Sale Contract

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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2039 OF 2001

BETWEEN:

LEVER BROTHERS (MALAWI)LIMITED.....PLAINTIFF

and

TELECOMMUNICATION CONSULTING
COMPANY LIMITED.....DEFENDANT

CORAM: **HON. JUSTICE A.C. CHIPETA**
Hara, of Counsel for the Plaintiff
Mwangomba/Kalaya, of Counsel for the Defendant
Katunga (Mrs)/Balakasi, Official Interpreters
Gondwe (Mrs) Court Reporter

JUDGMENT

This action commenced on 7th August, 2001 with issue of writ accompanied by a Statement of Claim. The Statement of Claim has since been amended. The Plaintiff, Lever Brothers (Malawi) Limited, seeks to recover from the Defendant, Telecommunication Consulting Company Limited, a sum of K1,950,000.00 paid as 75% of the price for Hicom 300E PABX, (alternately in evidence also referred to as Hicom 330E PABX),

Security fee refund

interest on this sum at the rate of 50% per annum from 1st July, 1999 to the date of judgment and thereafter to the date of actual payment, damages for inconvenience and for breach of contract, and for costs of the action.

The Plaintiff avers that the contract of sale herein was one of sale by description. As such, the Plaintiff claims that the contract carried implied conditions or that the Defendant warranted that the equipment it would supply would correspond with the description of the equipment agreed on, and that the same would be merchantable. The Plaintiff next avers that late in the year 2000 the Defendant purported to perform the contract herein, but brought equipment neither corresponding with the description agreed on nor otherwise merchantable and that in consequence the consideration for the deposit paid herein has wholly failed. The Plaintiff thus also complains that it has suffered inconvenience and hence the present action.

The Defendant, by a Re-Amended Defence and Counterclaim, has only admitted one item in the Plaintiff's claim. What the Defendant concedes is the existence of the contract of sale for a Hicom 300E PABX and the fact that it received, as alleged, the sum of K1,950,000.00, being 75% of the purchase price for the same. Hereafter apart from a general traverse at the foot of the defence, the Defendant has specifically denied all the other allegations made by the Plaintiff.

To begin with the Defendant has denied the allegation that the sale contracted on herein was one by description. The Defendant has thus equally denied the Plaintiff's imputation of existence of implied conditions or warranties regarding correspondence of the equipment with the description and the merchantability thereof. In the alternative, while still denying that the sale was by description, the Defendant denies that the equipment it supplied failed to confirm with the description given or that it was not merchantable. The Defendant accordingly next denies all of the Plaintiff's allegations

concerning the Defendant's alleged supply of worthless substitute equipment that cannot perform the function the Plaintiff expected the ordered equipment to perform, and the Plaintiff's lamentations of total failure of consideration and inconvenience.

Further or in the alternative and without prejudice to the denial of the allegation that the sale was by description, the Defendant pleaded that at the time of contract, Hicom 300E PABX was out of production, and that on communicating this to the Plaintiff, the latter gave it a go ahead to install a new system. The installation of the new system, by the Defendant's own confession at paragraph 7 of the Defence, was frustrated by conduct of the Defendant itself which has at all times been maintaining a temporary system, it is so averred, at the request of the Plaintiff. The Defendant, however, further pleaded that it would further or in the alternative contend that a new contract was agreed by the parties and that this new contract overrode the earlier contract.

The Defendant then further averred that the Plaintiff is not entitled to claim interest on the sum of K1,950,000.00 paid to it. To begin with it denies ever agreeing to pay interest on that sum of money from 1st July, 1999 and puts the Plaintiff to strict proof itself. Next the Defendant pleads that the contract this payment refers to, having been signed on 12th May, 2000, the Plaintiff should not be heard to rely on it in claiming the denied interest from 1st July, 1999. The Defendant wound up its defence by indicating that it will contend that the claim of interest herein, at the rate pegged, is unconscionable under Section 3 of the Loans Recovery Act and at common law and that as such it ought to be rejected by the Court.

The Defendant then availed itself of the opportunity to counterclaim against the Plaintiff in respect of various sums of money which it alleges that the said Plaintiff owes it. The sums in question include K88,000.00 for cabling, K17,450.00 for extension telephones, K363,112.00 for extension terminals,

K179,000.00 as service charge, cost of additional phones to be assessed, and interest at base lending rate plus 3% on all sums due.

When the case came up for hearing the Plaintiff's side only fielded one witness. This was Mr Mabvuto Zuze who is Lever Brothers' I.T. Operations Support Officer. Mr Zuze's evidence consists of a written statement, which he adopted, oral testimony, and twenty-five exhibits, mainly in the form of letters, which he tendered in the case. The long and short of Mr Zuze's evidence is that from the time the parties herein agreed that the Defendant will supply to the Plaintiff a Hicom 330E PABX, against which order the Plaintiff on 1st July, 1999 paid 75% of the purchase price in the sum of K1,950,000.00, all Lever Brothers (Mw) Limited has got from the Defendant are sweet promises upon sweet promises and that to date the desired PABX equipment has not yet been installed by the Defendant.

In particular it was Mr Zuze's evidence that following negotiations in May, 1999, on 18th June, 1999 under purchase Order 17922 the Plaintiff offered to buy from the Defendant and the Defendant agreed to sell and deliver to the Plaintiff at its Head Office in Limbe a "Hicom 330E PABX" at K2,600,000.00 and that the Plaintiff, on 1st July, 1999, paid 75% of this sum at K1,950,000.00. It might be of significance to note here that exhibit "P1" which is a letter from the Defendant to the Plaintiff during negotiation stage, dated 24th May, 1999, in its appendix indicated as follows:

> "*INSTALLATION*
>
> *We would commence installation work within one week after receipt of your Official Order with payment subject to prior sale.*"

The same letter also indicted:

> *"PAYMENT TERMS*
>
> *We will require 75% with Order, 15% at Commissioning, and 10% on completion of the project."*

Following the placing of the Order on 18th June, 1999 and the subsequent payment of the requisite deposit on 1st July, 1999, it was Mr Zuze's further evidence that come 12th July, 1999, the Defendant wrote to the Plaintiff indicating the time span within which the contractual work herein would be completed. In passing, one might wish to observe that if the quoted portions of Exhibit "P1" were anything to go by, unless there was a prior sale of the item the Plaintiff was purchasing from the Defendant, from the date the Defendant had both the 75% deposit and the Official Order i.e. from 1st July, 1999, within a week of that date installation work should have commenced, but it apparently had not. The letter detailing the work plan, dated as it was 12th July, 1999, was already beyond the one week mentioned in exhibit "P1" as will be noted. Obviously installation was going to commence well beyond one week of the Defendant having both the Official Order and the deposit in this case.

Mr Zuze tendered the letter of 12th July, 1999 as exhibit "P2" in the case. In the body of this letter the deposit paid herein was duly acknowledged. The letter also indicated that by that date Telecommunication Consulting Company had already formally ordered the Plaintiff's equipment and it was expressing the hope to complete assembling the main part of the PABX on 20th July, 1999. Paragraph four of the letter runs:

> *"All other parts including the executive wings system will be shipped on the 16th July, 1999. Installation will commence immediately upon clearing of equipment from customs. Meanwhile our engineers will carry on installation of cables and distribution systems."*

Mr Zuze then went on to say that the hope just given by the above letter was not fulfilled and that on 8th September, 1999 the Defendant wrote to the Plaintiff to update it on progress. In the said letter, which was tendered as exhibit "P3," the Defendant indicated that its Technicians were through with the preparatory phase of the project and that the next phase would be installation of telephone sockets and receivers and such like, but that the planting of the PABX would fall in the final phase. In this letter, however, the Defendant took the opportunity to mention some of the problems it had to the Plaintiff. One of them was a faulty card for digital extension. The Defendant attributed this to shipping damages and assured the Plaintiff that the suppliers were sending a replacement. The Defendant's words were:

> *"As previously communicated to you, our supplier's factory was too busy to meet the normal delivery period. However, all items have since been shipped.*
>
> *We look forward to completing this project by the end of this month."*

Let me observe here that the impression I get from this letter is that save for the card for digital extension which had gotten damaged in transit to Malawi and which was readily to be replaced, by the date of this letter, i.e. 8th September, 1999, the Defendant was positively assuring the Plaintiff that all equipment to enable installation of a Hicom 330E had left the suppliers for the Defendant. Some of it, like the damaged card, had already been received and the balance was already on the way, having already been shipped. As can also be seen this letter was clearly earmarking the end of September, 1999 for completion of this project.

Mr Zuze's evidence went on to show that the end of the matter was not as near as this letter suggested. The PABX machine was not supplied as indicated in the exhibit "P3" and on 9th November, 1999 Lever Brothers (Malawi) Limited wrote Telecommunication Consulting Company to express concern over the latter's delay in fulfilling their obligation. A letter bearing that date, which the witness tendered as exhibit "P4,"

shows that the Plaintiff indeed registered deep disappointment with the rate at which promises were being made and broken and at the lack of progress in fulfilling the contract. Part of this letter reads:

> *"I would like to express our disappointment on the way the whole project has been handled.....The job has already taken over five months since June, 1999 and as a company we are concerned with this development."*

Mr Zuze then tendered in evidence exhibit "P5," a reply to this complaint, dated 22nd November, 1999. In it the Defendant expressed concern and regrets for the delay of the project. The Defendant also indicated that this was due to the missing of key modules on the PABX and that after waiting for three weeks it had however received a wrong replacement. To solve this reaming problem the Defendant said:

> *"We have now resolved to travel to Europe next week and sort out this problem once and for all."*

I suppose from the tone of this letter it would not be forfetched for an officious by-stander to gain the impression that save for the allegedly missing key modules, all else was in place for the installation of the Hicom 330E PABX.

The evidence of Mr Zuze did not unfortunately hereafter disclose whether the Defendant undertook the promised trip to Europe the week after this, and if so what resulted from it. He merely next indicated that on 16th March, 2000 and on 27th April, 2000, four to five months after, the Plaintiff wrote to the Defendant and again complained about the lack of progress in the matter. The letter of 16th March, 2000 is exhibit "P6" in the case. In paragraph three thereof the Plaintiff lamented as follows:

> *"Our normal procedure is to pay after completion of project but we were made to believe that prepayment would shorten the project period. We indeed paid you on July 1st 1999 but it appears we made an investment that has not borne fruit up to now."*

The same letter also indicates that the Plaintiff was getting quite fed up with the conduct of the Defendant Company. This comes out quite clearly in paragraph five of the same letter which in part reads:

> *"As you have been unable to meet the last deadline set by yourselves which you communicated in a meeting held here on Wednesday 8th March, 2000 after missing the agreed deadline of 29th February, 2000, we wish to let you know that we expect the project to be completed by 18th March, 2000. If this deadline is not met we will charge you interest based on the current bank rate on the money paid to you on 1st July 1999 amounting to K1,950,000.00 from July to March."*

Mr Zuze then went on to show that the deadline given by his employer, Lever Brothers, was incidentally also not met and that new promises hereafter kept coming from the Defendant. His exhibit "P7" was a letter dated 18th April, 2000 from the Defendant to Lever Brothers. It advised that the new PABX system installation was over and ready for change-over. Inter alia this letter indicated plans during the Easter holiday to effect the charge-over. Exhibit "P8" is a letter dated 26th April, 2000, again from the Defendant to the Plaintiff. It indicates that change-over could not be completed over the Easter Holiday as the Project Manager of the Defendant was away. The letter confirms that the change-over would be done from Friday 28th April, 2000 through Monday 1st May, 2000. Mr Zuze next tendered exhibit "P9", a letter from his employers to the Defendant in which the Plaintiff had yet again to issue another ultimatum. In response to the then latest suggested dates for change-over, the Plaintiff wrote:

> *"...this deadline as far as Lever Brothers is concerned is final. You have written before to confirm changeover the latest of which was last weekend, but you have always been absent and silent when the agreed time comes.*
>
> *We will not accept excuses for failure to complete this project this time, as it has been prolonged for unacceptable period of time."*

PWI hereafter indicated that on 12th May, 2000 the Project Officers of the two parties herein signed an agreement pertaining to the supply and installation of the PABX machine herein. The said agreement was tendered by the witness as exhibit "P10". Among other things, it was agreed that the Project herein be completed on 15th May, 2000. A further point the two sides agreed on, worth highlighting, is paragraph 8, which reads:

> *"The above procedures and timing shall be adhered to by both TCC and LBM. Failure to adhere to the procedures by TCC (which had been the case before this agreement) shall give LBM the mandate to claim interest on the money (K1,950,000.00) paid by LBM for this project on 1st July 1999 at 50% current bank rate."*

According to Mr Zuze at some point the continuation of these delays led to a crisis situation for the Plaintiff. The Plaintiff's contract with Malawi Telecommunications Limited for use of the latter's PABX machine was approaching expiry and with the Hicom 330E PABX not yet supplied and installed the risk was high that the Plaintiff was going to be out of telecommunication. On disclosure of this impending crisis, per Mr Zuze, the Defendant offered to and did supply to the Plaintiff an inferior model PABX machine for use, pending the supply and installation of the PABX machine that was ordered. This machine, the witness indicated, was merely meant to be temporary and it could not provide the service the Plaintiff expected from the machine ordered.

Even with a temporary communication system in place, it would appear the Plaintiff saw no further progress in the matter. Mr Zuze's exhibit "P11" is a complaint dated 8th June, 2000 from Lever Brothers to the Defendant on further failures by the Defendant to meet new deadlines. It refers to a failure of the Defendant to comply with its own fresh deadline of 5th June, 2000. In the letter in question at paragraph four the Plaintiff states:

> *"As you have once again not been able to meet the deadline you set for yourselves, we hereby give you our own final deadline as we*

believe you do not give this project the priority it deserves having taken almost a year instead of six weeks at most."

It then sets down the date Friday 9th June, 2000 as the said final deadline and urges the Defendant to take the matter seriously.

There is then a letter dated 27th July, 2000 tendered as exhibit "P12" in the case. It is from the Defendant to the Plaintiff. It confesses that the Defendant had experienced major problems with procurement and delivery of equipment in the project. It proceeds to attribute these problems to unforeseeable circumstances. It then makes a revelation I find rather stunning in a statement to be found in its paragraph two, which goes:

"Although we have changed over this is still provisional as our final product has not yet been delivered and we are now proposing a change of configuration of the system to suit the latest developments on the Hicom range of PABX."

I should just like in passing to mention that I find this revelation stunning because the impression created by most earlier correspondence was that all items of the equipment had been received except for the correct key modules which would be properly replaced on a trip to Europe by one employee of the Defendant in the final week of November, 1999. The disclosure, therefore, that the final product had not yet been delivered is definitely startling and mind-bogging. As will be noted the indication at the top of page two of this letter was that the Defendant would then not be ready to hand over the final system until 1st September, 2000.

Now, whereas exhibit "P12" was written by a Mr G. Mussa as Customer service Project Engineer on 27th July, 2000, the next exhibit Mr Zuze tendered, i.e. exhibit "P13", is word for word the same letter. The only difference is that it instead bears the date 1st August, 2000, has a different reference number, and is authored by a Mr F.S. Mijiga also employing the title Customer Service Projects Engineer. Why

this had to be so is not cleat at all, although it seems to suggest some panicking and more on the Defendant's part.

Mr Zuze then tendered in evidence two subsequent communications from the Plaintiff to the Defendant showing the former's exasperation with the latter on this subject. The first, a facsimile transmittal, was complaining about the Defendant promising at a meeting held on 8th August, 2000 to send a document outlining all the tasks the Defendant would carry out from then up to installation of the desired PABX machine, and complaining about the failure to send the same. This is exhibit "P14" dated 14th August, 2000. The next exhibit, "P15", is a letter dated 27th September, 2000. In it the Plaintiff, at paragraph three, says:

> *"We have no wish to hold any more meetings due to the fact that those we have so far held have not borne fruit. We have now decided to let our lawyers handle the issue."*

Following this threat it was Mr Zuze's evidence that the Defendant came up with yet another explanation for its failure to deliver the PABX machine purchased by the Plaintiff. The witness in this regard tendered exhibit "P16", a letter dated 18th September, 2000, from the Defendant to the Plaintiff. In paragraph two of this letter the Defendant advised as follows:

> *"Following a careful consideration, we have resolved to order a more recent Model to replace the Hicom 330E VI.0 now out of production. The replacement system is a Hicom 150E."*

The letter herein, as it turned out, opened a fresh chapter of promises between the parties, beginning with that in paragraph six, which goes:

> *"Our supplier have given us as reasonable delivery period of five weeks. It will take us three days to complete installation."*

Looking at this, one may be entitled to wonder if, from previous correspondence, the Hicom 330E was already ordered, shipped and received, except for the correct key modules, which defect a promised trip to Europe might

already have rectified, why its going out of production, as only revealed at this stage, had to affect installation and necessitate ordering a replacement model. One may also be entitled to wonder how unilaterally, in the circumstances, the Defendant could just have resolved to order a Hicom 150E. In this letter, if one looks at it carefully, the Defendant was merely communicating a decision it had already taken and acted on. It was not asking for the Plaintiff's input on that decision. The question therefore may be whether the Defendant was not, this time round, trying to drag the Plaintiff by the nose, rather than consulting it with a view to reach a new consesus.

To cut the testimony of Mr Zuze a bit short, let me say that his exhibits P12 to P25, being correspondence going back and forth between the Plaintiff and the Defendant in respect of the installation of the newly promised or imposed Hicom 150E, and being dated between 17th October, 2000 and 14th May, 2001, are basically just a repeat of the first phase that related to the Hicom 330E PABX. This phase consists of promises, breaches, excuses, and more promises on the part of the Defendant Company and a chain of complaints on the part of the Plaintiff Company. Among the excuses offered by the Defendant in these exhibits are indicators that the delays in installing the substitute machine were caused by events beyond the Defendant's control, that the Defendant was having problems with import approvals owing to split shipment, and that the Defendant was working on final financial obligations with its bankers relating to custom duty clearance of equipment.

Like the first phase, this episode involving a Hicom 150E PABX also, inevitably perhaps, ended up with a threat to take legal action. The fourth paragraph of exhibit "P25", a letter from Lever Brothers to the Defendant, dated 14th May, 2001 captured the Plaintiff's mood as follows:

> *"Unless we have the correct PABX within the next 7 days then we shall have no choice but to refer this matter to our lawyers to collect on our behalf the 75% deposit paid with interest at bank rate from the time we paid you."*

Mr Zuze, to say the fact, in the long examinations he underwent in the case, be it in-chief, through cross-examination, and through re-examination, spent his entire time in this Court revolving around the evidence just discussed above.

The Plaintiff's case having thus come to a close, in opening its case, the Defendant announced that it too had only one witness to call in the case. DWI was Mr Francis Mijiga, Chief Consulting Engineer for Telecommunication Consulting Company Limited. The witness had submitted a statement in the trial bundle the Defendant had filed. I must mention that the witness duly adopted the statement so filed. He however on occasions was somewhat prone to going outside the said filed statement in the course of his oral evidence. Over and above the oral and written evidence above-referred, Mr Mijiga only tendered one exhibit in this case. He did, however, apart from this, make reference to and use of the Plaintiff's exhibits "P10", "P17", and "P22" to advance the defence case.

Mr Mijiga began his evidence by disclosing that he was the man at the centre of the negotiations that led to this contract. He indicated that the initial quotation given to the Plaintiff was K3,200,000.00, but that the parties finally settled at K2,600,000.00 after agreeing to drop some components and reduce costs. Incidentally, the witness did not disclose which components were agreed to be dropped. Further, to this witness there was no strict time limit within which the agreed project herein had to be concluded. He however indicated orally that the Defendant's projection was to complete the project within five weeks from normal expected delivery time.

It was Mr Mijiga's further evidence that after commencement of the project, the Suppliers, Siemens in Germany, advised that the desired PABX Hicom 300E was out of production. The witness was not so particular when exactly this was and what exactly he meant by "after commencement of the project." He then said that upon communicating this

development to the Plaintiff the Boards of the two companies herein met, discussed, and agreed that the Defendant should instead install the new model of the PABX then on the market. Again here, apart from verbal testimony, no documentary evidence of this joint Board meeting and/or agreement was furnished to the Court. The witness went on to indicate that to his surprise, per paragraph 10 of his statement, despite this agreement, the Plaintiff's technicians insisted that the Defendant should install the equipment that was out of production.

Hereafter, according to Mr Mijiga, Lever Brothers (Malawi) Limited indicated to his company that its contract with Malawi Telecommunications Limited was about to expire and that if the Defendant did not install the out of production equipment the Plaintiff would be without telecommunication service. Lever Brothers, the witness indicated, mounted such pressure on the Defendant that it just had to install a temporary system. I must say that the impression created by the witness' evidence through the statement he filed is that the temporary system the Defendant installed was the phased out Hicom 330E. His oral evidence, however, was that the temporary system the Defendant installed was a Hicom 118.

Further the witness said that the installation of this PABX was orally agreed on, and yet he tendered in Court Exhibit "D1", an agreement dated 25th June, 1999 between the parties herein in respect of a Hicom 118 PABX. By way of explaining this document, Mr Mijiga said the Hicom 118 mentioned in it is the very temporary PABX machine his company installed for the Plaintiff. His further indication was that it was cited in the agreement in question because it was the only machine his company had that was readily available. The witness added that exhibit "D1" was signed so early during negotiations only so as to facilitate payment of the deposit on the agreement relating to the Hicom 330E that was to be ordered from suppliers. In fact the witness also added that this Hicom 118 PABX was going to be used in the

management wing of the Plaintiff Company as the Hicom 330E was still being awaited.

In a bid to explain the Defendant's failure to finish installing the system ordered, in paragraph 15 of his statement evidence, Mr Mijiga put the blame on the Plaintiff rather than on his own company. He claimed that the Defendant had supplied and installed three quarters of the system, but that before the Defendant could conclude its assignment, the Plaintiff instructed its lawyers to commence these proceedings. Another reason Mr Mijiga offered for his company's failure to complete the project herein was that a dispute had arisen between the parties regarding the project value. He indicated that one party felt that the quotation was for a system with accessories while the other felt that it was for a system without accessories.

Mr Mijiga went on to say that eventually the new system arrived from the suppliers in Germany, but that the Defendant could not install it, partly because of the differences earlier mentioned and partly because the Plaintiff had already referred the matter to its lawyers. The witness ended his testimony by praising the temporary system his company had installed, which he indicated the Plaintiff has throughout used without complaint about technical problems. He claimed that in the circumstances the Defendant did not breach the contract herein, and he went on to express willingness to replace the temporary system with the new machine on the market. In terms of how soon exactly the Defendant could manage this and install the Hicom 150E PABX, the witness estimated a period of 8 weeks upon taking into account eventualities such as what the suppliers might have in stock, shipping time, and the time needed for arranging payment through the banks.

I need to mention here that the Defendant rested its case upon fully presenting its evidence in respect of its defence in the matter. It did not cross over to the Counterclaim it had filed. It transpired actually, as DWI was still testifying in-

chief, that the Defendant had intimated to the Plaintiff, and that in consequence the two of them had agreed that the Defendant's Counterclaim herein would not be proceeded with. The parties having thus in due course alerted me of their consensus on this point, I have accordingly duly proceeded on the basis that the Defendant has dropped its Counterclaim in this matter. The indications given to the Court were that a solution to the claims listed in the Counterclaim would be struck between the parties outside this case.

Both parties having concluded the presentation of their respective testimonies in this matter, learned Counsel for the two sides took turns in making oral submissions to the Court. In general they each followed the patterns set by the skeleton arguments they had included in the trial bundles filed on behalf of their clients.

In brief learned Counsel for the Plaintiff pointed out that the evidence in the case is not much in controversy. The Defendant failed to deliver the initially agreed on Hicom 330E PABX for which the Plaintiff had already paid 75% of the purchase price in the sum of K1,950,000.00. The Defendant, he added, further failed to deliver the Hicom 150E it next offered. In the end the Plaintiff gave up and concluded that the Defendant will not deliver at all. It is on this account, he said, that the Plaintiff's claim in this action is first for a refund of the price it paid, being money had and received, on a consideration that has wholly failed, secondly for interest on the sum so paid on 1st July, 1999, thirdly for damages for inconvenience, and finally for damages for breach of contract.

In respect of its allegation that the Defendant has breached the contract herein, it was the Plaintiff's contention, in the light of Sections 28 and 29 of the Sale of Goods Act (Cap 48:01) of the Laws of Malawi, that the agreement herein having been made, and the Plaintiff having paid the K1,950,000.00 75% deposit on 1st July, 1999, the Defendant was under a duty to deliver to the Plaintiff a Hicom 330E PABX, subject-matter of the agreement, as per contract terms.

With further reference to Section 30 of the same Act, it was argued on behalf of the Plaintiff, that the Defendant's duty was to so deliver and install this PABX at the Plaintiff's premises.

At this point learned Counsel attacked the Defendant's claim that there was no time limit for the performance of the contract herein. The Court was in this regard asked to refer to exhibit "P2", a letter of as early as 12th July, 1999 from the Defendant, in which the Defendant itself spelt out a time frame for its performance of this contract. Reference was further made to several other exhibits including exhibit "P10" where various dates were promised by the Defendant for the completion of this contract. It was thus contended that even if it were accepted that there was no time limit to this contract, it certainly ought to have been performed within a reasonable time and that the Defendant is way out of that reasonable time.

Beyond this the Plaintiff also attacked the Defendant's attempt, through its defence evidence, to suggest that its installation of a Hicom 118 at the Plaintiff's premises was either performance or part-performance of the agreement herein. On this point the Plaintiff submitted that the Defendant having acknowledged that it installed the Hicom 118 "as a temporary system" pending the delivery of the PABX ordered, it cannot therefore claim this installation as a performance or a part-performance of the contract.

It was seriously argued in this regard, that at law a party to a contract must perform the very thing he undertook to perform. In support of this principle the Plaintiff cited the case of Arcos Limited vs E.A. Ronaasen and Son, a House of Lords decision reported in [1933]A.C. 470 and the case of Davies vs Collins, a Court of Appeal decision reported in [1945]1 All ER 247. Also cited were paragraphs 1491 and 1493 of Chitty on Contracts; General Principles, 26th ed. On basis of these authorities, the Plaintiff was of the view that whatever the merits of a Hicom 118 PABX, without the contract having been varied from either a Hicom 330E or a Hicom 150E to a Hicom

118, supplying a Hicom 118 cannot be a performance or a part-performance of the contract herein. Thus the supply of this PABX must only be understood, as put in the Defendant's own words as a temporary system, pending the delivery of the correct PABX.

On the premise therefore that the Plaintiff believes that the Defendant breached its duty to deliver and install the PABX machine part-paid for herein, it called in aid Section 51 of the Sale of Goods Act. The Plaintiff's submission thus was that the Defendant ought to pay it damages for this non-delivery. The damages in question, it was argued, flow directly and naturally from the seller's breach of this contract. In further support of this contention, the Plaintiff cited the case of Mponda vs Khambadza t/a Khei Distributors (Private) Limited)[1987-89] 12 MLR 6.

Futher, it was the Plaintiff's submission that the sale agreed on by the parties herein was a sale by description. It was here argued that the evidence of both PWI and DWI shows that initially the Defendant was bound to deliver a Hicom 330E PABX and that it was only after failure to deliver this item that a Hicom 150E surfaced. This too was however not delivered.

The Plaintiff was therefore emphatic that without a further variation of the agreement a Hicom 118 could not just step in to substitute the agreed PABX machine. It was also then pointed out that in any event the Hicom 118 PABX was only installed as a temporary system pending delivery of the right PABX machine. It was thus contended that the Defendant did not perform the duty to deliver the PABX described in the agreement between the parties.

Reference was then made to Sections 15 and 16 of the Sale of Goods Act with respect to implied conditions in case of sales by description. The point the Plaintiff was making in its submissions was that since neither a Hicom 330E nor a Hicom 150E was delivered and installed, the installation of the

temporary system Hicom 118 cannot be argued to be a delivery of an item corresponding in its description to the item agreed on. To buttress this point the Plaintiff had recourse to the case of Kusani vs Limani Limited [1981-83]10 MLR 39, in which it said the Court had applied the cited Section 15 herein.

Basing on the above arguments the Plaintiff took the view that this non-delivery and non-installation of the agreed PABX machine means that the consideration for which K1,950,000.00 was paid as 75% deposit has in this case wholly failed. The Plaintiff thus submitted that it is therefore entitled to a refund of the sum it paid. To buttress the point that the Plaintiff should get back its K1,950,000.00 from the Defendant, the Plaintiff cited in support of its claim the House of Lords decision in Fibrosa Spolka Akcyjna vs Fairburn Lawson Combe Barbour Limited [1942]2 All E.R. 122, wherein it particularly referred to certain dicta in the judgments of Viscount Simon, L.C., and Lord MacMillan at pages 129 and 143, respectively.

Further, on the same K1,950,000.00 paid as deposit herein, the Plaintiff submitted that it is entitled to interest at the rate of 50% from the day this sum was paid in 1999 i.e. 1st July to the day of Judgment and hereafter to the day the principal sum is refunded. The first basis the Plaintiff resorted to for claiming this interest is Clause 8 of exhibit "P10" where the parties herein specifically agreed on this interest at this rate. Beyond this the Plaintiff referred the Court to Section 11 of the Court's Act which, he said, empowers the Court to direct payment of interest on debts or contracts.

The Plaintiff then cited a number of cases in which Courts have awarded interest in cases involving situations of similar breach of contract. Among the authorities cited are Civil Cause No. 1526 of 1993 A.G. Tselingas vs Industrial Development Group Limited decided by Hon. Justice Tambala, as he then was, on 22nd August, 1995; Civil Cause No. 259 of 1990 Inter-Ocean Freight Services vs A.P. Khoromana and Nali

Limited decided by the late Hon. Justice Mbalame on 16th February, 1994; Zgambo vs Kasungu Flue-Cured Tobacco Authority [1987-89]12 MLR 311 by then Registrar Mwaungulu, and National Bank of Malawi vs Chimwaza [1992]15 MLR 367. It was accordingly submitted that this is a proper case in which the Court should direct the payment of interest on the deposit paid by the Plaintiff on a consideration that has wholly failed.

In its submissions the Plaintiff further made the point that in this matter it has been seriously inconvenienced by the conduct of the Defendant and that it is therefore entitled to claim separate damages for this inconvenience. Having paid K1,950,000.00 deposit on the contract, the Plaintiff said it hoped for early installation of the Hicom 330E PABX facility. Since this payment on 1st July, 1999 to date it has not had use of the PABX so paid for. Reference was made to the evidence of PWI as showing that in consequence of this non-delivery, a lot of inconvenience and frustration has been suffered, which would not have been the case had the desired PABX been installed. The temporary system installed by the Defendant, it was submitted, has not lived up to the requirements the ordered machine would have fulfilled.

It was thus pointed out that now six years after paying 75% of the cost of the machine then contracted on, the Plaintiff will still have to acquire the PABX machine to satisfy its need and that it will so acquire this at today's price. The price to be paid now is likely to be different (most likely higher) from that paid in 1999 and this will be a loss on the part of the Plaintiff. All this loss, it was submitted, directly and naturally flows from the Defendant's breach of the contract herein. To date, the Plaintiff said, the PABX contracted on and part-paid for has not yet been delivered and installed and the inconvenience of relying on an unsatisfactory temporary system continues. The Plaintiff thus pressed for damages for inconvenience separate from damages for breach of contract.

On the part of the Defendant learned Counsel equally observed that the evidence on the two sides is not much in dispute. While agreeing that the parties were indeed agreed on delivery of a Hicom 330E PABX to the premises of the Plaintiff, the Defendant placed emphasis on the point that, as per paragraph three of exhibit "P2", this was subject to the availability of the machine from the suppliers. On this account the Defendant querried what the legal position was when, before the contract was performed, it transpired that the item contracted for was out of production.

With reference to the case of Taylor vs Caldwell [1861-73]All E.R. Rep. 24 which it was said was the authority for the proposition that if parties contract for an item that does not exist then the contract is frustrated, the Defendant argued that due to the frustration of contract herein it should get discharged. Reference was also made to paragraph 1632 of Chitty on Contracts 26th edition for the same principle. It was, all in all, accordingly submitted on behalf of the Defendant in this case, that the fact that the Hicom 330E contracted for went out of production frustrated the contract herein and that the Defendant should therefore not be held liable.

The Defendant, however, proceeded to contend that the frustration of the initial contract notwithstanding, the parties herein entered into a new agreement. To the Defendant, per submission, this new contract is the one embodied in exhibit "D1" and it is dated 25th June, 1999. This is the contract the parties signed in respect of a Hicom 118 PABX. Placing reliance on the case of Berry vs Berry [1929]2 K.B. 316 it was contended that the legal effect of entering a new agreement is that one party cannot insist on the performance of the original contract. On this basis it was submitted that the ruling contract is the one in respect of a Hicom 118 PABX and that the Plaintiff cannot therefore insist on the performance of the agreement in relation to a Hicom 330E PABX.

Further relying on exhibit "D1" the Defendant argued that it is clear that both parties duly executed it and that the evidence shows that this agreement has been performed. Relying on the authority of the case of Sanders vs Anderson Building Society [1971] A.C. 1004, the Defendant argued that the parties herein are bound by the agreement depicted by exhibit "D1" and that in that case the Plaintiff cannot insist on the performance of the original contract. The said original contract, being anyway frustrated with the going out of production of the Hicom 330E, it was submitted that there is no going back to that contract. The contract of 25th June, 1999 having been performed, the Defendant submitted that the K1,950,000.00 paid on 1st July, 1999 cannot be refunded unless this contract was for no consideration at all or had no value attached to it. All in all, on the above account, the Defendant prayed that the Plaintiff's case be dismissed with costs.

Having heard all the parties had to say in this case, both by way of evidence and by their submissions in the case, I am now ready to make a determination in the matter. I have spent long hours considering the parties' pleadings and the evidence they proferred in their support, as well as the law and the legal authorities they placed reliance on. I have also throughout, as I did this, borne in mind the onus and the standard of proof applicable in Civil Cases. I have thus appropriately cautioned myself about the fact that the burden of proof in these cases lies on the Plaintiff and that the level I am supposed to be satisfied to, if the Plaintiff is to succeed, is one on a balance of probabilities. I must say that I duly understand this to mean that the minimum the Plaintiff must do to prove his case is to show me that his version of this case is more probable than the version I have got from the Defendant. His case will therefore have to fail if either, when placed on the scale, it is no heavier than the Defendant's or if it is less weighty than the Defendant's.

Reverting to the basics in this case, to wit, the claim of the Plaintiff, as pleaded, and the defence of the Defendant, also as pleaded, it is quite plain right from the outset what agreement the parties herein struck and were therefore bound by. By virtue of a very clear and unequivocal admission in these very pleadings, it is settled that the material contract between the contestants herein was one for a Hicom 300E, which in this case has also alternatively been referred to as a Hicom 330E PABX. This was at a price of K2,600,000.00, of which K1,950,000.00, being 75% of the full price, was paid by the Plaintiff to the Defendant as far back as 1st July, 1999. On the Plaintiff's part all the evidence, as proferred by Mr Zuze, PW1, which all in all in my view throughout remained solid and unshaken, is to the effect that for a whole year and some three months since this agreement was entered into, the parties herein corresponded on nothing, but this Hicom 330E PABX, alias 300E.

Although not each and every piece of the correspondence in question specifically mentions this brand of Hicom PABX, between exhibit "P1", the offer from the Defendant to the Plaintiff dated 24th May, 1999, and exhibit "P16", the letter from the Defendant to the Plaintiff revealing for the first time that Hicom 330E was out of production, I have no doubt in my mind that all the correspondence in between was in respect of a Hicom 330E or 300E and in respect of no other type of PABX. In particular within this chain of correspondence, well apart from exhibit "P16", exhibits "P10" and "P14" specifically make it clear that the subject under discussion between the parties was no other type of PABX than the one the Defendant has clearly admitted in its defence.

Indeed as seen in this lengthy correspondence, there was promise after promise from the Defendant to the Plaintiff about delivery and installation of a Hicom 330E PABX, and excuse upon excuse on why the Defendant was failing to deliver and install the said PABX, despite glowing indication on several occasions within the correspondence to the effect that the material equipment had been sourced from suppliers

and that it was ready for installation except for one small hitch or other. Looking at exhibits "P15," dated 7th September, 2000, and "P16", dated 18th September, 2000, I cannot help concluding that if it had not been for the threat Lever Brothers made in Exhibit "P15," that it was handing over the matter herein to its lawyers, the hide and seek game that had been played since May, 1999 about the Hicom 330E would most likely not have come to any end. In my view, therefore, the evidence of the Plaintiff, which incidentally DWI virtually fully agreed with, clearly demonstrates that from May, 1999 to September, 2000 the Defendant undertook, on the deposit it received, to deliver to and install for the Plaintiff a Hicom 330E alias 300E, but that, it never came round to doing it.

Next, as I earlier observed, the switch from a Hicom 330E to a Hicom 150E, per exhibit "P16", appears to have occurred suddenly and at the instance of the Defendant without any consultation with the Plaintiff. From the way exhibit "P16" sounds, this switch from one brand of PABX to the other has all the appearance of having been imposed. As I have wondered earlier on, despite DWI's assertion that the Boards of the two parties herein met and agreed to change their contract from applying to a defunct Hicom 330E to a Hicom 150E, there were neither minutes, nor other correspondence, nor indeed even a written agreement of this alleged variation tendered to support DWI's naked word. As I have incidentally also already observed, however, this abrupt switch the Defendant announced in exhibit "P16" from a Hicom 330E to a Hicom 150E, effectively numbed the Plaintiff from carrying out its threat to take the matter that had become trying and tiresome to its lawyers.

What follows after this letter, in my assessment, truly bears out the point that the Defendant's announcement that it would soon install a more recent model PABX, that included all the Plaintiff's requirements as well as recent technological developments, rekindled the Plaintiff's lost hope in the contract. With the Defendant's captivating promise in paragraph six of this letter, to the effect that the Defendant's

suppliers had given them a delivery period of five weeks and promising that it would take the Defendant only three days to complete the installation, the Plaintiff instantly forgot all its misery of the past year and three months, and was once again hooked on to the hope generated by the sweet promise.

Again, as I have pointed out before, trusting once again that the Plaintiff would soon install a more modern PABX, this dream did not take long to become a nightmare. The old routine of promises for installation, which were surely not kept, followed by different excuses being furnished from time to time, was readily re-established. Inevitably this too had to and did indeed lead to the Plaintiff's loss of patience. Through exhibit "P25", dated 14th May, 2001, that is eight months down the line, the threat to refer the matter to the lawyers surfaced once again. This time, as now evidenced by this action, this threat really materialized, hence Civil Cause 2039 of 2001.

On account of paucity of evidence, I am reluctant to hold that the parties in this case varied their original agreement. Rather I am prepared to find that, after being so cornered about its failure to deliver and install the PABX the parties had agreed on, as per concessions in the pleadings, and after threat of legal action, upon seeing no escape route, the Defendant suddenly came up with the excuse that the Hicom 330E PABX, was out of production. Using this excuse the Defendant immediately imposed on the plaintiff the information that it had already pressed an order for the modern replacement of the defunct Hicom 330E. Let me confess that I view all this with a jaundiced eye. This is because in one year and three months the Defendant had for the most part throughout consciously and soberly led the Plaintiff to believe that it (the Defendant) had already sourced the Hicom 330E PABX, except for a damaged extension card which was being replaced, and also except for missing key modules, which a staff member was going to travel to Europe for to have replaced.

Thus whether or not, in the end it can be said that indeed the Hicom 330E PABX had gone out of production and that as a result the Plaintiff agreed to vary this contract to be one for a Hicom 150E PABX, what is very clear in this case is that after eight more months of extended patience on the part of the Plaintiff, the newly promised Hicom 150E equally proved elusive, and was not delivered and/or installed by the Defendant. In aggregate therefore, since striking the agreement herein, for some twenty-one months, which is a period of time just falling three months short of two years, the Plaintiff had neither received the PABX it had part-paid K1,950,000.00 for, nor had it received the substitute Hicom 150E the Defendant had selected as a substitute for it.

Now, there is in this matter a third model of PABX also featuring. This is the Hicom 118 PABX. In the Defendant's submission this is the PABX the parties herein settled for and agreed on once it came to light that the Hicom 330E PABX was out of production. This submission is, however, heavily contradicted by evidence, both from the Plaintiff's side and even from the Defendant's side. In the adjudication of cases, I must say, evidence ranks first and submissions rank much lower in the ladder. A submission that does not tally with the evidence that is supposed to back it therefore has no value to the Court.

The way the Defendant has pleaded its case, nowhere is it averred that an agreement in respect of a Hicom 118 PABX at any point replaced the agreement the parties struck, as conceded in paragraph one of the defence, in respect of the Hicom 330E or 300E. Of course the Re-amended Defence and Counterclaim does allude to a PABX machine other than the 300E or 330E one, but there is no mention what model exactly this one is. At paragraph 8 of this pleading the Defendant asserts that a new contract was agreed between the parties which overrode the earlier contract. However, when this was done and what this new contract was, cannot be deciphered from the pleading.

Coming to DWI's written Statement of evidence, which he adopted, equally apart from specifically naming the Hicom 300E (alia 330E)PABX as the item agreed on by the parties, the Defendant mentions two other PABX machines without being specific about what models these were. The witness first mentions in paragraph 9, that following communication to the effect that the Hicom 300E was out of production, the parties agreed that the Defendant company should install a new model then on the market. The model in question has not been particularized. Next, at paragraph 13 of the statement, the witness indicated that due to pressure from the Plaintiff arising from the premise that its contract with Malawi telecommunications Limited was about to expire, the Defendant installed for them a temporary system. There is no revelation in the statement what model of PABX was installed as part of this temporary system.

It is only in the witness' live testimony that Mr Mijiga became a little more revealing. He thus said the Hicom 118 PABX featuring in the case was the one installed for the running of the temporary telecommunication system and that this system was being used pending the installation of the Hicom 330E PABX. The witness also said that although the Hicom 118 PABX features in exhibit "D1", an agreement between the parties dated 25th June, 1999, it was only so cited therein for convenience, as that type of PABX was the only one available at the Defendant Company at the time and that this agreement was signed in order to facilitate the payment of the K1,950,000.00 deposit on the Hicom 330E.

Now, if the sole and main witness for the defence is the one who so discredited exhibit "DI" in this case, in that he virtually described the exhibit as a bogus agreement, what then is the effect of a submission from the bar depicting exhibit "DI" on Hicom 118 as being actually the agreement that replaced the agreement on Hicom 330E? Of necessity, in my view, the submission must succumb to the evidence and fall away accordingly. Indeed the witness went on to disclose that the only variation that took place, according to him, was

one from Hicom 330E to Hicom 150E. Accordingly I here find it settled, even from the angle of evidence, that at no point was a Hicom 118 PABX ever agreed by the parties to replace the installation of the Hicom 330E earlier agreed on.

I dare say also that on the evidence it was not even agreed by the parties to replace the installation of the Hicom 330E with the installation of a Hicom 150E PABX. The only role the evidence on record plays in respect of the Hicom 118 PABX herein, as I see it, is that of satisfying me that this PABX was used for the running of a temporary telecommunication system for the Plaintiff. This system has, of course, somewhat now become a temporary system of a rather permanent nature, having been in place for some five years or thereabouts. All this, I am convinced on the evidence, however, is because in all this time the Defendant has not installed either the Hicom 330E or the Hicom 150E in all the time that was available to it before the Plaintiff got tired of waiting and suing. I in fact noted with interest that even at the hearing, where the defendant indicated that it was ready, able, and willing to install the Hicom 150E, it became clear that this would not be as immediate as the Defendant would have me believe as the Defendant would have to order the PABX herein afresh from Germany, and this would certainly mean more waiting and invariably more promises.

Certainly, to my mind, if the twenty-one months long failure to deliver and install the PABX contracted on or even the one substituted for it at the instance of the Defendant, be it by agreement or by imposition, is not a breach of contract, then I do not know what a breach is. I therefore affirmatively hold here that the PABX the parties agreed on was a specific model of the Hicom series, that it was not and has not been delivered and installed to date, and that even when the Defendant imposed on the Plaintiff a switch to a different model, that too was not and has not been delivered and installed to date. The Defendant, however, right from the word "go" demanded and got a very substantial deposit of K1,950,000.00 for this promised but never fulfilled delivery

and installation. All these years it has been holding on to the Plaintiff's money, and it is now close to six years that the Defendant has had this money. This, in my judgment, is clearly a breach of the contract of sale by description the parties entered into herein.

The question of liability having just been resolved, I must now move on to consider the issue of damages. The first claim laid by the Plaintiff is for a refund of the deposit it paid, on account of a total failure of consideration in the matter. I hardly think that this claim is debatable as I quite fully agree with the Plaintiff's claim of title to the deposit it paid. The only reason this money was paid, as I understand it, was for the Defendant to supply to and to install for the Plaintiff a Hicom 330E PABX. Later even when the Defendant cleverly imposed on the Plaintiff to instead get a Hicom 150E, as seen, this new promise too was not to be fulfilled. Why then the Defendant should keep nearly K2,000,000.00 worth of the Plaintiff's deposit money for an item or for items it has not been able to deliver and install all this time, would be a great wonder.

There has incidentally been a defence, to the effect that the original contract was frustrated, and that on authority of Taylor vs Caldwell (Supra) on such frustration of contract the Defendant should be discharged. The first thing to observe is that in the normal sale of goods situation delivery and payment are concurrent activities, as Section 29 of the Sale of Goods Act provides. In the present case however, the parties agreed otherwise. As happened the payment of the deposit was done way in advance of delivery. Now, if because of stoppage of production delivery has been frustrated, why should that both discharge the Defendant from being obliged to deliver the PABX that is out of production, and also entitle the same party to consume the payment the Plaintiff made in advance. Thus, in my understanding, even if it indeed be true that the contract herein was frustrated, I would still not find that to be a licence for the Defendant to retain the price it would not have got by virtue of the frustration, had there been no advance payment. Indeed this is why in Taylor vs Caldwell

Justice Blackburn ended his judgment at p. 30 with the conclusion that the destruction of the music hall by fire, freed both parties from their obligations. In particular the Plaintiff was freed from using the facilities and paying for them. I am sure therefore that if the Plaintiff had paid in advance Justice Blackburn would have ensured a refund per discharge from the obligation to pay for a service frustrated from being rendered.

Besides this, the way the Defendant has put its case, it is as if at the very time the parties were agreeing on a Hicom 330E, unknown to them, the said item was out of production. This, however, on the evidence available, is not true. The negotiations started in May, 1999, the agreement was in June, 1999, and the deposit was paid on 1st July, 1999. From then on the Plaintiff indicated that it was corresponding with the suppliers, that they had sent some parts, then that the last shipment was on the way, and finally that it would soon install the PABX machine. This went on for a whole year and three months, and significantly it is only when the Plaintiff threatened legal action that the Defendant came up with the excuse that the Hicom 330E was out of production. In my assessment, this turn in events cannot genuinely be called a frustration of the contract in the manner the Defendant would have me believe. It is sheer trickery in my view. I accordingly direct that the Defendant do refund to the Plaintiff the K1,950,000.00 it has been holding on to without having furnished the requisite consideration since as far back as 1st July, 1999.

To me the full sum remains refundable notwithstanding that in the interim, for some years now, the Defendant has provided the Plaintiff with a temporary communication system using a Hicom 118 PABX. My understanding, on the evidence, is that the provision of this temporary system was an independent and emergency arrangement between the parties, separate from and having no effect on the agreement the Defendant was yet to perform his side of. There is no way therefore that I can treat the installation of this temporary

communication system as stepping into the shoes of the main agreement and as therefore amounting to a performance or a part-performance of that agreement. My direction for the refund of this deposit therefore remains intact.

Turning to the Plaintiff's claim for interest on the deposit it paid, I am likewise of the view that it is only fair that the Plaintiff earns interest on its money. I vividly recall cries of foul play that emanated from the defence side on this topic, but in all sincerity I believe it is the Defendant itself that has played a foul game in this case. The assertion by the Defendant that at no point did the parties agree on payment of interest on this deposit is clearly answered by exhibit "P10" to which the parties' Project Managers appended signatures. Similarly as against the lamentation that the rate of interest demanded by the Plaintiff is unconscionable, again exhibit "P10" silently answers that. The parties themselves agreed to this rate of interest of 50% and it happened, as it appears, to have been the bank lending rate at the material time from what the exhibit shows.

Normally when one party seeks to recover interest from another on money owed, they customarily add to the base lending rate either 1% or 3%. A ready example in this case is the claim the Defendant had lodged in this very case against the Plaintiff on interest in the now abandoned Counterclaim. The Plaintiff here, unlike others, is adding nothing to the rate the parties agreed on, which rate apparently happened to be the ruling bank rate then. I accordingly in the present case award to the Plaintiff interest at the agreed rate of 50% per annum on the K1,950,000.00 deposit from 1st July, 1999 to date. This sum the parties must jointly work out and get the endorsement of the Registrar on, on the figure reached. Beyond today, the date of judgment, the K1,950,000.00 will continue to earn interest at the same rate until it is repaid to the Plaintiff.

Turning to the claim for damages for inconvenience and to the claim for damages for breach of contract, I am not so sure the Plaintiff has clearly, if at all, distinguished the two from each other. In the present case the Defendant has been found liable for breaching the duty it bore as seller, in the contract of sale herein, to deliver and install a Hicom 330E PABX machine, and later the alternative Hicom 150E it offered. Of necessity this breach has deprived the Plaintiff of the use of the PABX so agreed on for all this time. I have, however, wondered whether this deprivation of use is any different from the inconvenience the Plaintiff says it has suffered so as to entitle the Plaintiff to a claim for damages under two separate heads.

Now that the Plaintiff has had to sue on the broken contract and that it may have to look elsewhere for another PABX machine, and also due to the fact that after the expiry of such a long time, the Plaintiff may have to contend with a different and probably higher purchase price, managing this late purchase, it strikes me, this is all part of what are the direct consequences of the breach of contract herein. The Plaintiff should be in a position, I believe, to claim damages for all this purely under the head damages for breach of contract, and yet they can all equally be viewed as inconveniences too. It therefore does not appear to make sense to me that the Plaintiff should seek damages for the breach under one heard, and separate damages for inconvenience under a different head, as the two appear to be one and the same.

Leaving this aside for a while, to the credit of the Defendant, I should say that even though it was by separate and emergency arrangement, the fact remains that throughout the existence of this breach of contract, the Defendant has been able to provide a temporary communication service for the Plaintiff and to maintain it also. The Plaintiff has therefore been saved from being totally out of telecommunication service and even if the service provided be described as not being at par with what the Hicom 3330E PABX or the Hicom 150E PABX would have provided, it cannot be denied that the

presence of this temporary system significantly reduced the impact of the breach of contract the Defendant committed in terms of the inconvenience suffered and yet to be suffered by the Plaintiff.

As it is, there is no evidence before me how much more or how much less the next PABX machine the Defendant might opt to purchase will cost. I believe I really should not have been left to guess if I am to assess the damages of this breach correctly. Equally, much as an attempt was made by PWI to indicate that with the temporary system of telecommunication in place, to some extent the internal telephone directory has been confused, I must point out that the evidence on that complaint was not so detailed. I happen also to have no evidence before me for measuring to what extent, if any, the external communication of the Plaintiff has been affected, if at all, and as to whether the use of this temporary telecommunication system has in any way had any adverse effect on any of the Plaintiff's business dealings. Basically therefore the question of damages either for breach or for inconvenience has been left at large, in that only scanty evidence has been made available.

Section 51(1) of the Sale of Goods Act sanctions a buyer to maintain an action against a seller for damages for non-delivery of the goods contracted on. Sub-Section (2) of the same provision provides that the measure of damages to be awarded shall be the estimated loss directly and naturally resulting, in the ordinary course of events, from the sellers breach. In Kusani vs Kulima Limited (Supra), where like in the present case the Plaintiff paid a deposit (in that case K3,000.00) for the items he was purchasing from the Defendant, when the Defendant failed to deliver all required equipment by the agreed time, and when some of the items so delivered were not compatible with each other so as to enable the Plaintiff to use them, the Court ordered the Plaintiff to regain his deposit. The Plaintiff had however also sought to recover a profit of K5, 000.00 which he indicated he was going to make had he been supplied with all necessary equipment in

time to cultivate his crops for sale. This additional claim however failed, because of absence of evidence that could show that, but for the Defendant's breach, the Plaintiff would indeed have so cultivated and sold his crops.

In contrast with the case just discussed, in Mponda vs Khambadza (Supra), where the Plaintiff was able to show that the Defendant's failure to deliver 37 out of 50 tonnes of salt that was to be resold at a profit by the buyer and that he thereby caused the Plaintiff to lose K5,217.00 profit, the Court, without any hesitations, under Section 51(2) of the Sale of Goods Act, duly awarded such loss of profit as damages.

The question concerning the present matter therefore is whether the evidence available in this case is clear enough to give me an indication of what level of damages can be said to be directly and naturally resulting from the breach the Defendant committed herein. Let it be recalled that I have had difficulty, both from the evidencial angle and from the submissions angle, about how to distinguish inconvenience as a separate head of damages, from the head damages for breach of contract. To my mind, as I have already tried to demonstrate, inconvenience and other loss associated with breach of contract, are necessarily fused, and to award damages separately for each of the two heads the Plaintiff has hatched looks like an exercise in splitting hairs. Thus I have resolved that if I am to make any award here, I will treat both the heads the Plaintiff has submitted as falling under one and the same head, to wit, damages for breach of contract.

Further, recalling to mind that the separate arrangement between the same parties, that has made a temporary system of communication throughout available, has to a great extent mitigated the Plaintiff's suffering or inconvenience in this case, and that there is not such abundant evidence before me as to sufficiently demonstrate the extent to which the temporary system has disadvantaged the Plaintiff, and also that with the refund of the deposit ordered herein along with its handsome interest it is not so clear from the evidence whether the next

PABX will or will not be out of reach for the Plaintiff to purchase, I can only justly settle for nominal damages in respect of this breach. The contract breached, since being entered into, is just about 6 years old now. I award to the Plaintiff for this breach a token of K10,000.00 for each year the breach has tortured it with loss of use of the desired PABX model and associated inconvenience. My total award under this head therefore for the 6 years suffered is K60,000.00.

In sum total therefore I have awarded to the Plaintiff (a) K1,950,000.00 refund of the deposit it paid to the Defendant, (b) interest at the rate of 50% per annum on the sum of K1,950,000.00 to date, to be jointly calculated by the parties and endorsed by the Registrar, (c) interest at 50% per annum on the same sum from today, the date of judgment, to the date the said sum is repaid, to be calculated on the date of payment, and (d) K60,000.00 as damages for breach of the contract herein. In addition to these awards I also award to the Plaintiff the costs of the action. I order accordingly.

Pronounced in open Court the 30th day of May, 2005 at Blantyre.

A.C. Chipeta
JUDGE