JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 374 OF 2015

BETWEEN

OIL AND PROTEIN COMPANY LIMITED ..... PLAINTIFF

-AND-

AHL COMMODITIES EXCHANGE LIMITED ..... DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mbeta, of counsel, for the Plaintiff
Mr. Songea, of counsel, for the Defendant
Ms. Annie Mpasu, Court Clerk

JUDGMENT

Kenyatta Nyirenda, J.

Introduction and background

The Plaintiff commenced these proceedings by way of Originating Summons seeking (a) an order of specific performance compelling the Defendant to supply 10,320 metric tonnes of soya beans to the Plaintiff within two weeks from the date of judgment at the price of K205/kg in accordance with the terms of the Trade Facilitation Agreement dated 24th April 2015 [hereinafter referred to as the "TFA"] and as mutually varied by the Plaintiff and the Defendant on 11th May 2015, (b) a declaration that the Defendant cannot unilaterally vary the terms of the TFA generally and in particular the prices of soya beans at which the Plaintiff should purchase the same contrary to the clear terms of the TFA, (c) a declaration that the Defendant is liable to compensate the Plaintiff for any loss and damages occasioned to the Plaintiff by the Defendant's delay or refusal and/or neglect to supply the said 10,320 metric tonnes of soya beans to the Plaintiff within the agreed period between

May and July, 2015 under clause 2.4 of the TFA, (d) any order or relief the Court may deem fit in the circumstances and (e) an order for costs of this action.

The Originating Summons also sets out the grounds on which the Plaintiff seeks the above stated orders and declarations and the grounds read as follows:

> *"a. It was a clear term of the Trade Facilitation Agreement dated 24th April 2015 as mutually varied by both the Plaintiff and the Defendant on 11th May 2015 that the Defendant shall supply 10,500 metric tonnes of soya beans to the Plaintiff at the unit price of MK 205 per kilogram between May 2015 and July 2015 as follows:*
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> *i. 1500 metric tonnes by May 2015*
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> *ii. 3000 metric tonnes by June 2015*
>
> *iii. 6000 metric tonnes by July 2015*
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> *b. The Defendant has only supplied 180.67 metric tonnes of soya beans to the Plaintiff out of which the Plaintiff was forced to pay the sum of MK240 per kilogram instead of MK205 per kilogram as agreed by the parties under the said Trade Facilitation Agreement as mutually varied by both the Plaintiff and the Defendant on 11th May 2015.*
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> *c. Despite several reminders and in breach of the clear term of the said Trade Facilitation Agreement the Defendant has failed, refused and/or neglected to supply the remaining 10,320 metric tonnes of soya beans to the Plaintiff within the agreed period between May 2015 and July 2015*
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> *d. The Plaintiff cannot source soya beans from anywhere else other than to insist on the performance of the terms of the said Trade Facilitation Agreement by the Defendant in order for the Plaintiff to fulfil its obligations under two Contracts dated 28th April 2015 which the Plaintiff entered with CP Feeds Limited and Top Foods Limited for the supply of 5,800 metric tonnes and 3600 metric tonnes of soya cake respectively as well as avoid and/or prevent business reputational damage resulting from its failure to supply the total of 9400 metric tonnes of soya cake, which damage would be huge and difficult to compute."*

This being an action commenced through an originating summons, the evidence relied upon by the parties is in the form of affidavits. The Plaintiff filed with the Court three Affidavits in Support of the Originating Summons, namely, (a) Affidavit in Support of Originating Summons dated 16th September 2015 sworn by Mr. Zameer Karim, the Plaintiff's General Manager [hereinafter referred to the

"Plaintiff's Affidavit in Support"], (b) an Affidavit in Reply to Affidavit in Opposition to the Originating Summons sworn by Mr. Zameer Karim on 14th

November 2015 [hereinafter referred to the "Plaintiff's Affidavit in Reply"] and (c) the Plaintiff's Supplementary Affidavit to the Originating Summons dated 17th November 2015 sworn by Mr. Zameer Karim [hereinafter referred to the "Plaintiff's Supplementary Affidavit"].

On its part, the Defendant filed with the Court one affidavit, namely, Affidavit in Opposition to the Originating Summons dated 14th October 2015 sworn by Mr. Davis Winstone Manyenje, the Defendant's General Manger [hereinafter referred to as the "Defendant's Affidavit"] .

Prior to the return date, the Respondent filed a Notice to Cross-examine Mr. Winstone Manyenje on his affidavits above. In that regard, during the hearing of the Originating Summons herein, Mr. Winstone Manyenje was cross-examined by Counsel Mbeta and re-examined by Counsel Songea.

Affidavit Evidence

Plaintiff's Affidavit in Support

The material parts of the Plaintiff's Affidavit in Support is as follows:

> *"4. By Clause 2.4 of a Trade Facilitation Agreement made on 24th April 2015 between the Plaintiff and the Defendant, it was agreed that the Defendant shall supply to the Plaintiff 10,500 metric tonnes of soya beans as follows:*
>
> *a. 1500 metric tonnes by May 2015*
> *b. 3000 Metric tonnes by June 2015*
> *c. 6000 metric tonnes by July 2015*
>
> *5. It was further agreed under Clause 3.1(a) of the said Trade Facilitation Agreement that the Defendant will supply to the Plaintiff the initial 10,500 metric tonnes of soya beans at the sum of MK196 per kilogram. I exhibit a copy of the said Trade Facilitation Agreement marked* ***"ZK 1"****.*
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> *6. By mutual variation of the said Trade Facilitation Agreement by both the Plaintiff and the Defendant made on or about 11th May 2015, the Plaintiff and the Defendant agreed that the said initial 10,500 Metric tonnes of soya beans will be supplied at the sum of MK205 per kilogram.*
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> *7. Meanwhile, the Plaintiff entered into two Contracts with CP Feeds Limited and Top Foods Limited for the supply of 5,800 metric tonnes and 3600 metric tonnes of soya cake respectively on the strength of the soya beans to be supplied by the Defendant to the Plaintiff under the said Trade Facilitation Agreement. I exhibit*

*copies of the said Contracts marked **"ZK 2(a)" and "ZK 2(b)"**.*

8. *The Defendant only supplied 180.67 Metric tonnes of soya beans and demanded that the Plaintiff should pay the sum of MK240.00 per kilogram contrary to the agreed price of MK205 per kilogram.*

9. *The Plaintiff, without waiving its rights under the said Trade Facilitation Agreement and in spirit of preserving good business relations between itself and the Defendant, reluctantly paid for 90 metric tonnes at the sum of MK240.00 per kilogram but insisted that the remaining 90.67 Metric tonnes of the supplied soya beans as well as the remaining 10,320 metric tonnes for the period between May 2015 and July 2015 be paid on the agreed price of MK205 per kilogram. The correspondences between the Plaintiff and the Defendant as well as the invoice and payment vouchers dated 3rd June, 2015, 17th June, 2015, 27th July, 2015, 17th August, 2015 are exhibited and marked **"ZK 3(a)"**, **"ZK 3(b)"**, **"ZK 3(c)"**, **"ZK 3(d)"** and **"ZK 3(e)"** respectively.*

10. *As can be noted from the letter dated 17th June, 2015 and marked **"ZK 3 (b)"** above,*

the Defendant has refused and/or neglected to supply the remaining 10,320 metric tonnes and instead insisted on supplying at purported prevailing market prices and availability of the soya beans and also that the said 90.67metric tonnes of soya beans already supplied should be paid at the same unilateral price of the sum of MK240.00 per kilogram contrary to the clear provisions of Clause 3.1 (a) of the said Trade Facilitation Agreement as mutually varied on 11th May 2015.

11. *The Plaintiff has tried to source soya beans from other suppliers within and outside the Country without any success as there is no soya beans available on the market at the moment and that the season for the said soya beans is over.*

12. *On the other hand, as stated in its letter dated 17th June 2015 and exhibited as **"ZK 3(b)"** above, the Defendant has soya beans that it can supply to the Plaintiff but has refused and/or neglected to supply the same on account of the refusal by the Plaintiff to purchase the same at the Defendant's unilateral price of the sum of MK240.00 per kilogram.*

13. *In view of the refusal and/or neglect by the Defendant to supply the remaining 10,320 metric tonnes, the Plaintiff has failed to supply a total of 9400 metric tonnes of soya cake to CP Feeds Limited and Top Foods Limited in accordance with the said Contracts marked **"ZK 2 (a)"** and **"ZK 2(b)"** respectively above.*

14. *Consequently, Top Foods Limited has demanded the payment of USD180, 000.00 from the Plaintiff for the latter's failure to supply the soya cake as agreed. CP Feeds Limited is currently in the process of computing their losses.*

15. *I repeat paragraph 14 hereof and state that the Plaintiff risks paying huge sums of money to compensate CP Feeds Limited and Top Foods Limited but also tainting its goodwill which it has built over the past 15 years in the agro-produce industry for its failure to honour its clear contractual obligations.*

16. I repeat paragraph 15 hereof and state that the tainting of the Plaintiff's goodwill will greatly jeopardise its future business endeavours in the agro-produce industry, which industry has few players of the Plaintiff's calibre, and the damage thereof would be extremely difficult to repair and/or compensate.

17. I verily believe that the only effective remedy available to the Plaintiff is for the Defendant to be ordered to supply the said 10,320 metric tonnes of soya beans within the shortest time possible for the Plaintiff to be able to meet its contractual obligations to CP Feeds Limited and Top Foods Limited and/or heavily mitigate the loss and damage occasioned by the delay so far.

18. I further verily believe that the Defendant can deliver the said soya beans at the contract price of K205 per kilogram within two weeks as all the Defendant has to do is make the soya beans available for the Plaintiff to take delivery of the same as per Clause 2.7 of the said Trade Facilitation Agreement.

19. In the circumstances, I strongly believe that if the Defendant is not compelled to deliver the remaining 10,320 metric tonnes of soya beans to the Plaintiff, the Plaintiff will have no effective remedy to the contractual breach herein and will suffer irreparable loss and damage."

Defendant's Affidavit

The Defendant agrees that the parties negotiated and executed the TFA under which the total contracted volume for delivery between the months of May and July 2015 was 10,500 metric tonnes at K196/kg, to be delivered ex designated warehouses of the Defendant. It is also agreed that on the date of execution of the TFA, the parties revised the contract price from K196 to K190/kg of soya beans.

It is also stated that immediately after signing the contract it was apparent that market forces were overtaking the costing projections that both parties had anticipated. Soya bean prices were increasing so rapidly so much so that the contract price was immediately overtaken. The Defendant was facilitating transactions at prices more than the contract price within few days of executing the TFA. The parties discussed the matter and agreed to revise the contract price from K190 to K205/kg of soya beans. This change was effected to the TFA on 11th May 2015 as evidenced on page 8 of the TFA.

Paragraphs 14 to 21 of the Defendant's Affidavit pertain to the developments that took place after 11th May 2015:

"14. ***THAT*** *soya prices were still appreciating so much so that even the price of K205 per kilogramme would not hold. Attached hereto and marked "DM 2" is an extract of a trade report for the period 20th May to 4th June 2015 that shows that the Defendant was paying depositors the average price of K238.2 per kilogramme of soya beans.*

15. ***THAT*** *the volatile price movements affected mobilisation of the soya beans by the Defendants exchange members, client and soya beans forward contract holders. The Plaintiff was requesting that the Defendant should start deliveries. In tele-conversions the Defendant advised the Plaintiff of the prevailing soya prices and the Defendant advised the Plaintiff that market prices had surpassed the contract price thereby affecting mobilisation of the soya beans. In these updates the Plaintiff kept on advising the Defendant to match the market prices and mobilise the commodity. Attached hereto and marked "DM 3" is a copy of a trail of email correspondences in which the Plaintiff advises the Defendant of their appreciation of the volatility of soya prices and confirms that prices were negotiated to address the volatility. "DM 3" also shows that the Defendant appreciated the Plaintiff's flexibility on prices and undertook to start delivering the soya beans.*

16. ***THAT*** *contrary to paragraphs 8, 9 and 10 of the Affidavit in Support of the Originating Summons the Defendant kept on continuously updating the Plaintiff about soya prices in the country and on the Defendant's platform through tele-conversations between myself and the Plaintiff's Managing Director Mr. Zameer Karim. The Plaintiff did not object to the price adjustment and was advising us that we secure the volumes by matching market prices.*

17. ***THAT*** *clause 2.6 of "ZK 1" is to the effect that…. Therefore in an email correspondence appearing under "DM 3" the Defendant advised the Plaintiff that invoices for soya beans that was ready for delivery would be issued. Under the same "DM 3" the Plaintiff advised the Defendant to invoice their associate 'who is buying soya'.*

18. ***THAT*** *Defendant delivered a total of 180.67 metric tonnes of soya beans by 27th May 2015 and had invoiced the Plaintiff accordingly for this delivery. Attached hereto and marked "DM 4(a)" and (DM 4 (b)" are the Defendant invoice number 00134 dated 20th May 2015 and invoice 00154 dated 27th May, 2015 for a combined total of 180 metric tonnes at price of K240 per kilogramme.*

19. ***THAT*** *on or about 20th May 2015 I briefed the Defendant that we had secured supply of l21000 metric tonnes of soya the first 500 metric tonnes would be sourced at K240 per kilogramme. I advised the Defendant that we would therefore invoice them the stock at about K245 per kilogramme. However, the Defendant advised me that they would not be able to accept delivery of the said stock on account of the fact that it was too high for their projections.*

20. ***THAT*** *in reference to paragraph 17 hereof the Plaintiff did not honour the invoices as stipulated under clause 2.6 of "ZK 1" and that the Defendant started following up for payment of the 180.67 metric tonnes of soya that was delivered to the Plaintiff. The non payment was a breach of the said clause 2.6 of 'ZK 1".*

21. ***THAT*** *on 29th May, 2015 the parties had a meeting aimed at resolving the issues of prices and non payment for the soya beans that was delivered. The meeting took place at the Plaintiff's head office at Makata in Blantyre. The Plaintiff was represented by their Managing Director while the Defendant was represented by their General Manager and Legal Services Manager.*

22. ***THAT*** *at the said meeting the parties discussed factors that were influencing the ever increasing prices of soya. The Defendant indicated that they would regard the contract ("ZK 1" as null and void because they could not transact at high prices. At the time of the meeting the Defendant was receiving soya beans at price of K240 per kilogram ex depositor's warehouse. This translated to price of K243 per kilogram inclusive of logistics to Defendant's warehouse. Attached hereto and marked "DM 5" is the extract of the trade report indicating the prices prevalent around the time of the meeting.*

23. ***THAT*** *in the said meeting both parties anticipated that some market players would have met their requirement and would have withdrawn their participation. The parties anticipated that prices of soya might eventually drop, albeit not significantly. The Plaintiff insisted that they would not take any more deliveries unless the soya beans prices on the Defendant's platform had dropped to not more than K215 per kilogramme for deliveries in the Central Region and Southern Regions and K210 per kilogramme for deliveries in Mzuzu. See second paragraph of "ZK 3(b)".*

24. ***THAT*** *in the said meeting of 29th May, 2015 it was agreed that the Plaintiff would pay the invoiced price of K240 per kilogramme for the 180.67 metric tonnes that they had already taken delivery but would not take up deliveries anymore at that price. The Plaintiff acknowledged that they had not honoured the invoices that were issued by the Defendant as they should contractually do. They indicated that they had cash flow challenges. They advised that they would request that we split the invoices so that half the amount should come from their account and the other half would be paid on their behalf by Agricultural Commodities Exchange for Africa (ACE) where they would enjoy a warehouse receipt finance facility. I was requested to make calls to effect this arrangement to my colleagues in Lilongwe. I made the calls right from the meeting. Attached hereto and marked "DM 6" is an invoice that was issued following this arrangement immediately after the calls. While I was making calls to my colleagues, the Plaintiff's Managing Director also made his own calls advising his own relevant staff about the arrangement and he also made a call to Arthur of ACE advising him about the same arrangement. He even called one of his staff into the meeting to give him instructions on how to process the payments."*

The Defendants denies that it is hoarding 10320 metric tonnes of soya beans. This is dealt with in paragraph 27 of the Defendant's Affidavit which reads in part:

> *"…The Defendant receives deposit of various commodities from farmers and traders who apart from looking for favourable prices cannot wait for long before their commodities are disposed of. Since the Plaintiff had advised the Defendant in the meeting of 29th May,*
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> *2015 that they would not accept delivery of commodity at more than K215 per kilogramme for Central and Southern Region Deliveries and at not more than K210 per kilogramme for Mzuzu deliveries the defendant had been processing buy orders from other clients who were able to meeting demands of suppliers. Attached hereto and marked "DM 7" is an extract of trade transactions for soya buy orders that the Defendants has been processing over the months whose prices ranged from K255 to K267 kilogram."*

It is also the case of the Defendant that it cannot be held liable for the Plaintiff's alleged breach of contractual obligations to CP Feeds Limited and Top Foods Limited. The grounds for its position are set out in paragraph 28 of the Defendant's Affidavit:

> *"Firstly, the Plaintiff was always kept abreast of the market development and was supportive of the Defendant to match the market prices hence "DM 3" in which the Defendant expressed appreciation of the Plaintiff's flexibility on the prices. This was the case until towards the end of May 2015 when the Plaintiff felt that the prices were becoming too much for their business and decided not to give in anymore. Secondly, as observed under paragraph 17 hereof the Plaintiff advised the Defendant through "DM 3" that there was an entity buying soya beans for them in the style of Pride Commodities Limited. The Defendant did not deal with this entity. Therefore, the soya beans commodity that they were buying was not the consignment that was expected from the Defendant. In fact, although the Plaintiff advised the Defendant to invoice this entity, the payments did not come from them. The soya they have been sourcing is therefore not part of the contract between the parties. Thirdly, in the meeting of 29th May 2015 the Plaintiff had indicated that they would no longer buy soya from the Defendant and that they would treat the contract as void unless the price was not more than K215 for Central and Southern Regions deliveries or K210 for Mzuzu deliveries. At this time the Defendant had stock that was already costing way above the Plaintiff's bench marks. Therefore, the Plaintiff was not expecting any deliveries from the Defendant. The defendant emphasised on these fact in "ZK 3(b)". Fourthly, the Plaintiff's commitments to their clients are for May to October 2015 and August 2015 to January 2016 respectively. Deliveries under "ZK 1" were for months of May to July only."*

The Defendant also counterclaims against the Plaintiff. Firstly, there is the issue of 3,600 empty bags which were required to be returned by the Plaintiff to the Defendant per clause 5.4 of the TFA. On 30th November, during the hearing of this case, Counsel Songea informed the Court that the said empty bags had been returned. The Defendant did not pursue this part of the counterclaim thereafter.

Secondly, the Defendant counterclaims for the sum of K3,150,000, being balance on the proceeds of 180.67 metric tonnes of soya beans delivered by the Defendant to the Plaintiff. In this regard, paragraphs 29 to 35 of the Defendant's Affidavit are relevant:

> *"29. **THAT** in any case the Plaintiff breached "ZK 1". As pointed out under paragraph 17 hereof the Plaintiff was supposed to "settle its full trade positions immediately AHCX raises the invoice and in any case prior to the delivery of the goods." The*
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> *Plaintiff failed to settle payment before delivery. The first payment was received from ACE on 9th June, 2015, over three weeks after delivery and issuing an invoice. The Plaintiff neglected or refused to pay for the balance of K21,600,000. On 17th July, 2015 I wrote an email to the Plaintiff following up on payment that was long overdue. I indicated that the Defendant would be compelled to pass on the interest that it was being charged to the Plaintiff suffice to observe that the Plaintiff's Managing Director had requested that interest should not be charged as the same was against the dictates of his and other Plaintiff's directors faith. Attached and marked "DM 8" is an extract of email correspondences between the parties on the overdue payment.*
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> *30. **THAT** on 28th July, 2015 the Plaintiff made a partial payment of K10,476,000.00 being 50% of the amount on "DM 4(a)" (invoice dated 27th May, 2015). Attached hereto and marked "DM 9(a)" and "DM 9(b)" are the payment voucher issued by the Plaintiff dated 28th July, 2015 and Withholding Tax Certificate Number 1726101 issued on the same payment. This partial payment is a demonstration of continued breach of clause 2.6 of "ZK 1" which is to the effect that payment for the commodity should be paid before delivery.*
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> *31. **THAT** on 17th August, 2015, the Plaintiff made another partial payment of K7,326,000 leaving a balance of K3,150,000 on the invoice of 20th May 2015. The Plaintiff has neglected or refused to pay the balance. The Plaintiff now erroneously refers to the contract price of K205 which the parties never transacted at.*
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> *32. **THAT** contrary to paragraphs 6, 8 and 9 of the Affidavit in Support of Originating Summons the contract price was no longer K205 per kilogramme. The parties agreed that the Defendant should keep on matching the market prices until enough volume was mobilised. This is the context of the 'flexibility' referred to in my email dated 20th May 2015 appearing in "DM 3". The same day "DM 4(a) (invoice) for 90 metric tonnes at K240 per kilogramme was issued after discussing the same with the Plaintiff's Managing Director and as undertaken in that email.*
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> *33. **THAT** further to paragraph 29 hereof the Plaintiff breached "ZK 1" by refusing to return the empty 3600 empty bags in which 180.67 metric tonnes of soya beans were delivered contrary to clause 5.4 of "ZK 1". These bags do not belong to the*

Defendant but to suppliers of the commodity on whom the Defendant relied for repeat business.

34. ***THAT*** *the Defendant did not fail or neglect to supply the Plaintiff with the contracted volume. The true position is that the Plaintiff had no funds to honour the contract and forced the Defendant to borrow to pay off depositors. See "DM 8". The Plaintiff also failed to honour accept delivery of commodity that was deposited with their full knowledge of prevalent prices.*

35. ***THAT*** *even if the price would have remained at K190 or K196 or K205 as it appears in "ZK 1" the Defendant would not have continued supplying the soya beans on account of the Plaintiff continued breach of payment terms and refusal to return the empty bags belonging to depositors contrary to express terms of the contract."*

The Defendant's Affidavit concludes by stating thus:

"36. THAT the Defendant cannot be said to be in breach of the TFA for the mere reason that the Plaintiff themselves in the meeting of 29th May, 2015 declared the contract void unless prices remained within a range that was already surpassed by the market forces. All that remained beyond that meeting was for the Plaintiff to pay for the soya beans already delivered to them, return the bags and to hope for a miracle that prices would drastically drop thereby revive the contract. The Plaintiff kept on and is still continuing to breach their obligation to pay the full value of the commodity delivered and to return the empty bags."

Plaintiff's Affidavit in Reply

Paragraph 4 of the Plaintiff's Affidavit in Reply is material and it is in the following terms:

"i. I refer to paragraphs 13 and 15 of the Affidavit and state that the price adjustments mutually agreed by the parties were duly signed for by the parties' representatives as is indeed evident on page 8 of ***ZK 1****.*

ii. In as far as the Plaintiff is concerned, there were no other mutually agreed price adjustments nor was the Plaintiff bound to accept the Defendant's unilateral price adjustments.

iii. I further refer to paragraphs 14 and 16 of the Affidavit and state that prior to the execution of the Trade Facilitation Agreement herein, the Defendant took time to survey the prices of the soya beans and subsequently drafted the Agreement for the parties' execution. I exhibit copies of email correspondence between me and the Defendant marked ***ZK 4****.*

iv. In the circumstances, the Defendant cannot push the cost on the so called escalating prices of soya beans vis-a-viz the prices under the Agreement on the Plaintiff.

v. I also refer to paragraphs 20 to 24 of the Affidavit and state that:

*a. The Plaintiff made it clear that it was going to pay for the delivered soya beans at MK240/kg merely as a good gesture in a business relationship but would insist on further deliveries being done under the contract prices hence the Plaintiff's letter of 3rd June, 2015 marked **ZK 3(a).***

b. The Plaintiff did not at any point in time during the subsistence of the Agreement herein state nor experience cash-flow problems in respect to its financial obligations under the Agreement. The delay in paying for the delivered soya beans was occasioned by the Defendant's unilateral price adjustment whereby the Plaintiff had to seek legal advice on the same.

vi. I refer to paragraphs 25 and 26 of the Affidavit and state that the Defendant's failure or neglect to deliver the remaining tonnage of soya beans had nothing to do with the return of bags but rather entirely about price adjustments.

vii. I refer to paragraph 27 of the Affidavit and state that the Plaintiff merely demanded, and rightly so, to be supplied with soya beans at the agreed prices; the plaintiff would not have been involved in the internal affairs of the Defendant rather than the clear terms of the contract between the parties.

*viii. I refer to paragraph 28 of the affidavit and state that my email of 19th May, 2015 to the Defendant, which has been marked **DM 3** in the Affidavit, clearly stated that the Plaintiff signed back to back contracts for soya cake and that failure to deliver soya beans to the Plaintiff would surely affect the Plaintiff's obligations under those contracts. Thus, the Defendant would therefore be liable for the resultant loss.*

ix. I refer to paragraphs 29, 30 and 31 of the Affidavit and state that there was no way the Plaintiff could have paid for the delivered soya beans prior to delivery when the invoice for the same was only raised after delivery and that the prices had been unilaterally adjusted by the Defendant. The Plaintiff only got to know about the MK240/kg through the invoice and not through negotiations between the parties. Thus the Plaintiff did not breach Clause 2.6 of the Agreement.

x. Besides, the Defendant's failure and/or neglect to deliver the remaining tonnage of soya beans was not at any point blamed on delay in payment for the delivered soya beans nor the fact that bags had not yet been returned to the Defendant.

xi. I refer to paragraph 34 of the Affidavit and state that the Defendant is merely speculating on the Plaintiff's financial position.

xii. I further refer to paragraph 36 of the Affidavit and state that at no point did the Plaintiff nullify the Agreement herein nor indicate, either orally or in writing, that

the Agreement was void. As a matter of fact, there was no basis for regarding the Agreement as void."

Plaintiff's Supplementary Affidavit

The substantive provisions of this Affidavit read as follows:

"4. … CP Feeds Ltd and since claimed for damages resulting from the Plaintiff's failure to supply soya cake on time as agreed. I exhibit copies of the claims made against the Plaintiff marked ZK5.

5. Besides, had the Defendant supplied the soya beans as agreed, the Plaintiff would have processed the soya beans and get oil in addition to the soya cake. Thus the Defendant are liable to the Plaintiff for the loss of profits thereof."

The Defendant object to admission of evidence through this Affidavit because it was filed contrary to O. 28/1A/6 of Rules of the Supreme Court. The said Order states that once an affidavit in reply has been filed with the Court no any other affidavit shall be received in evidence without leave of the Court. The Plaintiff's Supplementary Affidavit was filed without leave of the Court. In the premises, the objection is upheld and the Court shall totally disregard the contents of this Affidavit in making its determination in this case.

Cross-examination and Re-examination of Mr. Davis Manyenje

Cross-examination

The material testimony of Mr. Manyenje during cross-examination by Counsel Mbeta can be summarized as follows. The parties entered into a valid agreement whereby the Defendant was, among other things, to supply to the Plaintiff 10,500 metric tonnes of soya beans at the sum of MK196/kg. The parties on or about 11th May 2015 agreed to revise the price to K205/kg. An addendum to the TFA, duly signed by both parties, was accordingly effected. Clause 12.4 of the TFA is obligatory in its terms and it requires amendments to the TFA to be writing and signed for by the parties.

That by an exchange of e-mails, the parties negotiated a new price of K240 per kilogram. This statement led to the following Q & A:

*"**Q:** Does the e-mail of 19th May 2015 mention the new price?*

A: *No! but in my e-mail of 20th May 2015, there is a confirmation that we negotiated a new price*

Q: *Do you mention K240 in your e-mail?*

A: *Not specifically but the e-mail refers to an invoice "DM4"*

Q: *Who signed the invoice "DM4"?*

A: *Employees of the Defendant- the ones charged with preparing invoices*

Q: *Is the invoice "DM4" an addendum to the contract?*

A: *I understand it to be so because it is an acceptable price confirmation.*

Q: *Whose signatures are on invoice "DM4"?*

A: *It is signatures of employees of the Defendant*

Q: *This means it did not meet the two conditions of clause 12.4 of the Contract?*

A: *The e-mails are equivalent to an addendum in this context*

Q: *Addendums have to be signed by both parties?*

A: *Yes, the e-mails indicate a confirmation by the parties."*

Counsel Mbeta finally turned to the issue of the contracts that the Plaintiff entered into with third parties on the basis of the TFA and Mr. Manyenje confirmed that going by the e-mail of 19th May 2015 he was aware that the Plaintiff had entered into back to back contracts for processing of soya cakes, etc.

Re-examination

In re-examination by Counsel Songea, Mr. Manyenje reiterated that the parties negoatiated a new price of K240/kg as supported by invoice "DM3" and e-mails of 19th and 20th May 2015. He also explained paragraph 15 of the Defendant's Affidavit by stating that soon after effecting the addendum, the parties found out that the prices were not good as reflected in DM5 and DM7. In his view, these documents reflected the volatility of price movements and explains why the Plaintiff agreed to the new price of K240/kg. He further stated that the Defendant raised invoices at that price and the Plaintiff paid part of the sum without objecting to the price. In this regard, Mr. Manyenje referred the Court to DM9(a), being a payment voucher originating from the Plaintiff acknowledging indebtedness to the Defendant.

Finally, Mr. Manyenje claimed that despite clause 12.4 of the TFA, the parties reached an understanding to do certain things without effecting addenda to the

TFA. He gave two examples to buttress his claim. Firstly, he referred the Court to "DM3", "DM6" and "DM9(a)" whereby the parties agreed that the Defendant should invoice a third party and the same was done without effecting amendments to the TFA. Secondly, although clause 2.6 of the TFA requires payment to be done prior to delivery of the goods, the parties agreed to allow the Plaintiff to take delivery of goods and make payments in respect thereof later on.

Before moving on I wish to observe that I have thoroughly gone through all the affidavits, including the evidence given during the cross-examination and re-examination of Mr. Manyenje. I do not intend to deal with each and every one of affidavits separately as I shall bear the contents thereof, (with the exception of course of the Plaintiff's Supplementary Affidavit) in my mind throughout this judgement.

Issues for Determination

There is one main issue in this matter for the determination of the Court, namely, whether or not the TFA could be amended in a manner other than as stipulated therein. The answer to the main issue will help in determining answers to the following sub-issues:

(a) did the price of K240/kg apply to the whole or only part of 180.67 metric tonnes of soya beans that were delivered by the Defendant to the Plaintiff?

(b) was there an enforceable contract between the parties in respect of deliveries made subsequent to the meeting the parties had on 29th May, 2015?

(d) is the Plaintiff is entitled to the reliefs and declarations sought in the Originating Summons?

(e) does the Plaintiff owe the Defendant the sum of K3,150,000 as per the counterclaim?

Submissions by the Plaintiff

Counsel Mbeta submitted that it is unquestionable that the Plaintiff and the Defendant entered into a contract for the supply of soya beans as set out in the TFA. He also submitted that, in terms of Clause 12.4 of the TFA, a valid amendment could only be made in writing and signed by both parties. As such, he

contended the exchange between the parties through emails did not amount to amendments of the TFA since the e-mails were not signed by both parties as envisaged by Clause 12.4 of the TFA. Counsel Mbeta further submitted that the e-mails cannot be relied upon because none of the e-mails indicated the price of K240/kg. It may be useful to set out in full the material part of the Plaintiff's Final Submissions

> *"4.3.1.2 …it should also be noted that the said Clause is couched in mandatory terms. Again, it would be noted that even Manyenje conceded that the mutually agreed amendments were lastly done on 11th May, 2015 and that both parties signed for the said amendment on the last page of the Contract. There is thus no basis for ignoring the provisions of Clause 12.4 of the Contract so as to regard emails and invoices which were in fact explained by ZK 3(a) as a valid amendment. As observed in the case of* ***Simiyoni v. Kanyatula*** *(supra) an incomplete agreement or negotiations towards an agreement without more, does not become a contract that can be enforced between parties. The corollary to this proposition is that an attempt towards amending a valid contract like the Defendant sought to lobby during the meeting of 29th May, 2015 would not give rise to a new contract*
>
> *at all. The present facts are also distinguishable from the facts in* ***Simiyoni v. Kanyatula*** *case as in the latter case there was no valid contract at all that could be enforced by the court. In the present matter, there is a valid contract and the parties have performed part of the obligations based on it. It is therefore an enforceable contract."*

Counsel Mbeta concluded as follows:

> *"4.1.4 From the foregoing, it is clear that there was a valid contract. The Defendant merely wants to run away from performing its obligations under the contract. This is where the court must provide an alternative remedy which is effective. As observed by Justice Kapanda, this is a commercial transaction and the innocent party must be put in a position where he would have been but for the breach of contract by the Defendant if in refusing to deliver soya beans at the agreed price of Mk205/kg. The Plaintiff's good will is at stake if it fails to honour its back to back contracts, of which the Defendant was aware all along and the Plaintiff cannot get any soya beans anywhere other than from the Defendant. It is our submission that justice demands that the Defendant must deliver the soya beans as pleaded. The Defendant has not at any point suggested that it cannot deliver the soya beans on account that it does not have stocks. It is merely saying it wants a higher price than what was mutually agreed by the parties. This is unacceptable and the court should come to the rescue of the Plaintiff by granting an effective remedy which in circumstances is specific performance. It is our submission that there is no basis for confining the Plaintiff to his remedy in damages when the same would not effectively put the Plaintiff where it could have been had the soya beans been delivered according to the contract."*

With respect to the prayer for specific performance, counsel Mbeta submitted that the underlying principles are that specific performance is an equitable remedy and, that being the case, a person who comes to equity is required to come with clean hands. Counsel Mbeta contends that the Plaintiff acted with clean hands in the transaction in that it was very clear that it only accepted the price of K240/kg in respect of 90 metric tonnes and not for the remaining 90.67 Metric tonnes of the already delivered soya and the deliveries to be made subsequently. Counsel Mbeta also invited the Court to note that all that the Plaintiff is demanding is the very benefit of getting the agreed quantity of soya beans at the agreed price without more and, as such, specific performance is the appropriate remedy. It might be useful to set out in full the relevant parts of the Plaintiff's Final Written Submissions:

> *"4.1.3.5 The assertion that the Defendant should not be forced to deliver soya beans at a loss is averse to the spirit of commercial transactions. The Court will take judicial notice that parties enter into contracts and agree on prices while fully informed of the implications of the prices agreed on both loss and profit margins. The spirit of the law is that parties must be bound by what they contracted for more especially where the agreement is reduced*
>
> *into writing and the parties have signed for it. (See **Gestetner Ltd (NCR OEC) v. Malawi Revenue Authority**, **Howatson v. Webb**, Jacobs **v. Batavia and General Plantation Trust** and **Hashmi v. DHL Express**). It is not for the Court or the other party to be concerned about profitability of a business venture as that is left to the parties at the point of negotiations for the prices before the contract is entered into or later on when the prices are renegotiated and mutually agreed upon in accordance with the terms of the contract. This is why the spirit of commercial transactions is such that each party expects that the obligations of the particular contract will be honoured and not breached. Justice Kapanda (as he was then) right observed in **Gestetner Ltd (NCR OEC) v. Malawi Revenue Authority** as follows:*
>
> > *'…. In essence it is common case that a defendant is required to perform that which he or she agreed to do. **… In my judgment, where one party to a contract is in breach and seeks to opt out of a contract without a valid reason (as provided under the contract), the courts are obliged to provide an alternative remedy. This gives a clear message that commercial transactions will be honoured and that if a party is in breach, then the innocent party would be put where he would have been had the contract not been breached.***
>
> *4.1.3.6 Besides, unlike in the present case, the facts in the case of **Co-operative Insurance Society Ltd v. Argyll Stores** [1997] 3 All ER 297 were such that the Plaintiff sought to force the Defendant to continue running a business that was making losses merely to observe the terms of the lease agreement. Lord Hoffman rightly stated that:*

> *'But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust. …'*
>
> *In the present matter, the Plaintiff will not get any additional monetary benefit from specific performance. All that the Plaintiff is demanding is the very benefit of getting the agreed quantity of soya beans at the agreed price without more. Again as observed by Kapanda J (as he was then) above, commercial transactions must be performed and that where one party opts not to perform his part of the contract, the courts must give an effective remedy to the innocent party. Here the Plaintiff ought to be given an effective remedy of specific performance regardless of the cost implications to the Defendant. It is not for the Courts to encourage the spirit of non-compliance with contractual obligations merely because damages are an adequate remedy. It is about what is just in all the circumstances. (Kapanda J above.)"*

Submissions by the Defendant

The Defendant waged a two-pronged attack against the Plaintiff's case. Firstly, Counsel Songea argued that following the meeting of 29th May, 2015, the TFA was null and void and, as such, what obtained thereafter was just a conditional contract. Secondly, Counsel Songea submitted that parties to a contract may agree by conduct or in writing to rescind the contract or to vary its terms and, in the present case, the parties varied the TFA. It might be useful to set out in full the relevant part of the Defendant's Final Submissions:

> *"4.3* ***Contract or Agreement to Contract***
>
> *4.3.1* *The Sale of Goods Act defines a contract of sale to include an agreement to sell as well as a sale. According to section 3(4) of the Sale of Gods Act 'an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred'. This means that until that condition is fulfilled, there is no contract between the parties.*
>
> *4.3.2* *Evidence show that during the meeting of 29th May 2015 the Plaintiff had advised the Defendant that the "ZK 1" was null and void because soya beans prices on the market were not sustainable for the parties to fulfil their obligations. See paragraphs 22, 28 and 36 of the Affidavit in Opposition of the Originating Summons and the evidence of Mr. Manyenje in both cross examination and re-*

examination. Then the Plaintiff advised that they would take delivery only if the prices of soya on the Defendant's platform dropped to K215 for the Central and Southern Region deliveries and K210 for the deliveries in the Northern Region. See paragraphs 23, 27 and 28 of the Affidavit in Opposition of the Originating Summons and the evidence of Mr. Manyenje in both cross examination and re-examination.

4.3.3 *Therefore, at this point due to this agreement to transact only if prices dropped to certain benchmark there was no longer a contract between the parties. There was an agreement to sell or to contract as stipulated under section 7(3) of Sale of Goods Act. It was a conditional contract as stipulated under section 3(3) of Sale of Goods Act. The condition was that prices should drop to the agreed benchmarks. This agreement to sell goods or to contract cannot be enforced unless the condition is met, that is, unless prices dropped to the agreed benchmarks. In re-examination Mr. Manyenje advised the court that this condition has not been met. He advised the court that at the time of giving evidence the average price of soya beans at the Defendant's platform was K320 per kilogramme.*

4.3.4 *Therefore, there was no enforceable contract for delivery of soya beans between the parties beyond 29th May, 2015. Mr. Manyenje told the court in re-examination that the Plaintiff's Zameer Karim even called the transporter and his personnel to advise them not to take any more deliveries from the Defendant right in the meeting in the presence of delegation from the Defendant.*

4.3.5 *Therefore the issue whether there was an enforceable contract between the parties l4for the Defendant to deliver soya beans at K205 per kilogram should not arise. The parties had willfully varied the price term. There was therefore no contract to supply soya beans at K205 per kilogram.*

4.3.6 *Beyond the meeting of 29th May, 2015 "ZK 1" was grossly repudiated in the sense that the parties had agreed not to enforce it. The Plaintiff did not contradict this evidence. It is trite law that parties may agree by conduct or in writing that the earlier contract or contractual terms are rescinded or varied. See the case of Capital Oil Refining Industries Limited v. Catholic Relief Services. Therefore, what remained between the parties was an agreement to sell goods if certain bench marks were met as defined under section 7(3) of Sale Goods Act.*

4.3.7 *The court cannot enforce an agreement to contract. It was held by the Supreme Court of Appeal in the case of Simiyoni v. Kanyatula stated that the court is powerless to enforce such an agreement to contract for the agreement lacks a complete contract to enforce."*

The Defendant is opposed to the grant of the remedy of specific performance. Counsel Songea submitted that specific performance is an extraordinary remedy, which is granted in very limited circumstances. He cited the cases of **Co-Operative**

Insurance Society Ltd. v Argyll Stores [1997] 3 All ER 297 wherein Lord Hoffman, at page 300, said that:

> "*Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the nineteenth century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy*."

Counsel Songea placed much emphasis on the observation by Lord Hoffman at pages 304-305:

> *"It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust. From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to*
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> *an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal. The cumulative effect of these various reasons, none of which would necessarily be sufficient on its own, seems to me to show that the settled practice is based on sound sense. Of course the grant or refusal of specific performance remains a matter for the judge's discretion. There are no binding rules, but this does not mean that there cannot be settled principles, founded on practical considerations of the kind which I have discussed, which do not have to be re-examined in every case, but which the courts will apply in all but exceptional circumstances."*

Counsel Songea also submitted that where one party leads the other to believe that he will not insist on the precise stipulation of the contract, and the other party has acted on that belief and has thereby prejudiced his position, the first party cannot afterwards insist on the terms of the original contract. The case of **Phekani (as administrator of the deceased estate of Moses Phekani) v. New Building Society [2005] MLR 370** was cited as authority for this proposition. In this case, the court found that it was clear that in the negotiations between the parties the defendant had made the plaintiff to believe that the defendant would pay costs

associated with an aborted sale of land. Then the defendant turned back on this and claimed the costs. The court agreed with the plaintiff argument that the defendant would not do this as the plaintiff had acted on the belief created by the defendant in the course of the negotiations.

Relying on **Phekani (as administrator of the deceased estate of Moses Phekani) v. New Building Society**, supra, Counsel Songea contended that the Plaintiff having taken delivery of 180.67 metric tonnes of soya at the price of K240 per kilogramme, it cannot thereafter refuse to honour the agreed price of K240 per kilogramme after it had already partly honoured the agreement. In this regard, Counsel Songea submitted that the conduct of the Plaintiff shows that it is acting with unclean hands and it is trite that an applicant for specific performance must have clean hands. For that proposition, Counsel Songea relies on **Simiyoni v. Kanyatula and JJ Makwinja v. Pride Malawi and Landed Property Agents [2006] MLR 218.**

Analysis and Determination

I have considered the formidable submissions put forward by both learned counsel. They argued with great skill and clarity on behalf of their respective clients. I am greatly indebted to them and wish to encourage them to continue with such excellent work for the good of the profession of law.

It is commonplace that the parties concluded the TFA which is in a written form. In the premises, it seems to me that it is necessary to start by looking at the legal principles that generally apply to written agreements. It is well established that a

party to a written agreement will be bound by its terms whether or not he has read them and whether or not he is ignorant of their precise legal effect: See **Howatson v. Webb (1908) 1 Ch. 1**.

Further, it is a well settled rule in law that parties to an agreement are to be confined within the four corners of the documents in which they have chosen to enshrine their agreement. Neither party may adduce evidence to show that his or her intention has been mis-stated in the document or that some essential feature of the transaction has been omitted: See **Jacobs v. Batavia and General Plantation Trust (1924) 1 Ch 257**. In the same vein, it is not open to the Court to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them in line with what the Court may think the parties really intended or ought to have intended. If, by any reasonable construction the intention of the parties can clearly be arrived at from the document itself, then the Court will give effect to that intention. The point was aptly put by

Kapanda, J. (as he then was) in **Gestetner Ltd (NCR OEC) v. Malawi Revenue Authority [2008] MLR (Com) 332** as follows:

> *"According to my understanding of the law every contract is regulated by its own terms. An instructive authority on the point is the decision of the Supreme Court of Appeal in Council for the University of Malawi v. Urban Mkandawire where it was put thus:*
>
> > *'…the law of contract is concerned only with legal obligations as agreed by the parties themselves and not with any other expectations however reasonable they might be;' …"*

Having laid that legal background, it time to turn to clause 12.4 of the TFA which is in the following terms:

> *"No variation or amendment of this Agreement or oral promise or commitment related to it shall be valid unless committed to writing and signed by or on behalf of all parties."*

It is not uninteresting to note that parties in the present case were very much aware of this provision as evidenced by the fact that when the contract price was revised from K196 to K190 and K190 to K205/kg of soya beans respectively, appropriate amendments were effected to the TFA as required by clause 12.4 of the TFA. In my view, the parties included clause 12.4 of the TFA well knowing that a written agreement could be validly varied or amended in several ways, that is, orally, in writing or by conduct. In other words, the parties deliberately chose that the TFA was not to be varied or amended orally or by conduct. What this means is that even if, for the sake of argument, the parties were to agree that the TFA could be amended by conduct, such a variation or amendment could not take effect until incorporated into the TFA as required by clause 12.4 of the TFA. In the premises, I find no merit

in the contention by the Defendant that the parties agreed by conduct or otherwise to vary or amend the TFA.

In any event, for the Defendant to establish that the TFA was varied or amended by conduct or otherwise, it has to adduce extrinsic evidence. That being the case, the Defendant has to surmount the parol evidence rule. Briefly stated, the rule stipulates that where the terms of a contract have been reduced to writing, parol or extrinsic evidence cannot be admitted to add to, vary or contract, the written terms. In the very exceptional cases where parol evidence may be admissible, it has to be credible: see **NBS Bank Ltd v. BP Malawi Ltd [2008] MLR (Com) 1.** In the present case, there is no credible evidence in my view to support the alleged variation or amendment of the TFA to raise the price of soya beans from K205 to K240/kg. A comparison of the addendum dated 11th May 2015, on one hand, and

DM3 and DM4, on the other hand, helps to illustrate my point. The addendum which signed by both parties reads:

> *"Price for Soya Beans ADJUSTED from K196/kg to K205/kg. Agreed by both parties"*

In contrast, neither DM3 nor DM4 expressly states that the parties agreed to a new price.

I now turn to the Defendant's argument that following the meeting of 29th May, 2015, the TFA was null and void. This argument is primarily premised on the contention by the Defendant that during the meeting of 29th May, 2015, the Plaintiff had declared the TFA null and void. The Plaintiff denies nullifying the TFA.

With due respect to the Defendant, this argument cannot be sustained. In the first place, a contract does not become null and void by one of the parties merely choosing to declare it as such. Secondly, it is trite that a void contract has no legal effect- it is actually no contract at all. That being the case, it is puzzling that the Defendant was ready and willing to take further deliveries from the Plaintiff under the said null and void agreement: see paragraph of d. of ZK3(b) (that is, Defendant's letter addressed to the Plaintiff dated 17th June 2015).

Before resting, it might not be out of place to examine another argument advanced by the Defendant. It is the contention of the Defendant that following the meeting of 29th May, 2015, the TFA became a conditional contract on attainment of certain benchmarks, namely, reduction of the prices to levels acceptable to the Plaintiff. I confess I cannot concur in this reasoning. I do not think that it is well founded either in law or in fact. Firstly, contrary to the Defendant's contention, ZK 3 (a) clearly shows that the only demand that the Plaintiff made was for further supplies to be made according to the agreed contract price of K205/kg and that 79.581 metric tonnes of soya beans already delivered would be paid at the agreed price of K240/kg.

Then there is also the issue of alleged waiver by the Plaintiff of its right to be paid at the price of K205/kg price. This issue has more or less been already dealt with hereinbefore. The Plaintiff had clearly indicated that only 90 metric tonnes of soya beans would be paid in the sum of K240/kg purely on the grounds that delivery had already been made and for the sake of preserving the business relationship: see ZK3 which reads:

> *"We agreed to the price as we had already taken deliveries prior to receiving the invoice. We then accepted in good faith to ensure a long lasting business relationship and we further agreed that we can no longer accept any further deliveries at that price.*

In light of the foregoing, it my finding that the TFA was a valid contract at all material times and its terms remain binding on the parties. It is further my finding that following the addendum of 11th May, 2015, the TFA was neither amended nor varied as required by clause 12.4 of the TFA. Furthermore, I have gone through the evidence and it does not support the Defendant's assertion that the Plaintiff acted with unclean hands. On that score, it is my finding that the Plaintiff did not act with unclean hands and never waived all its rights on the prices to be used.

I now turn to the prayer by the Plaintiff for an order of specific performance. Specific performance is an equitable remedy which courts order particularly in cases where the common law remedy of damages is inadequate. The leading Malawian authority on the matter is **Finance Bank of Malawi Limited v. Benson Tembo (2007) MLR 99** wherein the Supreme Court of Appeal stated the law, at page 101, as follows:

> *"Specific performance is an equitable remedy which the courts will decree when the remedy available at common law, usually damages is not adequate. In other words specific performance will not be ordered if there is adequate remedy at law. And like other equitable remedies, specific remedy is not a matter of right in the person seeking relief but is given as a matter of discretion to be exercised, of course, in accordance with settled principles; it is not left to the uncontrolled caprice of an individual judge, so to speak."* – Emphasis by underlining supplied

This being a judgment of the Supreme Court of Appeal, I will do well to heed the wise counsel of Mwaungulu, J., (as he then was) in **Mkhubwe v. National Bank of Malawi, HC/PR Civil Cause 2702 of 2000 (unreported)**, at page 13:

> *"Supreme Court decisions bind this Court. Departure from them is at the peril of reasons. Per in curium decisions never bind this Court. Equally, this Court never follows decision overlooking statutory provisions. This Court also distinguishes binding decision on the facts or principle."*

In the present case, the Plaintiff has not shown how damages would not be adequate remedy. The reason why the Plaintiff seeks specific performance was put thus in the paragraph 4.1.3.6 of the Plaintiff's Final Written Submissions:

> *"… In the present matter, the Plaintiff will not get any additional monetary benefit from specific performance. All that the Plaintiff is demanding is the very benefit of getting the agreed quantity of soya beans at the agreed price without more."* – Emphasis by underlining supplied.

I am not persuaded by the given reason. In the premise, specific performance is denied.

Counterclaim

The Defendant counterclaims for the sum of K3,150,000 on the premise that 180.67 metric tonnes of soya beans that it delivered to the Plaintiff was at the price of K240/kg. As already found and determined herein, the price of K240/kg was only in respect of 90 metric tonnes. The Defendant does not dispute that 90 metric tonnes of the delivered soya beans were paid at K240/kg. This is clear in ZK 3 (a). Again ZK 3 (d) shows that the sum of MK7, 326, 000.00 was paid based on MK205/kg as contract price. In the circumstances, the counterclaim has to fail as it is based on an erroneous calculation.

Conclusion

In light of the foregoing, I am satisfied that the Defendant is in breach of the TFA. Accordingly, it is declared that:

(a) the Defendant cannot unilaterally vary the terms of the TFA generally and in particular the prices of soya beans at which the Plaintiff should purchase the same contrary to the clear terms of the TFA;

(b) the Defendant is liable to compensate the Plaintiff for any loss and damages occasioned to the Plaintiff by the Defendant's delay or refusal and/or neglect to supply the said 10,320 metric tonnes of soya beans to the Plaintiff within the agreed period between May and July, 2015 under clause 2.4 of the TFA; and

(c) costs of this action are for the Plaintiff.

Having found in favour of the Plaintiff, I order that damages and loss suffered by the Plaintiff be assessed by the Registrar. Costs are for the Plaintiff. It is so ordered.

Pronounced in Court this 19th day of January 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE