

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 426 OF 2014

BETWEEN

BLANTYRE BAPTIST HOLDINGS LIMITED..... PLAINTIFF

-and-

HYDRO PARTNER MALAWI LIMITED..... DEFENDANT

CORAM: THE HON. JUSTICE D.T.K. MADISE

Mr. Banda/Mr. Chipofya Counsel for the Plaintiff

Mr. Mumba Counsel for the Defendant

Miss. E. Chimang'anga Official Interpreter

Madise J,

JUDGMENT

1.0 Introduction

1.1 The Plaintiff in this matter commenced these proceedings by way of a writ of summons on 29 October 2014 claiming the sum of K3, 085.000.00 being money the Defendant received for the construction of a borehole. The Plaintiff further claims interest on the said sum plus damages. The Defendant has disputed the claim in their defence.

2.0 The Facts

2.1 The Plaintiff summoned Blessings Tembo, the Financial Accountant at Blantyre Baptist Holdings Ltd. He told the Court that the Plaintiff entered into an agreement with the Defendant, Hydro Partner Malawi Limited on 26 June 2014. The contract was for the drilling of a borehole at a depth of 45 meters or more until water is found at a consideration of K3, 085.000.00 (BT 1).

2.2 According to the agreement the Defendant was supposed to write a report at completion of the work. The Plaintiff then paid 50% of the contract sum and work commenced. The Defendant then orally informed the Plaintiff that the work had been completed and that water was coming out. No report was prepared. The Plaintiff then paid another 45% to the Defendant which the Defendant partly used to purchase another pump as the original pump had developed a fault.

2.3 The Plaintiff stated that after a new pump was installed water only came out for a day and then stopped. The Defendant was informed and they promised to fix the problem. According to the Plaintiff's guard at the site, the Defendant visited the borehole for three times but no water came out. When the Plaintiff attempted to meet with the Defendant's official the former never cooperated.

2.4 Upon further investigations, the Plaintiff discovered that the Defendant had subcontracted Easy Borehole to drill the borehole and at 45 meters they did not find sufficient water to run the borehole. When they requested for more money from the Defendant to dig further their request was turned down.

2.5 The Plaintiff also sought an opinion from Bluzone who produced a report which classified the borehole as a dry well whose depth was 41 meters. Unfortunately the author of the report from Bluzone did not come to Court to explain his findings.

2.6 In defence Mr. Chimango Mandowa, Managing Partner of Hydro Partner Malawi Limited admitted that his company had indeed entered into an agreement with the Plaintiff to sink a borehole at Blantyre Baptist School. However he alleged that the Plaintiff had rejected the drilling spot the Defendant had suggested. The Plaintiff insisted that another drilling spot be identified. According to the Defendant the new drilling spot the Plaintiff had suggested was not suitable for the large equipment which the Defendant normally uses.

2.7 They then decided to subcontract Easy Borehole to do the work for them. Easy Borehole then drilled to a depth of 50 meters and installed a submersible pump and plumbing works. After the work was completed water started coming out. He stated that when the Plaintiff complained about the borehole the Defendant went and fixed the pump. Since then they have not received any complaint from the Plaintiff.

3.0 The issues

There are three issues for determination before me.

- 1) Whether the Defendant failed the Plaintiff by subcontracting the work.
- 2) Whether the Defendant and or their agent breached the contract when they sank a well which did not produce water.
- 3) Whether damages and or costs are payable.

4.0 The Law

4.1 The Plaintiff bears the burden to prove his case on a balance of probabilities. He who alleges must prove. Where the scales of justice are evenly balanced it means the Plaintiff has failed to prove his case. Whichever story is more probable must carry the day. This is settled law in this Republic and I need not go any further.

4.2 What is a Contract?

4.2.1 A Contract is an agreement between two or more parties which is enforceable at law. A Contract comes into being once an offer has been accepted. There must be an acceptance to perform or not to perform a certain act. The cardinal principle is that the agreement must be followed up with a consideration. Once this is done the agreement becomes binding and it is enforceable at law.

5.0 The Finding

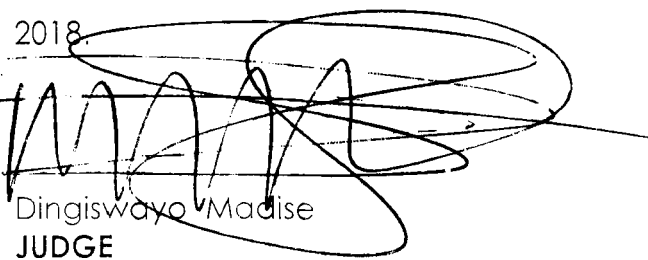
5.1 There is no dispute that the parties entered into an agreement for the Defendant to sink a borehole for the Plaintiff. The whole purpose of the agreement was for the Plaintiff to have water in that well. After the work was completed the water only came out for a day and the well stopped producing water. The Defendant was paid for to drill a borehole that was going to produce water and nothing more. It was not enough just to drill a borehole.

5.2 It is not in dispute that the Defendant subcontracted the work to another drilling company. This was not in the contract the parties signed. Secondly the Defendant did not bother to tell the Plaintiff that the work was being subcontracted. This was a serious breach of the contract. The Defendant told the Court that they had verbally informed the Plaintiff. If the original contract was reduced in writing, this amendment could have been in writing as well.

5.3 The Defendant must take blame for the poor work that Easy Borehole did. Whether Easy Borehole sank the well to a depth of 45 meters or more is neither here nor there. They were not supposed to be on site in the first place. It will never be known at what depth Easy Borehole dug the borehole. All we know is that whatever they had done on the site did not produce water. The whole purpose of digging the borehole was for the Plaintiff to have water and not a dry well.

5.4 The Defendant is therefore found liable for subcontracting the work without informing the Plaintiff. What they did was not in the agreement. They must refund back the money plus interest. I further award them damages for this breach which will be assessed by the Registrar within 21 days. I further award the Plaintiff costs of this action.

Pronounced in Open Court at Blantyre in the Republic on.....19..... February
2018.



Dingiswayo Madise
JUDGE