimant completed works worth MK21,675,090, abandoned the site, and owes MK2,852,224.60 for materials taken.

6. The dispute is arising out of the failure of the parties to agree on how much is payable or owed to the Claimant after completion of the works. 7. The Claimant asserts that he is owed amounts arising out of completed works and the defendant has neglected or withheld payment without providing valid reasons.

8. The Defendant asserts that they have fully paid the claimant for the work that was done and any amount withheld is arising from withholding tax, retention amounts for quality guarantee, and deductions for materials that the Claimant took from the Defendant.

9 . The Claimant claims MK71,392,290.00 plus interest.

10. The Defendant claims that some of the work done by the claimant was substandard and the Claimant refused to rectify the errors.

11 . The Defendant counter-claims that the Claimant owes them MK2,852,225.60 for materials collected for uncompleted work.

12. This Court proceeds to make its judgement based on all submissions and evidence brought before this court.

ISSUES FOR DETERMINATION

13. During a Scheduling conference for the matter held on 18th January 2023, the following issues were agreed to be determined during trial:

a***. Whether or not there was a contract or contracts between the parties? If so:***

i. What were the terms of the contract/s?
ii. Whether there was a breach of the contract/s?
iii. Whether the defendant overpaid the claimant or wilfully withheld payment from the claimant?
iv. Whether the claimant is entitled to the reliefs sought.

THE LAW

a. Standard and burden of proof

14. This being a civil matter, the applicable standard of proof is proof on a balance of probabilities, see Miller v Minister of Pensions [1947] 1 All ER 372, see also Chimanda vs. Maldeco Fisheries Ltd, 12 MLR, 51; Banda and Others Vs. ADMARC and Another (1990) 13 MLR 59.

15. As for the burden of proof, this rests upon the party asserting the affirmative of the issue, see Malawi Distilleries Ltd v Sichilima [2001-2007] MLR (Com) 16, Chinyama v. Land Train Haulage Civil Cause No. 677 of 1995. In a civil trial, the burden of proof rests upon a party (the Claimant or Defendant) who asserts the affirmative of an issue. See the case of Isaac Chiwale v Real Insurance C. Ltd. [2012] MLR 195.

16. See also Limbe Leaf Tobacco v Chikwawa and others {1996/ MLR 480, Unyolo JA as he then was held that it is a trite rule of evidence that any point in issue is to be proved by the party who asserts the affirmative.

17. The burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, to rebut the presumption. At the end of the case, the court makes its decision on the balance of probabilities, and this is the standard of proof required in civil cases.

b. **Law of contract**

18. This case rest on the interpretation of the contract between the parties.

19. Except where the law requires otherwise a contract may be written or oral, Zunda v Mkulumadzi Farm Bakeries Ltd (1995) 2 MLR 658 (HC.)

20. For there to be a valid contract one of the essentials is that there must be an agreement. The agreement is made up of offer and acceptance. See Joseph Chidanti Malunga vs. Fintec Consultants (A Firm) and Bua Consulting Engineers, Commercial Case No. 6 of 2008.

21. The position is also that where the contract is wtitten, the primary thing is to look at the document see MC Cutcheion v Macbryane (Davis) Ltd [1964] 1 WLR 125. Generally, each party in a contract is entitled to expect the other to perform to the letter of their agreement, Union Eagle Ltd v Golden Achievement Ltd [1997] AC: [1997] 2 All ER 215.

22. Each party in a contract is entitled to expect the other party to comply with the terms of the contract, see Union Eagle Ltd v Golden Achievement Ltd [1997] 2 ALLER 215, and failure to perform the contractual obligation constitutes a breach of contract and entitles the innocent party to contractual remedies, see Hochster v De La Tour (1853)2 E & B 678: {184360] A11 ER Rep 12.

23. Parole evidence cannot be used to vary a written contract, see Jacobs v Batavia and General Plantations Trust {1924] 1 Ch 287, see also Alliance One

Tobacco Malawi Limited v Kukuyu Investments Commercial Case No. 36 of 2008.

24. In cases of breach of contract, the aggrieved party is only entitled to recover such damages as may fairly and reasonably be considered to have arisen according to the course of things, from the breach itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach, see Mchawa v National Bank of Malawi [1991] 14MLR 266.

25. Courts can award general damages for breach of agreement and or negligence, however damages have to be proved. Special damages need to be specifically pleaded and proven. See Richard Matikanya v Attorney General, Civil Cause Number 985 of 1993.

ANALYSIS AND FINDING

26. Firstly, I will analyse the Claimants testimony.

27. The Claimant testified on his own behalf as PWl. The second proposed witness was withdrawn during trial.

28. PWl asserted that the first contract (EM3) was for one culvert only, but the parties verbally agreed to extend its scope to multiple culverts. He claimed to have completed works at various locations and submitted invoices dated 21 March 2019. He admitted receiving payment for earlier contracts but maintained that the disputed invoices reflected additional work. The Claimant is claiming MK71,392,290.00 in unpaid invoices for work done .

29. Under cross-examination, the Claimant acknowledged that all six invoices bore the same date and lacked verification or certification as required by the contract and the business practice between the parties. The Claimant also explained in cross-examination and re-examination how they used the same contract for works delivered at different sites, despite it not being an express term of the contract:

"*Counsel: Now can you please explain to the court how for a contract whose contract prices is MK9,075,000 you end up issuing invoices totalling MK59,323, 000.*

PW 1: When signing we were signing 1 con:tract but where were we were working if we work for location A it stands for the same MK9,065,000, we work and finish the job. After finishing that we start another new place, we were supposed to sign the contract for every location because they are different places.

Counsel: Where in the contract is that provided?

PW 1: It is not indicated in the contract because each contract stands for its own place alone. If we work on location A we work based on that amount once

finished we go and work on another place to avoid repetition of signing contract on every location, we were just carrying over on that contract for every location. That is why in the invoices we were indicating the locations like if you have worked in Mtandire you will use the same contract after Mtandire you work in Mchesi we use that same contract. You can work on 3 jobs in different locations even within that same month you claim from that side and you also claim MK9, 075,000 from
Mchesi, and you also claim MK9, 075,000 from the other locations... When we go for a new location, we use the same contract to work on that new location ... "

30. He also conceded that the third contract bore his signature, despite initially denying that he signed it.

31. In re-examination, the Claimant explained that the repeated use of the MK9 million contract was due to logistical convenience and that each location represented a separate scope of work. He maintained that the absence of complaints or written communication from the Defendant constituted approval of the works.

32. Now looking at the Defendants testimony, the Defendant called two witnesses: Mr. Lyu Deshuai, Deputy Project Manager (DW1), and Mr. Lawrence Madondolo (DW2), a laboratory technician.

33. Mr. Deshuai (DWI) testified that the Claimant was paid for verified works under all three contracts. He presented signed settlement documents showing that the Claimant_ completed works worth MK21,675,090. He denied any verbal modifications and emphasized that all contracts were generic and location-specific. He also stated that the Claimant abandoned the site after being asked to redo substandard which was established from the site inspection during the warrant period.

34. Mr. Madondolo (DW2) testified that he assessed the quality of works at various locations and found them substandard. He confirmed that the Claimant was not present during assessments and that no communication was made to him regarding the results.

35. In submissions by the parties, the Claimant argued that the Defendant breached the contract by failing to pay for completed works and failing to conduct joint site inspections: The Claimant relies on principles of contract law and is claiming damages for breach and loss of business.

36. The Defendant submitted that the Claimant was paid for all verified works, and that the invoices submitted were fabricated.

37. The defendant invoked the parol evidence rule which excludes oral modifications and emphasized the absence of verification for the claimed MK71 million. The Defendant also argued that the Claimant failed to oppose the

counterclaim.

38. Based on the issues to be determined in this trial, the following are my findings:

a. ***Whether or not there was a contract or contracts between the parties? If so:***

39. It is admitted by the parties that they executed several contracts between them. There is no dispute that the parties entered into three written contracts. However, the Claimant's assertion of a verbal extension and use of the same contract for works on different sites, is in question .

40. The law is clear that written contracts are valid and binding and parties are restricted to what is within the four corners of the document in which they have chosen to enshrine their agreement. Neither of them may adduce evidence to show that his intention has been misstated in the document or that some essential feature of the transaction has been omitted.

41. I am convinced by the Defendants submission that the Claimant's attempt to rely on oral modifications is precluded by the parol evidence rule, see Jacobs v Batavia and General Plantations Trust [1924] 1 Ch 287, see also Alliance One

Tobacco Malawi Limited v Kukuyu Investments Commercial Case No. 36 of 2008, Kapanda J (as he was then) at page14 of the judgement had this to say on the point;

"*I have always understood the law to be that where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them it is common place that the party signing will be bound by the terms of the written agreement whether or not he is ignorant of the precise legal effect. The basic deduction for this principle is that the parties have intended what they· have in fact said. Thus, their words must be construed as they stand. Furthermore, as it were, it is settled law that the meaning of the document or a particular part of it must be sought from the document itself and not outside it.*"

42. It is therefore my finding that the Claimants evidence regarding the extension or variation of the written contract is weak and speculative especially considering that there is no other evidence to support that assertion. The extended contract does not exist in writing. This leaves me with no choice but to conclude that there is no legal or factual basis to admit or rely on alleged verbal extensions.

43. To answer the question: *Whether or not there was a contract or contracts between the parties?* I am of the view that claimant has failed to discharge the burden of proof that there was a contract extension allowing them to duplicate and use the same contract to work on different sites and claim payment for the

same. There is no weight to support that what he is saying is the likely true version of what transpired.

44. It is therefore my finding that there was no contract extension between the parties which permitted the Claimant to bill for additional work on different sites.

i. What were the terms of the contract/s?

45. The claimant admits to the contracts executed on 10th August 2018 (Contract 1) exhibit EM3 valued at MK9,075,000.00, and contract executed on 4th November 2018 (Contract 2) valued at MK18,910,000.00, exhibit EM2.

46. The defendant admits to three contracts executed on 10th August 2018 (Contract 1) exhibit LD2 valued at MK9,075,000.00, contract executed on 4th November 2018 (Contract 2) exhibit LD5 valued at MK4,575,000.00, and contract executed on 16th November 2018 (Contract 3) valued at MK18,910,000.00, exhibit LD 7.

47. It is my observation that with relation to the contract executed on 4th November 2018, the claimants contract shows that the contract sum is MK 18,910,000.00 see EM2, whilst the defendants contract of the same date shows a contract sum of MK4,575,000.00 see LD5.

48. Furthermore, the claimant has not mentioned anything about a contract executed on 16th November 2018 for the sum on
MK18,910,000.00, exhibit LD 7.

49. It is clear that EM2 and LD7 are the same contract, but LD7 does not have a date inserted, whilst EM2 has a date inserted by hand and it is dated 4th November 2018, whilst the defendant pleads that it was executed on 16th November 2018.

50. Upon closer observation, the Defendant has exhibited LD 5 which is the contract executed on 4th November 2018 with a contract sum of MK4,575,000.00. PWl has disputed that he signed contract, yet under cross-examination he admitted that the signature belonged to him and he signed the contract to facilitate payment.

51. Upon closer inspection of the exhibits, the contracts clearly define the scope, payment terms, and verification procedures. The Claimant's reliance on oral modifications of the contracts is questionable and not supported by law. The application of the acceptance of an oral contract as in Zunda v Mkulumadzi Farm Bakeries Ltd (1995) 2 MLR 658 (HC) does not apply in this case, because it is clear from the evidence and conduct of the parties that all their contracts were entirely in writing.

52. The Claimant's claim of MK71,392,290 is therefore unsupported by verified documentation. All invoices bear the same date and lack acknowledgment by the Defendant. Settlement documents signed by both parties indicate that the Claimant was paid for works valued at MK21,675,090. The Claimant has failed to produce evidence of joint verification or certification of additional works.

53. The repeated use of the MK9 million contract for multiple locations, without written amendments or verification, undermines the credibility of the Claimant's claim. The uniform quantities and identical invoice formats further suggest fabrication. Hence to answer the question ***What were the terms of the contract/s***, it is this Courts finding that the terms of the contract is restricted to what is contained is Exhibits, LD2/EM2, LDS/EM3, and LD7 and not what is alleged to have been said verbally.

54. Moving onto the next issue on breach of contract.

ii. ***Whether there was a breach of the contract/s?***

55. Based on the written contracts, the Defendant's obligation was to pay was contingent upon verification of completed works.

56. It is the Defendants testimony that the Claimant abandoned the site and failed to participate in inspections. It is further alleged that the Claimant failed to

address the defects which were identified by the Defendant after completing the works and during the warranty period.

57. The Claimant's testimony was inconsistent and evasive under crossexamination as he changed his story from stating that he was not informed of the defects, and then, he corrected some defects which were brought to his attention. PW 1 contradicted himself regarding the number of contracts, the scope of work, and the issuance of invoices. His explanations lacked coherence and were unsupported by documentation.

58. On the other hand DWl and DW2 were consistent and corroborated by signed documents which they exhibited as part of their testimony. DW1 exhibited settlement forms, quantity breakdowns, and material records. DW2 conducted a quality assessment of the Claimants work, though conducted without the Claimant's presence, was standard procedure and not challenged by contrary evidence.

59. The Claimant in cross-examination also admitted that the contract provided for the Defendant a right to request for substandard work to be redone:

"*Counsel: Can you confirm that it was parl of the agreement that if you fail to meet the design requirements in terms of complex strength the defendant had the right to request you to dismantle the works that did not meet the specification and to request you to redo the works at your own expense?*

PW1: Yes I confirm that.

Counsel: Can you also confirm that under the contract you did agree that the defendant will withhold 4% as withholding tax and 5% as retention amount?

PW1: Yes I confirm".

60. It is therefore my finding that the Defendant's conduct does not amount to breach, as payment was made for verified works only. I further find that the Claimant was fully aware of his obligation to meet the quality standards stipulated in the contract, and the purpose of inspections and certification was to ensure that the standards are met. The claimant's failure to obtain certification or respond to quality concerns constituted a breach of contract by the Claimant and not the defendant. The defendant was within his right to not honour payment for defective and uncertified work.

61. To conclude, the claim fails under this head of argument.

62. Moving onto the next issue.

iii. ***Whether the defendant overpaid the claimant or wilfully withheld payment from the claimant?***

63. Based on my findings in the above, it is my finding that the Defendant was justified and within his contractual rights in withholding payment to the claimant on the basis that the work was not certified and some of the work was disputed due to failure to meet quality standards.

64. The remaining question is whether the defendant overpaid the claimant as per the Counter-claim. The Defendant's counterclaim is supported by signed documentation and unchallenged by the testimonies before this Court.

65. The Defendant's counterclaim for MK2,852,224.60 is supported by signed documentation detailing materials taken by the Claimant. The Claimant did not challenge this evidence, it seemed the Claimant assumed that since they were owed money by the Defendant it would automatically set off the counter-claim.

66. The Claimant's silence in response to the counterclaim further supports its validity.

67. The counterclaim is therefore upheld.

i***v. Whether the claimant is entitled to the reliefs sought.***

68. Based on failure of all the claims under all the heads of arguments, it therefore follows that the Claimant is not entitled to the reliefs sought in the statement of case.

DECISION

69. The Claimant has failed to discharge the burden of proof required to establish entitlement to the claimed sum. The Claimant has not proven that he is entitled to the sums mentioned (an additional MK71 million) in their claim. His reliance on unverified invoices and oral modifications is untenable.

70. The Defendant has demonstrated that payment was made for completed works and that the Claimant owes MK2,852,224.60 for materials.

71. I have found the Claimant's conduct of submitting inflated and unverified invoices dishonest and this warrants that they be condemned in costs on an indemnity basis.

ORDERS

72. Accordingly, the Court makes the following orders:

a. The Claimant's claim is dismissed in its entirety.

b. The Defendant's counterclaim succeeds.

c. The Claimant shall pay the Defendant MK2,852,224.60.

d. Costs are awarded to the Defendant on an indemnity basis.

Delivered this 9th day of September, 2025