

**IN THE HIGH COURT OF MALAWI**  
**LILONGWE DISTRICT REGISTRY**  
**CIVIL CAUSE CASE NO. 187/98**

**JACOR PROJECT ENGINEERING COMPANY**

**V**

**LEVER BROTHERS (MW) LIMITED**

**CORAM** : **I.C. KAMANGA, JUDGE**  
: Mapila, Counsel for Plaintiff  
: Msowoya, Counsel for Defendant  
: Jalasi (Ms) Court Reporter  
: Kaferanthu (Mr.) Court Interpreter

**J U D G M E N T**

The plaintiff's claim is for the sum of K169,000.00 for work and services done for and on behalf of the defendant and special damages for breach of contract. The claim is disputed by defendant.

In his statement of claim the plaintiff who is a construction company carrying on civil engineering works states that they entered into a contract with the defendant for the construction of pipe works at the defendant's Nacala Tank farm project in Mozambique. The contract period was four months. The total contract sum was K200,000.00. And that it was a further term of the said contract that the defendant was to insure all equipment used on the project and pay for the food

expenses; accommodation and general subsistence of the plaintiff's employees in the project. The plaintiff claimed that on or about the 1<sup>st</sup> of September 1994, the plaintiff, by an oral contract with the defendant, constructed two 1200 tonne storage tanks at the defendant's project at a total cost of MK169,000.00. The plaintiff's lament is that the defendant has failed or refused to pay the sum of MK169,000.00. The plaintiff further claims that it incurred expenses in the sum of Mozambican metical 53,800,000.00 on food, accommodation and general subsistence of its employees working on the project. And in breach of contract, the defendant has failed or refused to pay the sum of Mozambican meticals 53,8000,000.00. The Plaintiff's lament is that as a result of defendant's conduct, it has suffered loss and damage. Let me observe that this is a very old matter where the writ of summons was issued by the court on 17<sup>th</sup> April, 1998.

The defendant filed a defence which was amended on 31<sup>st</sup> July 2006. In the amended defence, the defendant avers that she was constructing a tank farm at Nacala. The said construction work involved:-

- a) Civil works which included construction of pipe supports, budes and sleepers among other things and
- b) Installation of pipes, lagging and cladding; and
- c) Election of tanks.

The defendant avers that the plaintiff was contracted to install the pipes, lagging and cladding while the civil works were done by the defendant's own personnel and re-erection of the tanks was done by a combination of the defendant's staff and Industrial Steel Limited. The express terms of the said contract included that:-

- the work period would be four months.

- the total cost of the work was K200,000.
- expenses on food, accommodation and transportation of labour would be borne by the defendant.

The plaintiff was to be Site Manager for the said project at Nacala at fee of K35,000.00.

The defendant's complaint is that wrongfully and in breach of agreement the plaintiff did not complete the agreed work on the agreed time. Sometime toward the end of July 1994, Industrial Steel Limited abandoned their portion of the work. By September 1994 it was clear that Industrial Steel would not go back to work and the plaintiff was asked to oversee the finishing of the construction of the tanks which was then being done by the defendant's staff. Wrongfully and in breach of agreement the plaintiff abandoned both the works in respect of the K200,000.00 contract and the supervision of the finishing of the construction of the tanks. The plaintiff was accordingly in October 1994 asked to submit his final certificate for the incomplete work on the K200,000.00 contract and the plaintiff was not expected to raise any invoice for the work it did not attend to in supervising completion of the tanks. Pursuant to the said instruction the plaintiff submitted his final certificate on October 5, 1994 and was paid accordingly. The defendant met all food, accommodation and upkeep expenses. And at no point did the plaintiff get authority from the defendant to meet such expenses on behalf of the defendant on condition of re-imbusement and that it was an implied condition that if the plaintiff needed to meet any of the claims meant to be borne by the defendant on behalf of the defendant, the plaintiff would seek prior authorization from the defendant. The defendant avers that the plaintiff did not construct two 1200 tonne storage tanks as alleged or at all. All the plaintiff had been asked to do was oversee the roofing of the tanks and final touch-ups which the plaintiff never did.

The defendant further aver that the plaintiff did not incur any food and accommodation expenses amounting to the amount claimed. That in terms of the contract the same was not the plaintiff's responsibility and if any need had arisen which necessitated the plaintiff to meet such expenses. On behalf of the defendant prior authorization or contemporaneous validation from the defendant should have been sought. No such authorization or validation was ever sought by the plaintiff from the defendant and there were no such expenses at all. The defendant further aver that if the plaintiff incurred expenses of Mozambican meticals 53,800,000.00 then plaintiff did out of its own volition without the defendant's authorization and the defendant was not in breach of contract as alleged or at all.

Civil procedure provides for pleadings and the purposes of pleadings. The purpose of pleadings is to set out clearly the case of the plaintiff and the defence of a particular defendant. The purpose is so that issues between the parties can be defined in advance of trial. The issues between the parties will therefore be limited to those in the pleadings until and unless they are amended. According to the case of Dudha vs North End Motors (11 MLR 425) a court cannot give judgment on matters that are not pleaded. And the case will not be made out if the matters in the pleadings are not proved by the evidence adduced by either party – Rhesa Shipping Co. SA vs Edimonds (1985 1WLR 948). As to the burden of proof, the legal burden lies upon the party who affirmatively asserts the fact in issue and to whose claim or defence proof of the facts in issue is essential. Here, the law seeks to hold a neutral balance between the parties. The proof is on a balance of probabilities. The essential elements of a claim or defence are determined by reference to the substantive law. And if the plaintiff fails to prove on essential element of his claim, the defendant will be entitled to judgment. Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving his claim, and the defendant assumes no legal burden by merely

denying them, unless the defendant asserts a defence which goes beyond denial (an affirmative defence). Then the defendant must assume the legal burden of proof of his defence.

Three witnesses testified for the plaintiff PW1 was Kilford Gwengweya. This was his testimony as per his witness statement that he adopted in court: He was employed by the plaintiff sometime back in 1987 as a welder. In or about February 1994 he went to Mozambique to install some pipes at Nacala. After finishing their work for the plaintiff, they were forced to complete the roofing works for a house which had been left unfinished by a company called Steel Engineering. PW1 and his fellow workers refused to do this work for sometime because it was not part of their work. Finally they agreed and finished the roofing. At this time Mr. Guerrero was in Malawi, he came back to Nacala before PW1 and his fellow workers finished the roofing.

PW1 was cross examined and this is how he responded: After finishing their assigned work, PW1 and his colleagues were asked to complete the roofing works on a structure. This was the unfinished work by Steel Engineering. This was in 1994. PW1 could not remember the exact month. This unfinished work resulted from a heavy cyclone that hit the site for some two to three weeks in either January or February. After the cyclone they had to re-do some of the works that they had already completed. PW1 and his fellow workers completed their assigned work when Mr. Guerrero was in Malawi. Mr. Guerrero was in Malawi for some three months. Then PW1 and his colleagues also started to do the unfinished work for Steel Engineering one whilst Mr. Guerrero was in Malawi.

Then Counsel for the defendant wanted to know if PW1 has ever attended primary school education. To which PW1 responded that he attended primary education up to standard five. And counsel

wanted to know whether PW1 had any work – related qualifications. PW1 stated that he had a welding certificate called welding General Fitters Certificate Grade II obtained at the Lilongwe Technical College.

Counsel for the defendant wanted to know the particulars of the person who instructed PW1 and his colleagues to complete the roofing work. PW1 responded by stating that the ones who told PW1 and his colleagues to complete the roofing work were the Lever Brothers people and not Mr. Guerrero. Counsel for defendant wanted to know whether Lever Brothers had indicated how much would be paid for the work done. PW1 stated that Lever Brothers never told them how much they would get for completing the roofing work.

And counsel for defendant wanted PW1 to explain Mr. Guerrero's role in the whole transaction. To which PW1 stated that he did not know and could not explain Mr. Guerrero's role in the whole transaction because he was just taken to Mozambique to do some work. Whilst in Mozambique he was just doing the assigned work and getting his dues. He never knew whether the same was coming from Lever Brothers or Mr. Guerrero.

PW2 was Masco Walter Phiri. He adopted his witness statement. This is what appears in the witness statement: In 1994 he was working with the plaintiff as a welder and fitter. They went to Nacala to install some pipes. Two other companies were on site. Industrial Engineering and Lever Brothers. Lever Brothers were the owners of the project. Industrial Engineering were to erect tanks on site.

Around the month of April a cyclone hit the site and destroyed almost everything. They had to redo the pipelines.

Soon after the cyclone Industrial Engineering left the site and went back to Malawi. He learnt that their passports were due to expire in July, 2004 and their boss called them back.

The supervisor of Lever Brothers on site was Mr. Kamanga. He asked PW2 and his colleagues to complete the roofing of the tanks because of the departure of Industrial Engineering. Mr. Kamanga advised PW2 and his colleagues that he had talked to Lever Brothers in Malawi on the phone and had been advised to arrange for Jacor Engineering to finish the work left by Industrial Engineering.

PW2 disagreed with Mr. Kamanga on the instructions, as he had not seen a letter from a Mr. Guerrero who at that time was in Malawi.

Kamanga received a fax from Malawi informing PW2 and his group that if they refused to do the work, they would not be given food. Since they were afraid of starving they agreed to do the job and completed it. They were advised to complete the work and leave Nacala before the time of elections in Mozambique. They finished the work in October 1994 before the elections and they left Nacala for Malawi.

In cross examination PW2 stated that the cyclone hit the works and they had to redo some of the work that had already been done. They had been responsible for pipe fitting. After finishing their assigned work, a cyclone hit the place and destroyed the work done, so they had to redo the same. They completed the second cycle of the work between April and May.

After finishing their work, they had nothing more to do. The other group that was assigned work at the site was Industrial Engineering.

Counsel for the defendant produced Exhibit P1 .... a letter from plaintiff to the defendant which is as follows:

Jacor Project Engineering Co.,  
P.O. Box 10141,  
Lilongwe,  
Malawi.

Our Ref : CERTIFICATE  
Your Ref : .....  
Date : 5<sup>th</sup> October, 1994

The Project Manager,  
Lever Brothers Limited,  
P.O. Box 5151,  
Limbe.

**For the Attention:** Mr. D. Gobebe

Dear Sir,

**CONTRACT**

Final certificate installation of pipe work at Nacala.

Following inspection carried by yourself on 17<sup>th</sup> October, 1994. I hereby submit the final certificate of 90% work executed on the contract.

CONTRACT SUM.....(order No. 09621)	K200,000.00
“ “ MANAGEMENT (order No. 10358)	<u>K 35,000.00</u>
<b>TOTAL</b>	<b>K235,000.00</b>
Less 10%	<u>K235,000.00</u>
PAYMENT OF 1 <sup>ST</sup> AND 2 <sup>ND</sup> CERTIFICATES	K211,500.00
	<u>K120,000.00</u>

Balance to be paid

**K 91,000.00**

Signed: .....  
**MANAGING DIRECTOR**

Counsel for the defendant wanted to know the author of the document. PW2 stated that this letter was written by Mr. Guerrero of Jacor Engineering Co, and it had been written on 5<sup>th</sup> October, 1994. Counsel for defendant wanted to know whether this letter was written whilst they were still on sight, to which PW2 stated that the letter was written after they had left Nacala.

Upon reading the document PW2 stated that this was a final certificate for the installation of pipe work. And that it indicated that work done was 90 percent. Whereupon counsel for the defendant wondered whether 90 percent meant somebody had completed the work. PW2 stated that 90 percent means that the work had not been completed. He however noted that this letter was written by his boss but as a person that was on site he knew that they completed all that they were required to do.

Counsel for the defendant wondered whether PW2 could be believed when he said they finished their assignment in May, 1994 when somebody said that the assignment was completed in March, 1994. PW2 stated that the court was better off believing him when he stated that the said work was finished in May, 1994 as he was the person that was on site, and Mr. Guerrero was just a project manager. Counsel for the defendant wanted to know the whereabouts of Mr. Guerrero at the time of completion of the assignment. PW2 stated that at the time that they finished work on site, Mr. Guerrero was in Malawi. Whereupon counsel for the defendant wanted to know the

role of Mr. Guerrero in the whole exercise. To which PW2 stated that Mr. Guerrero was the project manager. Counsel for defendant wanted to know the person that was supervising them and PW2 stated that they were being supervised by a Lever Brothers supervisor much as they also had their own supervisor.

PW2 was referred to Exhibit P2 A letter from Mr. Guerrero to Lever Brothers. PW2 noted that from the reading of that letter Mr. Guerrero was the site manager. And that when somebody is a site manager he has to be on site.

PW2 was referred to his statement that his group had to redo an assignment meant for Industrial Engineering. PW2 responded as follows. PW2 and his group finished their pipe work in May, 1994. Mr. Kamanga (of Lever Brothers) received a phone call from Malawi that if they did not finish the work vis-avis the roofing of the tank they would not get any food or allowance. Lever Brothers also sent this message through a fax. It was Lever Brothers that was providing PW2 and his colleagues with food. PW2 stated that after completing their assignment in May, 1994 they had another assignment to finish the roofing of the tank that had not been done by Industrial Engineering. And this was the work that they finished in October, 1994. Counsel for defendant wondered whether PW2 was misleading the court to which PW2 responded by saying that he was not misleading the court in saying that his group finished the extra assignment in October, 1994.

Counsel for the defendant wondered whether PW2 and his group left Mozambique because of the pending elections. PW2 stated that it was Mr. Kamanga their supervisor from Lever Brothers who told them that they had to finish the assignment before the elections. Counsel wondered in what capacity Mr. Kamanga was giving them the instructions to which PW2 stated that Kamanga would give them the

instructions in his capacity as supervisor and they would receive the constructions as his juniors. PW2 confirmed that during this time they were working at odd hours. He concluded by saying that PW2 and everybody did not leave because of the elections but that they left Mozambique because they had completed all assignments and this was before the elections.

In re-examination, PW2 stated that the pipe works were finished in the months of April or May. And that they finished the extra assignment in October, 1994. And that they left Nacala three days after finishing their work. And that Lever Brothers was providing the food.

PW3 was Jose Correirro Guerrerro, the managing director for the plaintiff. He adopted his witness statement. This is what is in his witness stament.

His company, the plaintiff, was contracted by the defendant to do pipework and pump installation at Nacala part in Mozambique. They went on the site in February, 1994. The place was right in the middle of the bush. The agreement with Lever Brothers was that the pump installations were to be completed in 4½ months. The pipe work was finished at the end of March, 1994 but they had to wait for valves which were misplaced in a container en route to the site. Soon after this a big cyclone called Nadia, hit the site. He was in Beira at the time. He went to Nacala soon after. All the works had to be done from scratch. The pipeline had to be pulled back with a machine from the sea.

One of the other companies working there was Steel Engineering, which was supposed to build a 1.2 million litre farm tank. After 4½ months Steel Engineering failed to make the base for the tank, and left the site. PW3 was in Blantyre at the time. He agreed with the

Lever Brothers Foreman in Blantyre and sent a fax to one A.C Barreto, PW3's foreman on the site to complete the job left unfinished by Steel Engineering. This was to finish roofing the tank and to construct a second tank. They were to agree on the charges when the project was finished.

The Plaintiff had 31 men on the site for whom Lever Brothers provided maize flour. PW3 had to provide meat, fish, chicken and vegetables. The food was being bought from nearby Nampula in his car. He could not produce most of the receipts for his food as the food was mostly bought from a market. He spent 53,800,00 Mozambican meticals on food items for the workers. Defendant was supposed to provide food for everyone on site.

In cross examination counsel for the defendant wanted to know whether the contract between the two parties was in writing. PW3 responded positively. PW3 was shown Exhibit P2, and PW3 admitted being author of this document. The document dated 8<sup>th</sup> February, 1994 is as follows:

The Project Manager,  
Lever Brothers (Malawi) Ltd,  
P.O. Box 5151,  
Limbe.

**ATTENTION:** Mr. A. Kavanagh.

Dear Sir.

RE: NACALA WORK

This letter would like to confirm the following:-

1. That K35,000.00 is the fee for supervising as site manager for a period of 4½ months (approximately 19 weeks). This period starts on February until mid June, 1994.
2. That while at Nacala in Mozambique, I will have my own private car for this work mentioned above. The car has to be transported to and from Nacala by rail from Limbe. There will be need for some motor fuel while at Nacala and these should be for Lever brothers account.
3. That the above some of the money and the quotation from Jacor Project Engineering for work at Nacala are based at current kwacha value as the quotation was not in Dollars. I am concerned that the floating of the kwacha will have a devaluation effect on the two quotes. If this will be the case, the devaluation effect should be provided for in due course.

I hope the following is fair and justable and in any case takes care of both parties involved in work.

This document was not signed. There is however another document IDD2 that was produced as a quotation and signed and it reads as follows:-

Our Ref: QUOTATION: NACALA PROJECT –  
MOZAMBIQUE.

Date: 23<sup>rd</sup> July, 1993.

Attention: Mr. Kavanagh.

Dear Sir,

#### PROPOSED PIPE WORK AT NACALA PROJECT, MOZAMBIQUE

Thank you asking Jacor Project Engineering to quote for the above, and we have much pleasure in presenting our quotation to you as follows:

Jacor Project Engineering will supply all labour, skilled and semi-skilled to install and supervise all pipe work: Test and help commission of all pipe work to your specification.

#### QUOTE BASIS

- a) All civil work described in your tender document, which includes all pipe support, bridges and sleepers to be done by Lever Brothers contractors.
- b) While Jacor Project Engineering will install all piping, lagging and cladding material, it is assumed all will be performed.

#### COST (QUOTE)

The cost of this job is estimated to be at K200,000.00.

#### LABOUR

- One site manager to be available at site throughout the period of construction.
- Two Malawian pipe fitters.
- One Malawian Rigger.
- Two Malawian coded welders.
- All the necessary unskilled labour to be recruited locally within Nacala Port Area.

#### TIME

Approximately four months from date of commencement, if we experience no delays in the supply of materials etc.

Should there be a problem in this respect, Lever Brothers is to be responsible.

## PAYMENT

Jacor Project Engineering would be working out of base in Nacala and as such payment of approximately US Dollars 2000.00 per month would be required, payable in Mozambique.

Expenses on food, accommodation, home upkeep, transportation on labourers and equipment from Malawi to Nacala in Mozambique to be covered by Lever Brothers.

Signed: J.C. Guerrero  
MANAGING DIRECTOR

Counsel for the defendant wanted to know PW3's background and whether he understood the terms of the contract in issue and how payment is conducted in contract of the nature in issue. To which P3 responded as follows:-

He is a steel engineer involved in the construction Industry. He qualified in Portugal Lise as a steel engineer. He qualified as a boilmaker from NIC thus the Industrial Consul Steel Engineering in Rhodesia, Zimbabwe.

He said that he is familiar with contracts in the engineering industry. For payment for work done to be delivered a payment certificate has to be issued. On the payment certificate, the nature of work done and the amount to be received is reflected. In his testimony PW3 stated that he issued two such certificates. One before departure for Nacala. The other one was for 90 percent. For the work done, he received K35,000.00 for site management, 3,340 dollars for the local foods and 12000 rands and K30,000.00

Counsel for defendant wanted to know what happens when a party is assigned extra work when the original contract was in writing. PW3 stated that if there is a contract in writing specifying the type of work that is to be done, and there is an extra assignment, the parties have to come to an agreement with regard to the extra work. PW3 stated that they did not enter into another written agreement with regard to the extra assignment in this particular case because this was not the first time that he did additional work for Lever Brothers. Hence he did the work on trust. Counsel wanted to know if any evaluation by plaintiff as well as an independent valuer was done on this extra work. PW3 stated that the plaintiff conducted an evaluation on the extra assignment; and Brown and Clapperton Company was to do the independent evaluation but the same never happened.

Counsel for the defendant wondered why PW3 issued certificates for work done which were less by ten percent. PW3 explained that they claimed payment for 90 percent of the work because the extra ten percent was meant for the fitting of some valves. These valves were never fitted. PW3 stated that at the time that his workmen completed the work in May, 1994 the valves had not arrived. And when they were completing the extra work in October 1994 the valves had not arrived. So as far as he was concerned, they had completed the work at 90 percent and he was not going to wait for three years for the valves. Hence he claimed for the work done which was ninety percent of the whole project. In his testimony he said that the defendant had fully paid the plaintiff for the work done, according to the certificates that he had issued.

PW3 stated that the claim which was the subject of this hearing was for the local food, wood, water and the other things he had bought plus the additional work.

Counsel for the defendant wanted know whether PW3 was ever in Mozambique during the contract period. PW3 stated that he was in Mozambique except for two or three times. A breakdown of his time in Mozambique was as follows: He went to Mozambique in February, 1994 and came back to Malawi after one month, in March. He stayed in Malawi for a week and went back to Mozambique for one and a half months. Then the Engineer for Lever Brothers Kavanagh passed away and he came to Malawi, this was in April, 1994. When the cyclone hit the site he was in Mozambique at Beira. In June, July he was in Malawi. In August he was in Malawi. Whereupon counsel for defendant wanted to know why in the period June to August he was in Malawi. PW3 state that his site management ended in June, 1994. And he left his foreman on site for the extra assignment. He would visit the site briefly. In August he visited on a Brown and Clapperton plane.

Counsel for the defendant wondered if PW3 sought permission from Lever Brothers with regard to payments for the food and other payments in Mozambique. Counsel also wondered why PW3 engaged in such an activity when the express terms of the contract indicated that the defendant would supply the food and other items. PW3 stated that he had talked to the Engineering Manager for the defendant who authorized that he could make payments for food and other items. This was because the defendants had indicated that they were having problems to transfer money to the site. Hence he used his money and surrendered the receipts to the defendants and the receipts plus invoices are still with the defendants. PW2 also stated that when the cyclone hit the site all the food was destroyed. As site manager he was responsible for the people. Much as he had been given some money for the whole period, he had to spent extra because of the destruction of food by the cyclone and he also had to buy fresh water and fresh foods. Hence when he surrendered the receipts he was assured of payment.

Counsel for the defendant referred PW3 to his statement that he had performed an extra assignment. Counsel observed that there were some inconsistencies on this because PW1 had stated that the extra assignment involved building a structure whereas PW2 had stated that the extra assignment consisted completing a roof structure. PW3 stated that some of his employees were assigned to finish the roofing whilst others were assigned to build the tank. For those that were assigned to do the tank, they had to start from scratch. PW2 was involved in the roofing whilst PW1 was involved in the building.

Counsel for the defendant wondered why the plaintiff took over an assignment that had been allocated to another. PW3 stated that they were working with Steel Engineering and they had to take over the assignment when Steel Engineering left the site. As such, the extra assignment started from scratch with regard to the building of the tank and they had to do a roofing on the other structure. It was his statement that the claim for K169,000.00 was for all the additional work, on the site.

The defendant did not produce any evidence. They indicated that it was not possible for them to do the same because of the history of the matter. The parties had entered into an agreement a long time ago and most of the officers who were engaged and are conversant with the matter sought greener pastures else where or are dead.

As was observed above a case will not be made out if the matters in the pleadings are not proved by the evidence adduced in court by either party.

From the evidence that was in court it is not contested that there was a written contract between the parties for the plaintiff to provide sources to the defendant in Nacala. It is also not contested that the

terms of the contract included that the PW3 was to be on site supervising the work in a period of February to June, 1994. It is not contested that food was to be provided by the defendant. It is not contested that the plaintiff only did 90 percent of the assignment.

From the evidence and following from the defendant's cross examination, what is in dispute is that there was an oral agreement between the parties in which the plaintiff was to do the extra assignment which had been abandoned by Steel Engineering. The defendant also contests that the contract term that all food was to be provided by the defendant was at any time varied. The defendant also contests that PW3 was not on site as per the contract agreement. From the evidence on record, I make a finding of fact that contract period for the written assignment was February to June, 1994. PW2 and PW1 stated that there were periods in this period when PW3 was in Blantyre which included the period that there was a cyclone. PW3 stated that he was in Beira during the material time. PW3 also explained that he was in Blantyre to attend to a Mr. Kavanagh's funeral and that in the period of his contract he was in Malawi for a total period of two weeks. And PW3 noted that for this period he was wholly paid the contract sum. My finding is that much as PW3 was not in Nacala for some of the time, the period that he was not on site was not fundamentally long so that it would be termed to be a breach of the contract. Here we are talking about the contract period of February to June, 1994. A look at the evidence shows that PW1 and PW2 were noting that PW3 was not on site most of the time that they were involved in the construction. The period that they refer to in this instance is the period after June, 1994 when they claim that they were engaged in the extra assignment. PW1 and PW2 also indicated that PW3 was not on site during the time of the cyclone, in this was during the contract period, in his evidence PW3 stated that he was at Beira during this period.

As to the money spent by the plaintiff to provide for consumables. The contract terms indicate that the defendant were responsible for the consumables. From evidence of PW1 and PW2, these consumables were being bought by the defendant. Its only PW3 who claim that he spent personal finances to buy the consumables in Nacala after the cyclone. And it was PW3's evidence that as the site manager, he was personally responsible for the welfare and upkeep of the workers. And the defendants who were out of sight, would indicate that they were having problems to send the food as per contract terms. When one considers PW1 and PW2's evidence on what transpired after June, 1994, I find that it is highly probable that PW3's statement that the defendants were facing hurdles to send the consumables by rail from Blantyre. I come to this finding from PW1 and PW2's evidence who stated that food was provided by the defendants, but the defendants through a Mr. Kamanga indicated to PW1 and PW2, in the period that PW3 was out of site, that no work on extra assignment meant no food, and it was PW1's statement that they proceeded to perform in the absence of PW3 because of the food threat. I also find that it is highly probable that a cyclone destroyed the food on site for which there was need for replenishment and it was PW3 who replenished the same.

The other issue is whether there was a contract between the parties for the plaintiff to perform an extra assignment. Counsel for defendant implied from his line of a cross-examination that since the parties had engaged in a written contract, it was not possible for them to engage on another activity without threshing out the specific terms. Chitty on contracts (27<sup>th</sup> ed @ 559-560) notes that where the agreement of parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the written agreement. But it by no means follows that the document will contain all the terms of the contract: it may be partly oral and

partly in writing. He further observes that many contracts are made solely by word of mouth or are contained as evidenced by documents which have not been signed by the party affected. He notes that In such cases it is necessary to prove that such statements were intended to have contractual effect. In the matter at hand, it is necessary to distinguish that there were two contracts. The written contract and the oral contract. As regard the written contract, all witnesses testified that they performed as per the requirements. According to PW3 the only drawback was the valves which were not delivered on site by the defendant, hence the 10 percent reduction: The main claim is for payment for the extra assignment. There is no written agreement with regard to the alleged activity. Counsel for defendant attempted to demonstrate that if practice between the parties involved providing services as per written agreements, the plaintiff would not take a risk to perform a service when there was no written contract. PW3 testified that despite absence of written agreement this was not the first time that the plaintiff had performed a service for the defendant on oral instructions and the parties would agree on the exact sum later. According to PW1 and PW2, after a completing the assignment for which PW3 was the supervisor, they were assigned extra assignment. They never heard from PW3 their boss so they refused to provide the service. A Mr. Kamanga of Lever Brothers on site impressed upon them to do the work. According to PW1 and PW2 they completed the work in October, 1994. PW3 in his testimony indicated that whilst in Blantyre, he talked to officers of the defendant, a Mr. Gobede in particular, and they agreed that as Steel Engineering were now out of site, plaintiff was to finish the work. Hence instructions were sent to the site for plaintiff's workmen to do and finish the work that had been uncompleted by Steel Engineering. I make a finding of fact that the plaintiff's workmen performed the extra assignment. I also make a finding that because of the history in course of dealing between the parties, their relationship was such that the plaintiff would perform a

service at the defendant's instance and the defendant would pay. With that type of history, the plaintiff had no problems to perform an activity for the defendant for which the parties would agree on the exact amount to be paid.

I therefore make a finding for the plaintiff for money spent on the consumables as per the amount claimed.

I also make a finding for the plaintiff that there was an oral contract for plaintiff to render a service for which consideration has not been met.

Appreciating that the contract was in 1994, and appreciating that the claim herein is for specific damages; looking at the value of the money as in 1994 and appreciating that as at now the value will be meaningless, I exercise my discretion and award the plaintiff interest on the claim at the prevailing minimum bank rate from the month of January, 1995. I refer the matter to the Registrar for assessment costs to the plaintiff.

**Made** in open court this 3<sup>rd</sup> day of June, 2008.

I.C. Kamanga (Mrs)

**J U D G E**