

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 2790 OF 2003**

**BETWEEN:**

**P. D. PHIRI t/a MALAYA BUILDING  
AND CIVIL ENGINEERING CONTRACTORS.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL .....DEFENDANT**

**CORAM: KALEMBERA, DEPUTY REGISTRAR**

Chalamanda, Counsel for the Plaintiff

**ORDER**

This is an order for assessment of damages pursuant to a default judgment entered herein on the 1<sup>st</sup> day of March 2004 in which it was adjudged that damages be assessed by the Registrar.

The defendants despite being served with the Notice for Assessment of damages did not attend. The assessment therefore proceeded in the absence of the defendant. The plaintiff called one witness Paston Domino Phiri, the plaintiff himself.

It was his testimony that he is the Managing Director of the plaintiff company and that he entered into a contract with the defendant for the construction of Chitipa District Hospital and six health centres (Ex PDP 1). He further informed the court that on certificate No. 8 he is claiming the sum of K13,168,370.70 for the work actually done. Further he claims the sum of K14,903,874.72 being loss of profit on the balance of the contract sum. It was further his claim that there be release of the bonds which are discharged either upon completion of the work guaranteed or upon wrongful repudiation of the contract on the employers' part as is the case in this matter. As to the loss of use he informed the court that the total loss comes to K4, 400.000.00. He also needs the sum of K200, 000.00 for demobilisation of the plant, vehicles and equipment and furniture and the total sum of K2, 657,812.00 for the extension of time under claim number 3 of the summary of claims. The total sum comes to K35, 230,057.42 and per the terms of the contract 65% was supposed to be paid in Euro currency, and 35% in Malawi currency which converts to 392,316.89 Euros (K50, 478,277.52) and K12, 330,520.00. The total therefore comes to K62, 808,797.61 and from this sum a total sum of K7, 144,226.35 should be paid directly by the defendant to the creditors whose list appears in the schedule.

As already stated herein there is a default judgment therefore the question of liability was already settled. The defendant having failed to attend the assessment the plaintiff's testimony is unchallenged. What I need to do therefore is only to determine the damages payable.

Mr Chalamanda, counsel for the plaintiff has argued that according to law regarding damages where there has been a breach of contract is such that a sum stated in a contract to be payable in the event of breach of contract by one party to the other will be liquidated damages if it represents a real attempt to agree in advance what the damages would be in the event of breach of the contract (**Ref African Lakes Corporation Ltd –v- ORR [1923-60] ALR (MW) 25**) This case further holds that where damages caused by the breach cannot be ascertained, a sum stated in the contract to be paid in the event of breach is prima facie to be regarded as liquidated damages.

In the matter at hand per the writ of summons and statement of claim the plaintiff claims for the contract sum or the balance thereof; damages for repudiation of the said agreement and costs. It has been held that where contract work has been partly carried out and the contract is brought to an end by the employers' repudiation, the contractor is entitled to be paid the value of the work done at contract prices and to claim in addition damages the measure of which is normally the loss of profit on the unfinished balance (**Felton –v- Wharrie [1906] H.B.C. (4<sup>th</sup> ed.) p. 398(CA))**)

In the matter at hand the plaintiff under Certificate Number 8 is claiming for the sum of K13, 168,370.70 being sums to be paid for the work actually done. There being no evidence to the contrary I do award the plaintiff the sum of K13, 168,370.70 for work actually done. Furthermore under claim No. 5 on the summary of claims the sum of K14,

903,974.72 being loss of profit on the balance of the contract sum. This being the consequence of the defendants' wrongful act I do award the plaintiff damages in the said sum of k14, 903,874.72 being loss of profit on the balance of the contract sum. As to the loss of the use of equipment such damages would be calculated on the value of the plant and other articles of which he had been wrongfully deprived (**Ref. Keating on Building Contracts, by Hon. Anthorny May, 1991 at p. 207**). In the present case the plaintiff's equipment is still retained by the defendants whose calculated loss for use of the equipment comes to K4, 400,000.00. I do award this sum to plaintiff as damages for loss of use of the equipment. I further award the plaintiff the sum of K100, 000.00 as the cost of demobilisation of the equipment. The plaintiff is further awarded the sum of K2, 657,812.00 being for the extension of time for 45 weeks at K59, 062.50 per week being acceptable practice in building contracts.

The total award on the claims therefore comes to K35, 230,057.42.

The plaintiff further indicated in his testimony that per the terms of the contract 65% was supposed to be paid to the plaintiff in Euro Currency and 35% in Malawi Currency. As of 10<sup>th</sup> October 2003 at the conversion rate of K128.6671 to 1 Euro 65% and 35% of the total claim of K35, 230,057.42 comes to a gross total claim of K62, 808,797.61. This having been a term of the contract I therefore award the plaintiff damages as assessed the total sum of K62, 808,797.61 plus costs. I further order that the sum of K7,144,226.35 be paid directly by the defendant from the total award to the plaintiff's creditors whose list appears in the schedule (to be supplied to the defendants). Furthermore the defendants having wrongfully repudiated the contract I order for the release of the bonds.

**MADE IN CHAMBERS** this 1<sup>st</sup> day of June 2004 at Blantyre.

**S. A. Kalembera**

**DEPUTY REGISTRAR**