**REPUBLIC OF MALAWI**

**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**LILONGWE REGISTRY**

**COMMERCIAL CASE NUMBER 97 OF 2015**

**BETWEEN**

**LUSO AFRICAN STEEL ENGINEERING CONTRACTORS.....PLAINTIFF**

**AND**

**HALLS GENERAL DEALERS.....DEFENDANT**

**Coram: L. MTCHERA, ASSISTANT REGISTRAR**
**P. Likongwe, of Counsel for the Plaintiff**
**G. Khonyongwa, of Counsel for the Defendant**
**D. Banda, Court Clerk**

## ORDER ON ASSESSMENT OF DAMAGES

### Background

This matter came before this court for assessment of damages. The background to the case is that the plaintiff commenced the proceedings

against the defendant claiming the sum of US$2,723,907.29 allegedly being the cost of various items of furniture supplied by the plaintiff to the defendant, interest thereon and costs of the action. By its amended defence and counterclaim the defendant denied owing the sum claimed by the plaintiff and made a counterclaim of US$81,433.12 or its Kwacha equivalent, interest thereon to be assessed and costs of the action.

The brief facts of the case are that Mr Albertino Freitas Besteiro, the proprietor of LASEC the plaintiff company herein and Mr Harry Gunda, the proprietor of Hals General Dealers went into partnership on 8th April 2010 under the name Hals Protective Clothing and General Dealers after Mr Besteiro was added as a partner to Hals Protective Clothing and General Dealers which Mr Gunda had already registered on 17th September 2002.

As partners they entered into various contracts with other clients for the supply of school desks, chairs and chalkboards at prices indicated in the contracts between the partnership and the customers.

By the time Mr Besteiro was added as a partner Hals General Dealers was operating two Accounts, the Malawi Kwacha Account and an FCDA Account. Thus Mr Besteiro was added as a signatory, but he was later removed by Mr Gunda because he felt he had become too greedy.

The money received from the various contracts was deposited into Hals Accounts indicated above. However, LASEC felt that it did not receive enough from the partnership. The partnership broke up and LASEC instituted the proceeding against Hals in a bid to recover its cost of production of the goods that were supplied to customers by the partnership.

The matter went for trial. However, as will be noted from the court record, after hearing evidence from only two witnesses for the plaintiff (one of whom was declared hostile) and before the defendant could be heard the court formed an opinion that this is a proper case in which the partnership ought to be opened. This was sold to the parties who accepted/bought the idea. The court then directed that a Consent Order be drawn which would stand as the final judgment in the matter.

The Consent Order was drawn by counsel for the plaintiff and was in part couched in the following words:

> 'BY CONSENT it is hereby ADJUDGED

1. THAT for purposes of fair distribution of the net proceeds from the contracts, the parties do reopen the Partnership Agreement for purposes of
    a) Calculating the cost of production; and
    b) Determining the Capital contribution of each partner in terms of money, labour, machinery, premises etc towards the cost of production.
2. That assessment of cost of production and capital contribution of each partner be assessed by the Registrar. For the purposes of the assessment, the Defendant shall have access to the Standard Bank cheque books on the project that the plaintiff may be keeping and the project files being kept by the plaintiff. At the same time, the plaintiff shall have access to all the bank statements from the bank accounts operated by the defendant trading as Hals General Dealers or Hals Protective Clothing & General Dealers during the course of the project and the project documents and files kept by the defendant. Such access be granted within 10 days of this consent order.
3. THAT the Registrar shall assess the cost of production and what each partner contributed to the cost of production so that each partner should be paid his cost of production before profit sharing.
4. THAT the parties shall proceed to file all the documents supporting their respective positions within a period of 45 days from the date of this order.
5. THAT the parties may make submissions to the honourable court on costs if they do not reach an agreement on costs for the proceedings. Costs for the assessment may be determined differently.

IN WITNESS WHEREFORE the parties hereto through their Legal Counsel have hereunto set their respective hands on the date hereunder….'

This order was issued by the court on 12th April 2016.

It has to be pointed out from the outset that this Consent Order comes from a background of a Partnership agreement which in apart provided as follows:

'6 . The profits and losses of the business (including loss of capital) shall be divided and borne by the Partners in 50% shares.

7 . Each Partner shall draw out of the banking account of the partnership sums to be discussed and agreed upon on account of his share of profits

but if on taking the annual general account the drawings of either partner during the year are found to exceed his share of profit for the year he shall forthwith refund the excess.'

As correctly observed by the plaintiff's counsel the case involve large volumes of documents that it will almost be impossible to state what each witness said during the hearing of the assessment. As such in this ruling the court will refer to specific parts of the evidence when dealing with a particular issue.

From the totality of the evidence and regard being had to the Consent Order and the court's understanding of the whole case, this court is called upon to determine the following issues:

1. The cost of production
2. The capital contribution of each partner in terms of money, labour, machinery, premises, etc towards the cost of production.
3. The drawings by each partner from the partnership
4. The profit for purposes of 50-50 sharing

In determining these issues the court will have regard to the evidence which was given during the main action and that which was given during the hearing of the assessment.

**Law and discussion**

The cardinal principle in awarding damages is '*restitutio in integrum*'. This means that the law will endearour, in so far as money can do, to place the injured party in a position he would have been had it not been for the wrong he is being compensated for – see **Halsbury's Laws of England 3rd Ed. Vol II p. 233 para 400**. Thus the rule presupposes that prior to assessment the injured party has provided proof and that what remains is the amount or value of the damages. –see **Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd [1992] 15 MLR 370**.

It is imperative to note that the law distinguishes general damages from special damages. Whereas general damages are such as the law will presume to be the direct or probable consequence of the action complained of, special damages on the other hand are such as the law will not infer from the nature of the course – see **Stros Bucks Aktie Bolag v Hutchinson (1905) AC 515**. Thus special

damages must be specifically pleaded and must be strictly proved – see **Govat v Manica Freight Services (Mal) Limited [1993] (2) MLR 521**. That is why a party who claims special damages is called upon to adduce evidence or facts which give satisfactory proof of the actual loss he/she alleges to have suffered, failing which special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd [1991] 14 MLR 516**

**Cost of production**

It has been noted that in support of this claim Mr Besteiro brought in evidence a lot of invoices which were initially supposed to be tendered in evidence by Mr Ashraf Patel. However during the hearing in the main action Mr Ashraf Patel disowned these documents. He informed the court that during the subsistence of the partnership there was no time that Hals was invoiced by LASEC. Thus he ended up being declared a hostile witness and he was cross-examined by counsel for the plaintiff.

This,clearly, was very significant to the case because the basis of the claim by the plaintiff against the defendant was the bulk of the invoices which were disowned by Mr Ashraf Patel. Thus the invoices having been disowned by this crucial witness there was no way the case would progress because basically the plaintiff had no evidence against the defendant. Hence it would be wrong for counsel for the plaintiff to insinuate that the defendant had no defence to the claim by the plaintiff.

Surprisingly, during the hearing of the assessment of damages Mr Ashraf Patel was dropped as a witness for the plaintiff and Mr Besteiro opted for his daughter Laura Ashley to testify on his behalf and on behalf of Mr Ashraf Patel. However according to Mr Harry Gunda and Ashraf Patel Laura Ashley was not in any way involved in the work of the partner. Thus they were surprised if she was competent enough to testify on something she was not involved in. The bone of contention then is the admissibility of her evidence in respect of the invoices and the quotations sourced from various suppliers.

As already alluded to earlier on, assessment of damages does proceed on the assumption that the damages have been proved but what remains is the quantum. This however does not mean that we should, in assessing the damages due and payable, dispense with the rules of procedure and means of proof.

It is trite law that hearsay evidence is generally not admissible in evidence as it tends to taint all other evidence in a case. See **Ratten v R (19720 WLR578.** Our considered view is that the crucial witnesses on this claim were Mr Besteiro and Mr Ashraf Patel who were directly involved in the affairs of the partnership. Mr Besteiro was a partner while Mr Ashraf Patel was the Partnership Accountant. As such these people were better placed to competently testify on anything to do with the partnership. What Laura Ashley told the court is what she was told by, or heard from, her father Mr Besteiro, thus being hearsay evidence and inadmissible in respect of the claim on Cost of Production.

As if that is not enough, it has been noted that the cost price of the desks in the main action is different from the cost price of the same in the assessment bundle. And no good explanation has been given as to why there is a departure from the initial claim in respect of the cost price of the desks. In addition, during the hearing of the assessment the court was taken through a number of invoices and delivery notes in support of the claim and it was noted that there were/ are discrepancies between the so-called invoices and the purported delivery notes of the alleged items of furniture manufactured by the plaintiff. Thus the court is inclined to agree with the defendant who throughout the hearing of the assessment kept on saying or referring to, the invoices as bogus.

**Capital contribution**

As noted from Mr Gunda's evidence during cross-examination there were three phases in the life of Hals Protective Clothing and General Dealers, namely the time when Mr Gunda was the sole partner, the time he partnered with Mr Besteiro and finally the time Mr Besteiro was removed as a partner.

For the partnership to perform contract Number NLB025/IPC/MOEST/EIM(2009-2010) there was need for capital. Counsel for the plaintiff did make mention of Hals Account being in debit of K50,824.79 and being in overdrawn state when the partnership started. He thus submitted that the money the plaintiff gave Mr Gunda ie KK2,300,000 and K150,000 for the purchase of materials at the beginning of the partnership, the sum of K1,911,318.25 paid to William Faulkner and K275,000 paid to Dipack and Manak and US$50,000 be considered as Mr Besteiro's capital contribution to the partnership. Counsel for the plaintiff further stated that Mr Gunda did not show how much he injected into the partnership.

It should be made clear in this ruling that when the partnership came into being Hals Protective Clothing and General Dealers had already won the contract referred to above with the Ministry of Education Science and Technology. Hals did all the work to ensure that the contract was awarded to them. There is no indication anywhere in the evidence that the plaintiff participated in the bidding process or any work related to the award of the contract. It important to note that all the work was done in phase 1 when when Mr Gunda was the sole partner. Therefore, although the US$2000,000 advance payment was made in phase 2 the same cannot be attributed to the plaintiff as she did nothing for Hals(phase 1) to be awarded the contract. In any case the plaintiff was not a partner. Mr Besteiro was the partner. Hence, in this ruling the US$2000,000 advance payment was what Mr Gunda brought into the parntnership.

With respect to the K3,355,200 Mr Gunda did mention in his evidence that the money was paid back although the figure was less. As regards the time frame within which the refund was done that is not a real concern for us. It should be remembered that the partnership made provision for the partners to make drawings from the partnership account. Therefore the court does not want to speculate as to why there was a delay in making the refund or why the amount paid was less. As already pointed out earlier on Mr Besteiro was the right person to explain all this and clear all the mist in the partnership. However he chose not to testify during the hearing of the assessment of damages. Perhaps he knew that his evidence would be adverse to the case of the plaintiff, hence his election to stay away from giving evidence. Thus as a material witness his not giving evidence adversely affects the assertions made by Laura Ashley whose evidence is also tainted with, and caught by the rule against the admission of, hearsay evidence.

Moving on to the US$50,000 allegedly paid to Ferpinta for the partnership to enjoy credit facility, we have carefully examined the exhibit attached to the Supplementary witness statement of Mr Besteiro. The exhibit which is in portugues language shows that the order was placed by ARISTA CORPORATION LIMITED through Account Number 014844500246 and the beneficiary was ALPINE of Fairleads, Benoni , Africa do Sul through account number 020999210. There is no mention of Hal Protective Clothing and General Dealers in the Form being the beneficiary of the money deposited into the account of Alpine. Therefore it is surprising that Mr Besteiro is claiming

that amount as his capital contribution into Hals when the beneficiary is clearly indicated in the form as ALPINE.

This leaves us with the sum of MK1,911,318.25 said to have been paid to William Faulkner and MK275,000 said to have paid to Dipack and Manak as a refund of interest charged on bid security they paid. Although Mr. Gunda claimed that all the money was paid back there was no evidence to back up his claim. Throughout the hearing of the assessment Mr. Gunda insisted that in most cases Mr. Besteiro used to call for cash instead of being paid through cheques or through deposits into his account or that of LASEC. As such it was difficult for him to produce evidence. For instance Mr. Gunda did mention in his evidence that apart from the US$876,711.11 drawings made by Mr. Besteiro he also lent Mr. Besteiro about 32 million Malawi kwacha (deposited into LASEC Account) which he did not pay back. The project Accountant Ashraf Patel did also mention in his evidence that Mr. Gunda deposited in LASEC account about 32 million kwacha which according to his knowledfe was not paid back.

However, contrary to the provisions of the Consent Order, Mr. Besteiro has not brought in evidence the bank statement of LASEC or any files for the Partnership/Project for the court to see for itself whether this amount was indeed deposited or not . And there has been no evidence that the money was paid back. This is further compounded by the fact that Mr. Besteiro chose not to come to court to give evidence during the assessment of damages, albeit to his own detriment as it negatively impacts on the plaintiff's case **- see BP Malawi Limited v NBS Bank Limited, [2009] MLR 39.** This court, therefore, is of the view that Mr. Besteiro deliberately chose not to come to court and testify during the hearing of the assessment of damages and he deliberately not produced in evidence the bank statement of the plaintiff company, the cheques books and files for the Project, contrary to the provisions of the Consent Order, with a view to conceal the fact that apart from the US4876, 171.11 *he also got a lot of money in cash* from Mr. Gunda and the Partnership. Hence it is the order of the court that the money which was deposited into the plaintiff's account by Mr. Gunda be paid back with interest at the current Standard bank base lending rate from the date the money was deposited into LASEC Account to the date of this ruling minus MK1,911,318.25 and MK275,000 paid to Willilalm Faulkner and Dipark and Manak respectively.

**Use of premises**

With regard to the use of premises as part of capital contribution, it has been noted from the oral evidence of Mr. Gunda and that of the Project Account Mr. Ashraf Patel that from the inception of the partnership there was no agreement whatsoever that the defendant would pay for the use of the premises. In addition Mr. Gunda's written witness statement filed with the court on 11 March 2016 captures the scope of the partnership which provided, *inter alia,* 'that Mr. Besteiro would provide his premises at LASEC where the defendant would manufacture desks; that the defendant would be responsible for payment of salaries and wages to employees as well as being responsible for payment of water and electricity bills incurred over the production period; and that the defendant would settle all credits of capital expenditure regarding the contract'. Again save for the provision of drawings by the Partners and the 50-50 sharing of the profits the Partnership Agreement which was exhibited in evidence makes no mention whatsoever of payment of rentals to the plaintiff by the defendant.

Be that as it may, the assessment of damages herein is being heard pursuant to the Consent Order which was signed by both parties. Under this head the plaintiff is claiming US$432,000 as rentals for the use of its premises by the defendant for a period of one and a half years. By its nature this claim falls under special damages which have to be specifically pleaded and strictly proved. However, contrary to the rules of pleadings and procedure the plaintiff has not provided any evidence in support of its claim.

During the hearing of the assessment Ms Laura Ashley Olivier informed the court that the US$432,000 being claimed for use of 400 square metres does not include the rentals paid to J&M. She, however, conceded that there is no evidence on how they came up with the US$432,000 apart from stating that the standard charge at the time of hearing of the assessment of damages was US$3 per square metre.

As pointed out earlier on in this ruling, special damages need to be specifically pleaded and strictly prove. One therefore would have expected evidence to the effect that the premises in respect of which the claim is being made is indeed 400 square metres; and evidence to the effect that the standard charge per square metre is indeed US$3. To our dismay the plaintiff has not brought any of these apart from just plucking the figure from the air. Even if we were to go by the

standard charge alleged by the plaintiff's witness of US$3 per square metre we do not think that the rentals can go up to US$432,000 for a period of one and a half years. With the claim pegged at US$432,000 it would mean that the defendant was supposed to pay US$ 24,000 per month as rental which if converted into local currency at the current exchange rate will translate to about Mk17,592,000 per month. This to say the least is very expensive and an exaggeration compared to the premises which the defendant was using. The court had an opportunity to visit the premises when it was shown, among other things, the machinery which were used. And our considered view is that the plaintiff is not justified at all in claiming US$432,000 as rentals for use of its premises more especially taking into account the fact that there was no designated place where the defendant was allocated to for the manufacture of its desk as the Project Accountant rightly put it in his evidence.

Be that as it may, it is trite law that where there is no proof of special damages but nonetheless the claimant is awarded damages he becomes entitled to nominal damages – **Mathew J Msusa and another v Royal and Son Alliance Co plc and another [2009] MLR 337.** Therefore taking into account all the circumstances of the case the court orders the defendant to pay the plaintiff the sum of MK600,000 per month as rental for the use of its premises. At the rate of MK600,000 per month the defendant will be required to pay MK10,800,000 for the period of one and a half years that the defendant used its premises. Since this was the time of the partnership between Mr. Besteiro and Mr. Gunda and further that the partnership has been reopened the MK10,800,000 will have to be paid by both Mr. Gunda and Mr. Besteiro – the Partnership. As such each partner will be required to pay half the amount. Thus Mr. Besteiro as a partner will pay Mr. Gunda the money he owes him as already decided above less MK5,400,000 (five million four hundred thousand kwacha).

**Drawings and 50-50 sharing by the partners**

As pointed out earlier on in this ruling the Partnership Agreement allowed the partners to make drawings from the partnership account. The agreement further provided that in the event that one's drawings exceed what he would be entitled to as his share he would be required to pay back to the partnership the excess amount before the 50-50 sharing of profits.

According to counsel for the plaintiff the plaintiff made a drawing of US$876,171.11 from the FCDA while the defendant drew US$627,309.45 and MK731,002,529.00 from the local currency account. There is however, no indication in the submission by counsel as to how much the plaintiff drew in cash from the local currency account. This, however, is in sharp contrast with the analysis which was made by the Project Accountant Mr. Ashraf Patel. According to Mr. Patel the dollar analysis showed that Mr. Besteiro drew US$876,171.11 while Mr. Gunda drew US$711,305.54. Mr. Patel was also quick to point out that there was US$270,000 in the FCDA which was not part of the project. This underscores the fact that the account the partnership used indeed belonged to Mr. Gunda where payments from his other business were also paid into. Thus whatever Mr. Gunda drew from the FCDA should be reduced by US$270,000 which was not part of the project.

It is unfortunate that in their analysis of the FCDA counsel for the plaintiff and Laura Ashley Olivier did not take into account this fact. As if that was not enough, they did not take into account the fact that the Kwacha Account was used as a 'conduit' for the FCDA as has been well explained in the Bank Accounts Analysis by the defendant in Appendix 2. Thus, if counsel for the plaintiff and Laura Ashley Olivier had critically analysed the bank statement they would not have gone to town with the so many 'transfers to local' without a clear understanding of how the money that was 'transferred to local' was used for. This will be dealt with in the ruling later.

A closer analysis of the FCDA indeed shows that there were five debit transactions which totalled US$876,711.11 that was transferred to LASEC Account through the account of Hals. This amount of money was used by Mr. Besteiro and LASEC for their own benefit. This is in contrast with the sum of US$711,305.54(minus US$270,000) allegedly withdrawn by Mr. Gunda from the FCDA because a critical analysis of the bank statement shows that most of the money that was transferred to the Local currency account was used for overdraft clearances, cash security for guarantee, forex related transactions and normal business transactions. The loans and overdrafts were used for normal business transactions as depicted in the Malawi Kwacha Account analysis soon after the dollar analysis in Appendix 2. These are also reflected in the Bank Statement which was exhibited by the plaintiff. These transactions included payments for operational costs, payments to domestic suppliers through cheques cashed on the counter amounting to MK366,263,862.54, ordinary and bankers

cheques amounting to MK510,292,361.39, bank transfers and guarantees amounting to MK359,380,950.00 and payment to foreign suppliers amounting to MK82,441,937.39.

The other debit transactions in the Malawi Kwacha Account included Vehicle and Asset Finance facility repayments and loan repayments – in phase 2 while Mr. Besteiro was still a signatory – that totalled MK474,938,624.57, while the others included bank charges, overdrafts interest and taxes(VAT) and withholding tax. Thus it should be noted and emphasised that most of the funds in the US$ Account were transferred to the Malawi Kwacha Account to facilitate utilisation. The Malawi Kwacha Account was in fact being used as a 'conduit' for the US$ Account and this is normal where a business has a Foreign Currency Denominated Account. For instance looking at Appendix 2 on the US$ Account utilisation it is clearly shown that US$876,171.77 was transferred to LASEC Account for the benefit of Mr. Besteiro and LASEC against US$486,749.00 which was transferred to the Local Account for purposes of loan and overdraft repayment by Mr. Gunda. Therefore it would be wrong to simply conclude that all the money which was transferred to the Kwacha Account was used by Mr. Gunda for his personal benefit as the plaintiff would want the court to believe.

If Mr. Besteiro was familiar with, and was involved in, the day to day management of the Partnership and had an opportunity to critically go through and analyse the bank statement exhibited by the plaintiff herein he would have appreciated that the Partnership could at times – with the consent of the bank – overdraw on its account and the said money was recovered with interest either from the FCDA (transfer to local) or payments (inflow of cash) made into the account by clients or from other sources as the analysis and the Bank statement clearly show. That in our view explains the overdraft and loan repayments in the analysis contained in Appendix 2 which the plaintiff did not take into account when listing down the withdrawals allegedly made by Mr. Gunda.

As pointed out earlier on by counsel for the plaintiff the partnership went through three phases, namely when Mr. Gunda was the sole partner, when Mr. Besteiro was added as a partner and lastly the phase after Mr. Besteiro was removed as a partner. And according to the evidence of the Project accountant Mr. Ashraf Patel during the hearing of the assessment all the cash cheque withdrawals made during phase 2 when Mr. Besteiro was a partner should be considered that the partners know what the money was meant or used for.

Unfortunately counsel for the plaintiff has just listed down the so many cheque withdrawals made from the time Mr. Besteiro was added as a partner up to December 2013 when the project was wound up without indicating which withdrawals and how much was involved during the phase Mr. Besteiro was a partner. Again the list of the withdrawals has not taken into account the fact that even after Mr. Besteiro was removed as a partner Mr. Gunda [together with Hals] continued to pay some suppliers who were owed money even during the phase Mr. Besteiro was a partner. And as has been noted from the totality of the evidence this obligation of paying suppliers continued up to December, 2013 when the projects came to an end.

Again the Project Accountant Mr. Ashraf Patel did indicate in his evidence that there were times when one-of suppliers were paid through cash cheques. Therefore, in our considered view, it cannot be said that all the cash cheques cashed from the time Mr. Besteiro was added as a partner in April 2010 to December 2013 were used by Mr. Gunda for his personal benefit as pointed out earlier on. In this vein, therefore, we find the list of the withdrawals provided by the plaintiff to be wanting and misleading to say the least.

Clause 2 of the Consent Order specifically stated that:

*'..... for purposes of the assessment, the defendant shall have access to the Standard Bank cheque books on the Project that the plaintiff may be keeping and the Project files being kept by the plaintiff. (emphasis supplied). At the same time the plaintiff shall have access to all bank statements from the bank account operated by the defendant trading as Halls General Dealers or Hals Protective Clothing and General Dealers during the course the Project and Project documents and file kept by the defendant...'*

However to the court's dismay the plaintiff did not produce any of the documents as stated in the Consent Order. Our considered view is that if these had been produced they could have in one way or the other assisted in establishing as to whom some of the payments were made during the phase Mr. Besteiro was a partner and even after his removal from the partnership. But the plaintiff and Mr. Besteiro in their wisdom chose not to comply with the very same order that they willingly signed [which could have enabled the court in arriving at a just decision]. The defendant on their part complied with the court order by obtaining the bank statement from Standard Bank and served the same on the plaintiff.

It must be borne in mind that assessment of damages is conducted just like a trial and that the principle still remains that he who alleges must prove. Thus, in our considered view, it was not enough for counsel for the plaintiff, using the bank statement obtained by the defendant and served on them, to simply list down the withdrawals as they did in Appendix 2 without any indication as to how the money was used as expounded above. As noted from the evidence of both the Project Accountant and Mr. Gunda business continued even after the removal of Mr. Besteiro as a partner. There was a list of suppliers who were supposed to be paid and wages which were carried on until the end of the contracts. In addition, according to Mr. Gunda, Mr. Besteiro continued to make drawings even after he was removed as a partner, most of which he had no evidence for, since the money was given to him on trust without envisaging any possible legal suit in future. Therefore, in our considered view it is not enough to simply list down the withdrawals without apportioning any to Mr. Besteiro and the plaintiff which they got in cash.

What is clear from the above explanation and the analysis of both the FCDA and the Malawi Kwacha Accounts is that the US$876,171.77 withdrawn from the Hals account and transferred to LASEC Account was used for the benefit of Mr. Besteiro and LASEC other than Hals' business. This is in contrast with US$711,305.54 [minus US$270,000] allegedly withdrawn by Mr. Gunda because a substantial part of this amount was used for various business related transactions as explained above. And if we consider the evidence of the project Accountant that there was US$270,000 in FCDA Account which was not part of the project then it is obvious that Mr. Besteiro got a lion's share of the proceeds of the projects. Perhaps that could be the more reason Mr. Besteiro [and the plaintiff] did not even bother to ask for the analysis and reconciliation of the Malawi Kwacha Account after the Dollar Account analysis. Therefore, it is our ruling in this matter that in the absence of any clear evidence on how much Mr. Besteiro got from the partnership in cash from the time he was added as a partner to the time the projects wound up, there is no basis for the Court to order a 50-50 sharing of profits. Had Mr. Besteiro made himself available and opted to give evidence during the hearing of the assessment of damages he would have shade more light on all these, but he chose to stay away for reasons best known to himself. This court, therefore, cannot fill in the gaps left by the plaintiff and Mr. Besteiro in proving their case.

**Costs**

Costs are in the discretion of the court. Having handled the matter during the assessment of damages and indeed due regard being had to all the circumstances of the case, our considered view is that had sanity prevailed between the partners in the way they ran their partnership in terms of keeping records of all transactions from the inception of the partnership, there would be no need for any of them to come to court to seek redress. Thus our order is that each party shall bear its own costs.

Delivered in chambers the 2nd day of November, 2017.

L. Mtchera
Assistant Registrar.