Banda J.

IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO.260 1985

BETWEEN:

SAFARI CONSTRUCTION CO.....PLAINTIFF

- and -

N.W. MWAUNGULU.....DEFENDANT

Coram: MAKUTA, C.J.

Mhango, Counsel for the plaintiff
Msisha, Counsel for the defendant
Longwe, Court Reporter
Mkumbira, Official Interpreter

JUDGMENT

By a specially endorsed writ the plaintiff claims from the defendant the sum of K6567.95 being balance of building fee. The defendant denies liability and has made a counter-claim.

The plaintiff is a construction company. In or about June 1982 the defendant requested the plaintiff to complete his house on plot number MZ 537 along Chimaliro Road at Mzuzu. The plaintiff's proprietor, Mr. Oliver Mwenifumbo, visited the site. There was already a structure with IBR iron sheets on the roof. There was no ceiling and the floor was not done. After inspecting the structure Mr. Mwenifumbo finally quoted the sum of K34,960.40 as the price for completion of the house. This quotation included construction of servants quarters which were not there.

There was some communication from the defendant in writing advising that work should start. It was indicated that it would be financed by the New Building Society. The defendant was advised about the commencement of the work by a letter, Exhibit P2, dated 7th August 1982. The letter also mentioned that the work would be completed in 16 weeks. But the work actually started in the first week of September, 1982. After the work had already commenced the defendant wrote the plaintiff a letter, exhibit P3, dated 6th September, 1982 stating that he, the defendant, had received some communication from the New Building Society in which they, i.e. New Building Society, sought written confirmation that he had made arrangements to meet the project

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shortfall of K3974 which arose as a result of deductions from the total project cost. The deductions are from the mortgage and are in respect of inspection fees, estimated interest assuming a six-month completion period and a special advance fee. The confirmation letter was to be addressed directly to the General Manager of the New Building Society in Lilongwe. On 8th September, 1982, the plaintiff, by its letter, exhibit P4, confirmed to the New Building Society that there was an agreement with the defendant regarding payment of the sum of K3974 to plaintiff during the free maintenance period of six months after the completion of the work. The letter was copied to the defendant and to Messrs. Wilson & Morgan.

Construction work was completed in or around July, 1983. It would appear that the defendant was happy with the work because on 15th August, 1983 he wrote to the New Building Society with copies to Fitzsimons Northcrofts Associates and Safari Construction advising that Safari Construction had completed building the house to his satisfaction. Fitzsimons are quantity surveyors and inspectors for New Building Society. Fitzsimons Northcrofts Associates did not complain that there were omissions or mistakes and the plaintiff did not receive any complaint from the New Building Society. After the letter of 15th August, 1983, exhibit P5, the plaintiff received from the New Building Society final payment. The total payment was K28,392.05. There was therefore a shortfall of K34,960 minus K28,392.05 which came to K6567.95. This is the basis of the claim. Perhaps it is important to mention that the figure quoted by the New Building Society was K34,960 and not K34,960.40 and the parties seem to have adopted the New Building Society figure.

The plaintiff wrote several letters of demand, starting with one dated 13th September, 1983, exhibit P6. The other letters were dated 20th February, 1984, exhibit P7, 2nd April 1984, exhibit P8, 10th November, 1984, exhibit P9. After exhibit P9 the defendant replied by letter dated 7th December, 1984, exhibit P10, expressing surprise that the plaintiff had decided to take the matter to Court since the New Building Society were expected to pay the shortfall on completion of the house.

The defendant, as already mentioned above, denied liability. One of the reasons for denial is that the contract was not completed on time. It is contended that late completion resulted in more interest deductions being made by the New Building Society out of the sum of K34,960. This figure is quoted in exhibit P1 which also quoted sixteen weeks as the contract period. If the sixteen weeks was taken as the contract period the work should have been completed by December, 1982. In exhibit P2, which is a

letter from the defendant to the plaintiff dated 7th August, 1982, it is also stated, in paragraph 3, that work would commence during the week commencing 9th August, 1982 and it would be completed within sixteen weeks. If the matter had ended there it would be said that construction proceeded on the basis of exhibit P1. But exhibit D4, which is a letter from the New Building Society to the defendant, assumed a six-month completion period. The defendant in his letter dated 6th September, 1982, to the plaintiff seems to have adopted the six-month completion period. The defendant told the Court that the six months mentioned by the New Building Society was for purposes of calculating their interest. It is, however, significant that the defendant admitted in cross examination that he adopted the six months as the completion petiod. In another vein, he told the court, in effect, that time was not of essence although it was of concern to thim. Very ambiguous indeed!!

It will therefore be observed that there was no agreement as regards the period of completion at the time the work started. Nevertheless the conduct of the parties did, in my view, create circumstances upon which a court may imply a contract in order to give efficacy to the transaction. In Reigate v. Union Manufacturing Company (1918) 1 K.B. 592, Scruitton L.J., at page 605, stated that a term can only be implied if it is necessary in the business sense to give efficacy to the contract. It is in evidence that during construction there was general shortage of fuel and hence there would be difficulties in obtaining building materials from Blantyre and Lilongwe. The defendant was aware of this and, indeed, it is not disputed that the work was very much affected by this. In the circumstances I am of the view that "reasonable time" to complete the contract would be of essence. On 15th August 1983 the defendant certified to the New Building Society that the plaintiff had completed building the house to his satisfaction. This indicates that despite the shortages the plaintiff had diligently and reasonably executed the work. Accordingly the allegations of delay in the defence cannot, in my opinion, hold. As a matter of fact the defendant never, at any time during construction, gave notice of delay in the work and he never complained.

Another reason for denying laibility is the assertion that the plaintiff agreed that in consideration for awarding the contract the defendant would not pay the shortfall of K3,974.00 to the plaintiff. As already mentioned above, this shortfall arose as a result of deductions by the New Building Society from the total project cost in respect of inspection fees, estimated interest assuming a six-month completion period and special advance fee. The plaintiff denies that there was such an agreement. The plaintiff

further stated that they were not a party to the arrangement for payment and terms of advance made between the defendant and the New Building Society. There was therefore no way they could agree to such an arrangement since that would reduce the contract price and that would have been contrary to business efficacy. It is observed that when the New Building Society were asking the defendant to confirm that he had made private arrangement to meet the project shortfall, the contract between the defendant and the plaintiff to start construction had already been concluded and the price had also been agreed upon. I therefore do not see how the plaintiff could forgo part of the contract price unless they are a charitable institution. In fact the defendant's assertion suggests that the alleged agreement on the non-payment of the shortfall was discussed during negotiations of the contract. This does not appear to be the position since negotiations for the contract took place long before August 1982 and the shortfall was not even known to the parties. It is also significant that by their letter of 8th September 1984, exhibit P4, the plaintiff confirmed to the New Building Society that they had agreed with the defendant regarding payment of the shortfall to them by defendant during the free maintenance period six months after completion of the project. This letter was copied to the defendant and to Messrs. Wilson & Morgan. If the defendant did not agree with it he should have queried.

The defendant also testified that another consideration for non-payment of the shortfall was that the plaintiff was helping him with construction of his house at Wiba at Karonga. I must confess that I do not appreciate this alleged consideration because if the plaintiff was helping in constructing a house at Karonga it is a bit too much to expect another free service. This sounds very unbusinesslike.

In view of the available evidence I am of the opinion that the defendant is clearly liable to pay the shortfall. There is no evidence to support a contrary view.

It is already in evidence that the price of the contract was K34,960. The plaintiff was paid K28,392.05 and the balance of K6567.95 is what is being claimed. The shortfall of K3,974 is part of this balance. The defendant is therefore liable to pay the remaining K2,593.95.

I now turn to the counterclaim. The defendant pleaded that the plaintiff failed to carry out the works in a workmanlike and skilful manner and also failed to carry out the said works in accordance with plans furnished by the defendant. The defendant told the Court that before handover he inspected the house together with Mr. Mwenifumbo and he made one major request on the built-in wardrobes. It would appear he wanted more wardrobes to be built. This was in August 1983. According to the defendant, in December

of the same year the occupant of the house, Norman and Dawbarn to whom the house was let, informed him that the ceiling was sagging because the house was leaking. He was also informed that an overflow pipe had to be installed. When he visited the premises in 1984 he noticed that the ceiling was yellow and sagging. Water was going into the garage because there was no provision for drainage. The sinks were coming off the walls. However he did not contact the plaintiff to rectify the faults because, according to him, the plaintiff had negated the previous commitment on built-in wardrobes. Instead he employed Mr. Sagawa, DW2, to correct the faults. Materials worth K300 were bought and Mr. Sagawa was paid about K135.00. When giving his evidence Mr. Sagawa confirmed that he had done some repairs on the defendant's house. These repairs were effected on the roof, the ceiling, sinks, drainage etc. and he was paid just over K400.00. This figure differs from that given by the defendant.

I would like to observe that although the defendant knew about these defects he did not ask the plaintiff to correct them despite that these occurred during the six-month free maintenance period. The New Building Society was also never made aware of them. Again it should be recalled that on 15th August, 1983 the defendant wrote to the New Building Society that the work had been completed to his satisfaction. Can it then, in all fairness, be said that the plaintiff was to blame in these circumstances? I do not think so; and the plaintiff could certainly not be expected to guess. In any case the plaintiff asked the defendant to verify the rumours about the defects with a view to have them rectified but the defendant never responded. In my view I do not think that this allegation is substantiated. He is not entitled to be indemnified for choosing another contractor to rectify the defects.

So far as wardrobes are concerned it is observed that those which were indicated on the plan, exhibit P11, namely in bedrooms 1 and 3, were built and the ones the defendant complained about were not on the plan and the plaintiff cannot be blamed. On electric plugs, there is place for one socket in bedroom 1; there is no provision in the kitchen and the dining room. Those which were indicated were duly installed and the plaintiff cannot be blamed for those not indicated on the plan.

It was also pleaded that the plaintiff failed to complete the work within the stipulated period of six months and, as a result, the defendant was deprived of the opportunity to let the said dwelling house to interested parties and was, therefore, deprived of income from the house. I have already found that time was not of essence in this matter and the work was not to be completed within reasonable time. This is borne out by the fact that the defendant told the Court that according to his understanding the stipulated period was four months. Yet in the pleadings it is

stated that the stipulated period was six months. In my view this uncertainty indicates that there was no firm completion period. As regards income from the house there is no evidence that the plaintiff knew that the house was intended to be rented out. The mere fact that the defendant was resident in Blantyre is not, in my view, sufficient. No prospective tenant was mentioned during the proceedings and there is no indication that enquiries about occupation of the house had been made. I therefore do not see on what basis the plaintiff can be held liable for loss of income from the house.

It should also be mentioned that the plan which was used in doing the works is exhibit P11. It is important to mention this because exhibit D10 was alluded to as having been used to do the work. Both Mr. Hetherwick Singanile Mwalughali, PW2, the plaintiff's foreman and Mr. Charles Moyo, PW3, the plaintiff's former Works supervisor, never mentioned about exhibit D10. They used exhibit P11. It is significant to point out that exhibit D10 does not have the five bedrooms which the plaintiff worked on.

I have very carefuly examined the evidence in this case and on the balance of probabilities I am of the view that the defendant does not have any defence to the claim. I therefore find him liable. The counterclaim is not, in my view, substantiated and it is dismissed. The defendant will pay the costs of this action.

Pronounced in open Court on this 26th day of August, 1988 at Blantyre.

F.L. Makuta
CHIEF JUSTICE