JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 261 OF 2012

BETWEEN:

PERFECTO PEST CONTROL (PPVT) LTD ……..……. CLAIMANT

-AND-

MALAWI LEAF COMPANY LIMITED ……..……..….. DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mumba, Counsel for the Claimant
Mr. Dzonzi, Counsel for the Defendant
Mrs. Doreen Nkangala, Court Clerk

RULING

Kenyatta Nyirenda, J.

Introduction

This is the Claimant's action against the Defendants for the sum of K7, 347,061.03, compound interest thereon, indemnification of collection costs and costs of the action. The action is in respect of fumigation services that the Claimant rendered to the Defendant.

The action is strenuously contested by the Defendant on two main grounds, namely, inflation of prices by the Claimant and infestation of the tobacco with beetles resulting in re-fumigation of the tobacco in Germany.

Pleadings

The case of the Claimant, as set out in the Amended Statement of Claim dated 7th November 2016, is as follows:

"1. The plaintiff is a Malawian company doing the business of fumigation while the defendant is also a Malawian Company engaged in the buying, processing and exporting of locally grown tobacco.

2. Sometimes in mid 2010, the parties enter into a contract whereby the plaintiff agreed to fumigate tobacco for the defendant for the years 2008, 2009 and 2010 that was ready for export pursuant to the tender that was duly advertised by the defendant in the local press.

3. The plaintiff noted that the defendant had left out from the list of activities to be performed by the plaintiff some crucial items and after a discussion the parties agreed that some items of activities be added to the list that had been provided by the defendant.

4. The plaintiff states that the parties also agreed on new prices for the works that were to be performed by the plaintiff including the prices for the items that had been added to the list of activities that was provided by the defendant.

5. The plaintiff states that it duly rendered the fumigation services including the new items that had been added by agreement and raised invoices using the newly agreed prices but the defendant paid the plaintiff on the basis of the tender prices thereby leaving a balance on the invoice value.

6. The plaintiff repeats the paragraph 5 hereof and avers that the defendant is in breach of the contract and the plaintiff suffered loss and damage.

Particulars of loss

The sum of K2, 915, 165.213.00

7. The plaintiff pleads that the defendant also wrongfully deducted from the payment due to the plaintiff the sum of MK4, 431, 895.82 allegedly on account of re-fumigation expenses that were incurred by a customer in Germany who had bought tobacco from the defendant after the tobacco was infested by beetles.

8. The plaintiff stated that the tobacco was allegedly infested by the beetles was not fumigated by the plaintiff and it will at trial adduce evidence that the defendant deceitfully used fumigation labels from the plaintiff on cartons which were not fumigated but which formed part of the export consignment.

9. The plaintiff states that through its managing director challenged the defendant to travel to Germany at the plaintiff's expenses to verify the allegations that the tobacco that was fumigated by the plaintiff was infested by the beetles but the defendant refused.

10. The plaintiff repeats paragraphs 6, 7 and 8 hereof and states that the plaintiff has suffered loss and damage.

Particulars of loss

*The sum of **MK4, 431, 895.82***

*11. The plaintiff avers that the transaction between the plaintiff and the defendant was a commercial arrangement and the defendant has wrongfully withheld from the plaintiff the sums specified herein and pleads that the plaintiff is entitled to be awarded **compound** interest at 1% above NBS Bank Limited base lending rate from the dues to the date of actual payment.*

12. The plaintiff states that as a result of the defendant's wrongful withholding of the plaintiff's money the plaintiff has a loss in form of collection charges and the plaintiff seeks an indemnity of 15% of the principal sum plus the interest representing the collection costs payable to the plaintiff's lawyers.

***WHEREFORE** the plaintiff claims*

a)** The total sum of **MK7, 347, 061.03
b) Interest as pleaded herein
c) Indemnification of collection costs
d) Costs of this action."

Save for admitting that it entered into contract with the Claimant as stated under paragraph 2 of the Statement of Claim., the Defendants denies each and every allegation of fact contained in the Statement of Claim,. The relevant part of the Defence states:

"3. The defendant avers that the matter herein is commercial in nature as admitted by the plaintiff under paragraph 10 of the statement of claim and should have been commenced in the Commercial Division of the High Court. The defendant therefore challenges the jurisdiction of the General Division of the High Court on this matter.

4. The defendant denies the averment made under paragraph 3 of the statement of claim and state that it sought fumigation of tobacco services from the plaintiff. The list of activities the defendant provided on its advert was a mere guidance to those interested in offering the services to appreciate the scope of work. It was not exhaustive.

5. Paragraph 4 hereof refers. The defendant further avers that there was initially no dispute on the consideration for the services. The dispute arose when the plaintiff unilaterally raised prices for other services. The defendant duly denied to honour the prices to the extent of the adjustments. However, the defendant honoured the plaintiff's invoices to the extent of the agreed prices in full.

6. *Therefore, the plaintiff did not suffer any loss as claimed under paragraph 5 of the statement of claim.*

7. *The defendant refers to paragraphs 6, 7, 8, 9 and 10 of the statement of claim and avers that all the tobacco that arrived in German while re-infested at destination was fumigated by the plaintiff. The defendant immediately informed the plaintiff about the re-infestations by forwarding the email the defendant got from the customer. The plaintiff acknowledged the correspondence and sought a meeting with management of the defendant.*

8. *The defendant avers that the tobacco was re-fumigated on arrival at destination in German and the defendant's customer deducted the cost of re-fumigation from the defendant's proceedings. The defendant only passed on the cost to the plaintiff by deducting the same from money payable to the plaintiff.*

9. *Paragraph 8 hereto refers. Therefore the plaintiff did not suffer any loss and damage as claimed under paragraph 9 of the statement of claim.*

10. *The defendant avers that even if the plaintiff would have suffered loss there would be no basis for the plaintiff to claim interest of as claimed under paragraph 10 of the statement of claim and indemnification of collection costs as claimed under paragraph 11 of the statement of claim. Awarding of interest is discretion of the court and collection costs are not claimable once a writ of summons has been issued.*

11. *The defendant avers that this action has no merit and should therefore be dismissed with costs."*

Burden and Standard of Proof

The evidentiary rule applicable in civil matters is that the person who asserts must prove the claims and not the person who denies. The effect of this rule is that the obligation of satisfying the court on an issue rests upon the party who asserts the affirmative of the issue. The standard of proof is a preponderance of probability. This means that a claimant must prove a fact by showing that something is more likely so than not: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, **Robins v. National Trust Co. [1927] AC 515** and **Constantine Line v. Imperial Smelting Corporation [1943] AC 154.**

The party on whom lies a burden must adduce evidence of the disputed facts or fail in his or her contention. It, therefore, follows that in the present case the burden of proof is on the Claimant as the party who has asserted the affirmative to prove on a balance of probabilities that the Defendant wrongfully refused to pay the sum of K7, 347, 061.03, the compound interest thereon and, on indemnity basis, collection costs.

Evidence

The evidence consisted of witness statements, oral testimonies and exhibits. The witnesses were cross-examined and re-examined.

Mr. Gerald Walter Kanyemba (CW) testified for the Claimant. He adopted his witness statement and supplementary witness statement that he had filed with the court and served on the defendant. He was cross examined and re-examined.

CW's witness statement is couched in the following terms:

> *"1. My name is Gerald Walter Kanyemba. I am currently the Managing Director for Perfecto Pest Control (Pvt) Limited. The company is in the fumigation business. The head office for the company is in Blantyre and there is a branch office in Lilongwe. Over the years the company has rendered fumigation services to several companies including for commodities for exports such as tobacco.*
>
> *2. I remember that it was on 26 May 2010 that the defendant advertised in the Daily Times of that date under voucher number 39 that they wanted a fumigator to fumigate their tobacco for export. The advert required the fumigator to carry out a) stack fumigation; b) containerizing fumigation; c) mass fumigation, as and when was required; and d) sample room fumigation also as and when was required. Copy of the advert is attached hereto marked and exhibited as **"GWK1"**.*
>
> *3. I remember that we tendered to render the fumigation services as per the advert and on 24 June 2010, I received a phone call from Mr Kambilinya, the Chairman of the tendering committee advising that Perfecto Pest Control (Pvt) Limited was the successful bidder. Mr Kambilinya also requested me to confirm if we could use a dollar conversion fixed rate of MK150.80. I told him that I would comment after receiving the official letter on the matter. Copy of the tender document is attached hereto marked and exhibited as **"GWK2"**.*
>
> *4. On 28 June 2010 our Lilongwe office received the letter from the defendant. The letter is dated 24 June 2010. This letter advised that Perfecto Pest Control (Pvt) Ltd was the successful bidder. The letter also put the prices of the services in US Dollars and erroneously stated that we had agreed that the same be pegged at a fixed rate of MK150.80/dollar. Copy of the letter of 24 June 2010 from the defendant is attached hereto marked and exhibited as **"GWK3"**.*
>
> *5. On 2 July 2010, I duly wrote to the defendant confirming the telephone conversation I had with Mr Kambilinya and receipt of the letter advising that Perfecto Pest Control Limited was the successful bidder. I also restated the prices in Malawi Kwacha and advised that the prices were subject to change in case of devaluation during the contract period. This was due to the fact that we were importing the chemicals for the fumigation and the import price was in US*

*Dollars. Copy of the letter of 2 July 2010 aforesaid is attached hereto marked and exhibited as **"GWK4"**.*

6. *I remember that I made a phone call to Mr Kambilinya. I advised him that the advert had left several other services that go with fumigation. The advert should have included a) spraying of the entire warehouse (four walls and floor area), b) stack fumigation plus pass per minute (ppm) gas readings taken daily, c) monitoring temperature and humidity levels daily of the produce as well as the warehouse itself; d) general spray of the warehouse before aeration; e) inspection of the containers and both parties satisfied before load; f) spraying containers with deltamethrin; g) meshing of the containers in order to avoid reentry of beetles in transit; h) placement of beetle traps prior to shipment; and i) provision of fumigation certificate that bears full details of the product successfully fumigated. This is in accordance with Phillip Morris' Fumigation Standard Operating Procedure. These services also attract a charge. Copy of Phillip Moris' Fumigation Standard Operating Procedure manual is attached hereto marked and exhibited as **"GWK5"**.*

7. *I should mention here that the certificate contains the following information: a) commencement dates of aeration and completion; b) disclosure of fumigant name and dosage rate; c) volume fumigated at that particular time; d) total hours tobacco is under gas; e) air space phosphine concentration (ppm); f) ambient temperature (celcius) degrees. Copies of some of the certificates that were issued are attached hereto marked and exhibited as **"GWK6"** and **"GWK7"** respectively.*

8. *I know that after the telephone conversation I had with Mr Kambilinya, I duly wrote him a letter at his request. The said letter contained what I have stated above. Copy of the letter is attached hereto marked and exhibited as **"GWK8"**.*

9. *I know that after being successful and after agreeing on preliminary observations, the defendant was under an obligation to reduce all the terms into a contract document. In fact the letter from the defendant dated 24 June 2010 stated that "I am therefore writing to request your office to confirm the discussion in writing so that we go ahead with drawing a contract for services". See document attached hereto marked and exhibited as **"GWK3"**.*

10. *I want to state here that I did not get any contract from the defendant. All that I was told was that there lawyer was preparing the document. I remember that on numerous occasions I requested the defendant to provide me with the said contract. I know that at a certain time I went to the defendant and I was given my letter of 2 July 2010 with a notation "legal officer, lets process a contract for the supply of these services" with a signature and "HR & Adm Mger, 23/07/2010". Copy of this document is attached hereto and is marked as **"GWK9"**.*

11. *Meanwhile, the defendant went to my Lilongwe offices and got my staff that started fumigating the defendant's tobacco. This was before the contract document was finalized. This was wrong. I know that in all transactions of this*

nature there is always a contract document which acts as a guiding document for the obligations of the respective parties. In fact in all the engagements I have been engaged in, I have always signed contract documents. I attach hereto two contract documents I signed with Limbe Leaf Tobacco Company Limited and Kanengo Tobacco Processors Limited just as examples and are marked and exhibited hereto as ***"GWK10"*** *and* ***"GWK11"*** *respectively.*

12. *On 10 August 2010, I drove to the defendant's place where I was told that the contract document was ready. I was requested to go there in September. I went there on 2 September 2010 but I got the same news. On 6 September 2010 I went to see the General Manager, Mr Jimmy Kasamale, to advise him of the intention to withdraw our services because of non-provision of the contract document as was agreed. The General Manager called for an emergency meeting which was attended by three people namely Mr Kasamale, the defendant's accountant and myself.*

13. *I remember that I told the meeting that in the absence of a contract agreement there were two options. First that the rates for rendering the services be revised upwards and second that we should withdraw our fumigation teams on sites and to be paid for the services already rendered. At that point, Mr Kasamale told the meeting that he needed to call the Chairman of the Tendering Committee. He made the call in my presence and I could hear him talk to Mr Kambilinya.*

14. *I remember that after the call, Mr Kasamale, told the meeting that the defendant would go for the first option. He requested me to provide the revised and standard rates by 2pm of that day. I went to the Lilongwe Perfecto Pest Control Ltd offices where I prepared a letter which contained the revised rates for rendering the services. I should state also that the other aspects of fumigation were included. Copy of the letter is attached hereto marked and exhibited as* ***"GWK12"****.*

15. *There was no problem with the revised rates and we continued to render the services. I know that we sent a number of invoices for the work that we did for the defendant. However, I was surprised that there were deductions when making payments on account of the differences in prices. Accordingly, I wrote a letter to the defendant on 3 August 2011 complaining about the said deductions. Copy of the letter of 3 August 2011 is attached hereto marked and exhibited as "****GWK13****".*

16. *I remember that on a number of occasions the issue of wrongful deductions cropped up during meetings between the plaintiff and the defendant and I wrote my final letters on the issue to defendant on 17 January 2012 and 1 March 2012. The defendant replied to the issues raised in their letter of 22 May 2012. Copy of the said letter is attached hereto marked and exhibited as* ***"GWK14"****. To the said letter the defendant attached a summary of the deductions and the same total MK1, 848, 519. 95. Copy of the attachment is also attached hereto marked and exhibited as "****GWK15****".*

*17. As I have already stated, the defendant was aware of the said revised prices. In a later communication from the defendant to the plaintiff, Mr Edward Juma sent an email to the plaintiff and in it he quoted the revised prices clearly indicating knowledge of the same. The said email is attached hereto marked and exhibited as **"GWK16**". It is therefore clear in these circumstances that the deductions were wrongly done and in breach of the contract between the plaintiff and the defendant.*

*18. I know that the defendant made a further deduction of the sum of MK4, 431,895.82 from the payment that was due to the plaintiff. This sum is also captured on **GWK15.** The defendant explained that this was due to the fact that the tobacco was found with beetles while in Germany and this was the cost of re-fumigation. I know that this is not correct because there is no way that the tobacco that was fumigated by my company could contain beetles. I even challenged the defendant that I was ready to go to Germany at my cost to inspect the tobacco and see for myself that beetles were in the tobacco. But the defendant refused to do this.*

*19. Further, I know that there was no formal contract between the plaintiff and the defendant. These things could have been clearly spelt out in the terms of the contract. In the absence of the contract and provisions on this aspect, it was wrong for the defendant to deduct the said sum of MK4, 431,895.82 from my payment. I also later learnt that when packing the tobacco, the defendant was mixing fumigated and unfumigated tobacco. I got this from Mr Harold George Mapemba who was an employee of the defendant. Mr Mapemba gave me a statement and he was ready to testify before this court but unfortunately he died. His statement was served before the defendant before he died and is attached hereto marked and exhibited as "**GWK17**".*

20. I know that the deductions that were made from my invoices have caused me untold miseries. In reliance on the contract I had with the defendant, I obtained a loan and an overdraft from the NBS Bank Limited. I put up my house as security. I used the money to purchase the chemicals for the fumigation that I did for the defendant. Due to the deductions, I was unable to repay the loans and my house was up for foreclosure by the bank. I have been struggling to repay this loan up to now.

21. I also know that it has taken time for the defendant to refund me this money. If I had the money I could have invested the same and I could have made some profit out of the investment. I would therefore pray for interest from the defendant. I have also spent money to pay my lawyers in bringing this action to collect the monies from the defendant. I would like the defendant to indemnify me for the same.

22. All in all I pray to this court that justice be done in this matter. I have suffered quite a lot at the hands of the defendant. My business has suffered. I could not even pay the rentals for my Lilongwe offices at the time when I was expecting

monies from the defendant. The result was that my office was locked by my landlord and I stopped doing the business. My prayer is that the court should help me."

CW's supplementary witness statement reads as follows:

"1. I make this statement in addition to the witness statement that I already lodged with the Court. This statement is supplementary to the first one.

*2. I have looked at paragraphs 12-14 of my witness statement and I have noted that the exhibit **GWK 12** is not the correct exhibit. The correct exhibit is the one attached hereto marked and exhibited as "**GWK 18".***

3. I also want to state that exhibit GWK 12 is to the effect that I told the defendant that we would not stick to fixed dollar rates as communicated to us because of the fluctuations that were being experienced. We needed to be real in the way we transacted. In that letter I also outlined the aspects that were not covered by the advert. The exhibit should therefore remain as part of my documents as if it was attached to this statement.

*4. I also remember that on 18 May 2011, my accountant prepared invoice No. LL 0054 for the services that were rendered between the months of April 2011 and May 2011. However the invoice was based on the old rates. Copy of the invoice No. LL 0054 is attached hereto marked as **"GWK19".***

*5. I remember that when I went to deliver the said invoice I met with the Accountant for the defendant, a Mr Ibrahim. He pointed out to me that the rates were the old ones and requested me to bring another invoice. We agreed that the invoice number should be the same. I duly went back to my office and prepared a new invoice No. LL 0054 and submitted to the defendant's accountant. Copy of the new invoice is attached hereto marked as **"GWK20"**.*

*6. It is clear from these invoices that the one containing the original rates is for the sum of MK12, 924, 038.83 while the new invoice was for the sum of MK13, 990, 684.09. There is a difference of MK1, 066, 645.26. I have summarized these invoices on a document that I have attached hereto and marked it as **"GWK21"**.*

*7. I was surprised that the defendant paid on the basis of the old invoice and not the new invoice. This meant a loss of the said sum of MK1, 066, 645.26. This was surprising to me because it was the same defendant's accountant who cancelled the old invoice with old rates and asked for the new invoice with new rates. Copy of the payment voucher is attached hereto marked and exhibited as **"GWK22"**.*

8. I want to claim the difference of MK1, 066, 645.26."

In cross-examination, CW told the Court that paragraphs 6, 7, 8, 9 and 10 of the Statement of Claim summarise the claims by the Claimant. CW stated that the Claimant was unpaid because the Defendant used old rates and not the new agreed rates.

CW was referred to the last paragraph of Exhibit P3 ("*I also refer to the telephone conversation between the Managing Director of Perfecto Pest Control – Mr G Kanyemba and the undersigned where it was agreed that the prices of the services will be calculated using the exchange rate as at the date of the award of the tender which is K150,80002 per dollar (fixed)*") and asked the following questions:

Q: What currency was used?

A: United States Dollars

Q: What was the agreed exchange rate?

A: K150.8002

Q: What did you understand by that?

A: That the rate would not change

Q: The rate was fixed

A: Yes the rate was fixed. Whatever the case might be, our quotation would not change.

CW further admitted that as of 2nd July 2010, the Claimant undertook to render the services at the rates indicated in the bid documents. He further conceded that by the time he started rendering services, the Claimant's counter-offer to charge fluctuating rates for the quoted services had not been accepted by the Defendant. However, CW1 insisted that the Claimant was entitled to increase the rates since the Kwacha was devalued five times during the subsistence of the contract. When asked to produce the evidence proving the said devaluations, PW1 failed to adduce any evidence to substantiate these allegations:

Q: According to Exhibit P.2, the condition in the NB is change due to devaluation?

A: Yes, it is the only condition

Q: Do you remember the contract period?

A: No, I was not told

Q: Are you serious about that answer?

A: Yes

Q: Look at Exhibit 13, second paragraph. The contract ended on 21st July 2011?

A: I did not know about this. I was in the dark. I just followed what they were telling me

Q: Do you know that Malawi experienced fuel shortage at this time?

A: I do not know that

Q: Do you know that the Kwacha was devalued?

A: Yes, it was devalued more than five times

Q: Will you be able to show that between July 2010 and June 2011, there was devaluation?

A: There was devaluation

Q: Where is the evidence?

A: I do not have it with me here

Q: Did you put your issue about devaluation in writing?

A: No! but I discussed with the accountant

Q: Do you remember when you experienced the first devaluation

A: I cannot remember.

On the purpose for fumigating tobacco, CW told the Court that tobacco is fumigated so as to prevent any attack from pests and that the main pest is tobacco beetle. Thereafter, he explained the procedure followed in tobacco fumigation. In so far as is relevant to the issues in this case, he told the Court that when the tobacco was to be shipped, the fumigator and the client jointly check the container to be used for export, the fumigator then sprays the container with chemicals; any openings are scaled and treated; the container is meshed to prevent beetles during transit; thereafter the fumigator instructs the loading of the tobacco; then beetle traps are fitted in the container; and finally, the container is sealed shut.

On the issue of the tobacco getting re-infested with beetles, CW said that their tobacco was fully fumigated and a certificate was issued and therefore it was impossible for it to get re-infested and that he believed that the Germany-people lied. When further quizzed whether he personally supervised the fumigation, he

told the Court that he did not as he was based in Blantyre. He was shown Certificate No. MLC 138 and he confirmed that the same was issued by the Claimant in relation to the tobacco in question and that the Defendant was billed for the same. Certificates MLC 135 and MLC 136 were subsequently identified as IDD2 and IDD3. After being taken through the shipping manifests and all supporting documents showing that the same tobacco which the Claimant had fumigated and whose loading it had supervised, was the same tobacco that arrived in Antwerp, Germany but was found to have been re-infested, he said his theory was that the same had been swapped somewhere:

Q: Look at page 104 of the Defendant' Trial Bundle where there is the Infestation Control Report. Can you confirm that the container numbers are the ones which are part of your invoice as contained in your letter of 24th February 2011?

A: They correspond

Q: How many containers are said to have been found with infestation?

A: Five containers

Q: Total number of containers is 7

A: Yes

Q: You said you were not involved in the shipping process, I will thus refresh your memory. Do you know a road manifest?

A: I am not aware

Q: The container numbers in Sailing Advice dated 21st March 2011 and the Road Manifest Ref. No. 135/10 match those in your Invoice?

A: Yes but I do not know where I got the information in the invoice

Q: I put it to you that the information came from your people

A: There is a possibility that the container numbers were swapped, I am sure of that

Q: At what stage do you assume the containers were swapped?

A: The answer lies in Exhibit 17 (Witness statement by Harold George Mapemba)

Q: Which paragraph?

A: Paragraph 8 [which reads *"I know that a lot was happening at Malawi Leaf Company Limited. As sampler, I was the one who was getting samples and sending to customers. Sometimes my boss Mr Kasamale would instruct me to remove documents on samples and exchange even on grades of the tobacco so that in certain cases, the grades could be mixed up*"]

Q: Your theory is that the tobacco was being mixed up

A: Yes, the containers must have been swapped

Q: If the containers were swapped, it would change the numbers?

A: Yes

Q: Do you know that each container has its own unique number?

A: What I know is that the containers were swapped

Q: The containers left Malawi, went to South Africa and arrived in Germany. At what point were the containers swapped?

A: They were swapped in Lilongwe

Q: Then how come the container numbers did not change

A: They had a system of doing it

In re-examination, CW re-stated the basis of the claims by the Claimant, that is non-payment of K2,915,165.21 on various invoices and wrongful deduction of K4,431,895.82 from money due to the Claimant.

CW also explained the difference between the tender rate and the invoice rate.

Q: What is the difference between the two?

A: The tender rate is the old rate and the invoice rate is the new one

Q: How was the new rate arrived at?

A: It came after we had a meeting with the Defendant after I threatened to pull out the fumigation team

Q: Why did you want to do that?

A: Because they rushed to get my fumigation team without my consent

Q: How did they know about your fumigation team

A: Because they came to my office

Q: So what happened?

A: They told me that I should not have the fumigation team withdrawn because of pressure of the German company. I was asked to present the new rates to the Chairman of the Tender Committee. I met him and we inserted the new rates into the contract. As a result, I did not withdraw my fumigation team.

Q: You were asked questions on Exhibit P.16 (E-mail dated 28th July 2011), what is your comment on the rate being mentioned therein?

A: The e-mail came from the Logistics Manager and he confirmed that the new rates are the ones stated in this e-mail.

Counsel Mumba then turned his attention to the issue of exchange rate. CW maintained that quotations were in US$ because all fumigation chemicals were being imported in US$. The import price was always in US$. CW also denied ever agreeing to having the exchange rate fixed at K150.8002 per US$. He referred the Court to Exhibit P12 as an example showing his objection.

Re-examination of CW concluded by focusing on whether or not the parties ever signed a formal contract:

Q: Did you ever sign a contract with the Defendant?

A: No. I did not receive any contract from them

Q: Did you receive a draft contract

A: No, I did not

Q: Look at IK 6 in the Defendant's Trial Bundle, what is it?

A: It is a draft Contract Agreement

Q: Was it given to you?

A: It was never given to me despite the fact that I made several trips to Lilongwe. I saw it for the first time here in Court.

Counsel Mumba closed the Claimant's case. Then Counsel Dzonzi opened the Defendants' case by indicating that the Defendant would place reliance on the testimonies of two witnesses whose witness statements had been filed with the Court, namely Mr. Isaac Edwin Kambilinya and Mr. Jimmy Gray Kasamale. Mr. Kambilinya (DW) testified. The matter was adjourned for Mr. Kasamale to come and testify but he did not turn up.

DW adopted his witness statement on which he was cross-examined and re-examined. His witness statement is reproduced hereunder as follows:

> *"2. I am the Administrative Executive of AHL Group Limited which is the parent/holding company of Malawi Leaf Company Limited, the defendant herein. At the time of the contract which forms the subject of these proceedings, my position used to be known as Human Resources and Administrative Manager.*
>
> *3. In this statement, I am testifying to matters of fact personally known to me and to matters of fact that came to my personal knowledge by virtue of my position as the Human Resources and Administrative Manager for the defendant's parent company and from the business interactions with the plaintiff's managing Director, Mr, Kanyemba, in relation to the present matter.*
>
> *4. Procurements of goods and services for all our subsidiaries including the defendant herein is done centrally at the Head Office of the holding company AHL Group Limited.*
>
> *5. Malawi Leaf Company Limited, the defendant herein, in the 2010 harvest season requested the Head Office to out-source, on its behalf, fumigation services of its tobacco which was meant to be exported to its customers abroad. When we received the request we floated an advert in the local papers inviting various fumigation companies to submit their tenders. Please refer a copy of the advert marked as exhibit* ***"IK1".***

6. *In response to the advert referred to in paragraph 6.4 above several fumigation companies including the plaintiff submitted their tenders. Please refer to a copy of the plaintiff's tender document referred to as exhibit* ***"IK2"****.*

7. *All the tenders were at an appointed day opened by the tender Committee which I was chairing to assess which fumigation company should be engaged. After comparing and considering the various tenders received, the Tender Committee settled for the plaintiff and we presented our report to the Chief Executive who approved our selection of the plaintiff company based on the quality of services and the proposed pricing which the plaintiff had offered. Please refer to a copy of the report marked as exhibit* ***"IK3".***

8. *I then informed the plaintiff's company of its success through its Managing Director Mr Gelard by telephone which was then followed by an acceptance letter which wrote to the plaintiff. Please refer to a copy of the letter marked as exhibit* ***"IK4".***

9. *In the letter referred to in paragraph 6.7 above which was written following the telephone conversation I had with Mr Kanyemba, we accepted the tender from the plaintiff based on the prices that they quoted and which I reproduced from its tender documents and since the same were in United States Dollars, the letter expressly stated that the exchange rate to be used would be the prevailing rate then of K150, 8002 per dollar.*

10. *After I sent the letter referred to in paragraph 6.7 to the plaintiff, I made another telephone conversation with the plaintiff's Managing Director to have a clarification on the price of fumigating a 40 foot container which was quoted at USD 25, 840.00. He said that that amount should be read in kwacha and not in Dollars. I then wrote a letter the following day to the plaintiff's managing Director to confirm what we had discussed. Please refer to a copy of the letter marked as exhibit* ***"IK5".***

11. *I then referred the plaintiff's managing Director to the defendant's General Manager who would then be giving out to the plaintiff specific tasks to be performed as and when required. I also told the plaintiff that a formal contract will be written by the defendant's Legal Officer in due course.*

12. *At some point, the plaintiff's managing Director called me to say that the defendant was delaying in drafting the contract between the parties. I called and asked the defendant's Legal Officer who came and showed me the draft copy of the contract and stated that it was not finalized because he was waiting to receive a schedule of prices from the plaintiff for some ancillary services connected to the fumigation contract please refer to a copy of the draft contract marked as exhibit* ***"IK6".***

13. *Although the delay in completion of the contract document referred to in paragraph 6.11 above was as a result of the plaintiff's delay in furnishing the defendant's Legal Officer with the schedule of prices, the plaintiff then threatened the defendant's General Manager that he will be using standard rates which he*

uses when offering services where there is no contract. The General Manager called me to seek directions and I remember that I told him to tell the plaintiff's Managing Director that that was not acceptable. I further said that the plaintiff could not have the benefit of both worlds, namely, that it should be charging standard rates applicable to ordinary customers while it enjoys the benefit of the contract between the parties.

14. In view of the foregoing I can confirm that the defendant did not at any time agreed to the proposed revision of the prices and that was why the defendant made the deductions which the plaintiff complains about.

15. I therefore pray before this honourable court to dismiss the plaintiff's claims for being frivolous and unsubstantiated."

In cross-examination, DW informed the Court that he was familiar with the case and that there were two claims in question. He told the Court that he dealt with the issue of pricing for services whereas the General Manager of the Defendant dealt with the deduction of the cost of re-fumigation.

DW admitted that the advert of the tender did not specify a particular currency and this lead to the following Q and A:

Q: The bidders, including the Claimant., was entitled to quote in any currency?

A: To certain extent, yes

Q: The Claimant provided his quotation in US$?

A: Yes

Q: Why?

A: It was in US$ by choice

Q: Did he give a reason?

A: No! He did not

Q: Did he give you any explanation at anytime?

A: He explained that they wanted to peg the price in US$ in order to take into account devaluation

DW admitted that the Claimant objected to the exchange rate of 1 US$ to K1150.8002 as evidenced by Exhibit P.12.

The drawing up of a contract was the subject of the following questions by Counsel Mumba:

Q: In IK 4 you mention the drafting of a contract. Was the contract drawn up?

A: It was a draft

Q: Do you have the draft?

A: Yes

Q: Was it you who drew it up?

A: No! It was our lawyer, Mr. Songea

Q: Was it given to the Claimant

A: Mr. Songea said it was

Q: Was it signed

A: No! It was a draft

Q: Appendix 2 to the draft contract refers to Premier Pest Control. Was Premier Pest Control a party to the draft contract?

A: No

Q: It also contains fees and charges

A: Yes

Q: Are those the fees chargable by the Claimant?

A: They slightly differ

Q: These are not the prices quoted by the Claimant

A: No! They are not.

The next set of questions by Counsel Mumba centred on e-mails by Mr. Edward Juma:

Q: Do you know him?

A: Yes, he used to be the Senior Logistics Officer

Q: What did he write? Read it

A: "… charges will be based on your current rate of K250.80/cbm"

Q: Look at Exhibit P17, at page 2. Does it mention that rate?

A: Yes, it does

Q: How did Mr. Juma come to this rate?

A: Management had discussions with the Claimant

A: This means K250.80 was agreed

A: Yes

In re-examination, DW stated that the Claimant did not mention anything in the quotation about price variations or that they would use the US$. DW also clarified that K250.80 was in relation to ancillary services and not bid services. In conclusion, DW denied ever receiving communication from the Claimant regarding Kwacha fluctuation.

This marked the closure of the case for the Defendant.

Issues for Determination

Based on the facts of this case, the parties are agreed that there are five main issues for the determination of the Court, namely, whether or not:

(a) this Court has jurisdiction to hear this matter given considering that it is commercial in nature?

(b) the Defendant wrongfully refused to pay the sum of K2, 915, 165.21 from the Claimant's invoices?

(c) the Defendant wrongfully deducted from the Claimant's payments the

sum of K4, 431,895.82, being the cost of re-fumigation of the tobacco which had been found to have been re-infested by beetles?

(d) the Claimant is entitled to paid compound interest on the sums due from the Defendant?

(e) the Claimant is entitled to recover collection charges from the Defendant by way of indemnification or at all?

The Court shares the view held by the parties that the determination of these five issues would fully dispose of this matter. I will, accordingly, proceed to consider each of the five issues.

Whether or not this Court has jurisdiction to hear and determine this matter considering that it is commercial in nature?

Both parties are agreed that the matter before the Court is commercial in nature. It is the case of the Defendant that this Court does not have jurisdiction to hear and determine commercial matters. It is said that the action is null and void and it must, accordingly, be dismissed. It may not be out of place to quote in extensio the Defendant's arguments on this issue:

> *"As pointed out already, both parties are agreed that this is a commercial matter and as such it should have been commenced in the Commercial Division of the High Court. The Defendant notes further that this case was commenced in late 2012, five years after the establishment of the Commercial Division. It is our strong contention that Counsel for the Claimant was well aware of this fact and his choice of an improper forum must have been perpetuated by other factors but not ignorance. We contend further, that, if Counsel for the Claimant might have been in doubt, then paragraph 3 of the Defendant's Defence was sufficient notice that the Defendant was challenging the jurisdiction of this court. However, for reasons best known the Claimant it chose to either take its chances or ignore the issue altogether.*
>
> *The Defendant wishes to bring to this Court's attention the judgement of the Supreme Court of Appeal of Malawi in the case of* ***Hetherwick Mbale vs. Hissan Maganga, Miscellaneous Civil Appeal No. 21 of 2013*** *(unreported) wherein the court dealt with the consequences of commencing court proceedings in the wrong forum. Delivering the unanimous decision Mbendera JA put it thus at paragraph 58 on pages 19-20:*
>
> > ***"What is the effect of parties having conceded to the Commercial Division assuming jurisdiction? On the case authorities, this factor therefore that acquiescence of the parties in this case to confer or enlarge the jurisdiction of the Commercial Division was misconceived and impotent. This Court will not accede to it or endorse it. Therefore, the Judgment of the lower court is hereby vitiated for want of jurisdiction and is accordingly null and void."***

We also draw the attention of this Court to the decision of the Supreme Court of Malawi in the case of ***Stanbic Bank Limited v Lemson Mwalwanda MSCA Civil Appeal No. 22 of 2007*** *wherein the issue was whether or not the High Court had Jurisdiction to handle employment matters in view of the Industrial Relations Court.* ***Kalaile Ag CJ, Tambala JA and Tembo JA*** *held that as a general rule the original jurisdiction vested in the Industrial Relation Court.*

The facts of this case clearly show that the Claimant was aware of the commercial nature of this matter as admitted in paragraph 11 of the Amended Statement of Claim. Furthermore, in paragraph 3 of the Defendant's Defence the Claimant was put on notice that the Jurisdiction of this court was being challenged. As was quoted will approval in ***Bhima case (supra),*** *we submit that, if, not even the plainest and most express contract or consent of a party to litigation can confer jurisdiction on any person not already vested with it by law of the land, what then is there serve the present proceedings from being dismissed for being commenced before an improper forum. This court has no jurisdiction to hear and determine commercial matters. We submit, therefore, that just like in the* ***Mbale V Maganga Case****, this action is null and void and it must be dismissed. The Claimant, despite being put on notice, opted to maintain these proceedings before the wrong Court and it must be held to its election."*

The Claimant contends that this Court is properly seised of this action and, as such, the Court must proceed to determine the action on its merits. For the sake of parity of treatment, I will also quote the relevant part of the Claimant's Submissions:

"6.2 This action was commenced in 2012. In 2016, Parliament passed the Courts (Amendment) Act, 2016. This Act amended the existing Act that had no provision on the matter. The amendment is contained in section 6A of the parent Act. Section 6A(1) establishes the divisions of the High Court. Section 6A(1)(b) provides for the establishment of the Civil Division "which shall hear civil matters not provided for under any other Division of the High Court."

6.3 The Commercial Division, on the other hand, is established in section 6A(1)(b) and "which shall hear any commercial matter." The phrase "commercial matter" is defined in section 2 as "a civil matter of commercial significance arising out of or connected with any relationship of commercial or business nature whether contractual or not." The definition also contains a list of what is included in that phrase.

*6.4 Section 6A(2) of the Courts Act then contains a very important provision that "****Where a person commences a matter or makes an application in a division other than the appropriate division in accordance with this section, the Registrar shall, on his own volition or on application, immediately transfer the matter to the appropriate division." Further, section 6A(3) states that "The Courts may order that any costs arising from the process under subsection (2) shall be borne by the party who commenced the matter in an inappropriate division****."*

6.5 It is clear that the duty to deal with an action which is commenced in the wrong division rests with the Registrar and/or through an application of the parties. It is noted that in this matter, the Registrar allowed the matter to proceed. Further, it is noted that although the defendant put in a defence, they did not take out an application for the matter to be transferred to the Commercial Division of the High Court. The defence is not in itself an application and indeed there was no application. The Act also looks at the remedy as the transfer of the proceedings to the appropriate Division and not dismissal of the action for want of jurisdiction. It is submitted that where the Registrar has not transferred the action and where the parties have not taken out an application to transfer the action is likely to proceed and be heard and be determined in the wrong Division of the High Court. In this case, the Court cannot simply dismiss the action.

...

*6.9 Further, it is noted that **The Liquidator of Finance Bank Limited (In voluntary liquidation) v Kadri Ejaz Ahmed and Sheith Azizi Bhai Issa** case was decided on 24th November 2009 whilst the **Hetherwick Mbale v Hissan Maganga** case was decided on 1st June 2015. This action was commenced in 2012 when the case of **The Liquidator of Finance Bank Limited (In voluntary liquidation) v Kadri Ejaz Ahmed and Sheith Azizi Bhai Issa** was good law. Based on that case, there was nothing wrong with commencing this action in the general division of the High Court.*

6.10 However, these two cases of the Supreme Court of Appeal brought a lot of uncertainty on the issue. This is why it had to be settled by an Act of Parliament and the Courts (Amendment) Act, 2016 did just that. That was assented to on 1st September 2016. From that point it is applicable to all matters and supersedes the pronouncements in the judgments that were made before the Act.

6.11 It is submitted that in the foregoing circumstances, this action is properly before this court which must determine the issues on the merits."

I have considered the respective submissions and I am inclined to agree with the Claimant that the mere commencement of an action in a wrong division does not render the action null and void. Divisions of the High Court are creatures of section 6A of the Courts Act which is couched in the following terms:

"(1) The High Court shall have the following specialized Divisions-

(a) the Civil Division which shall hear civil matters not provided for under another Division of the High Court;

(b) the Commercial Division which shall hear any commercial matter;

(c) the Criminal Division which shall hear any criminal matter;

> *(d) the Family and Probate Division which shall hear any family or probate matter; and*
>
> *(e) the Revenue Division which shall hear any revenue matter.*
>
> *(2) Where a person commences a matter or makes an application in a division other than the appropriate division in accordance with this section, the registrar shall, on his own volition or on application, immediately transfer the matter to the appropriate division.*
> *(3) The Courts may order that any costs arising from the process under subsection (2) shall be borne by the party who commenced the matter in an inappropriate division."*
> – Emphasis by underlining supplied

Section 6A (2) of the Courts Act makes provision for a matter commenced in an inappropriate division to be transferred to the appropriate division. It is commonplace that a nullity (nullified proceedings) cannot be the subject of a transfer: there would be nothing to transfer. Had it been that Parliament intended that an action commenced in a wrong Division should be rendered null and void, section 6A of the Courts Act would have addressed the matter with clarity and directness.

I am further fortified in my view by the case of **Leonard Dickson Chiutsi v. National Bank of Malawi, HC/PR Land Cause No. 119 of 201**6 **(unreported)** wherein the Court thrashed the idea that the jurisdiction of the High Court, or any division thereof, as provided by the Constitution could be diminished or in any way qualified by means of subsidiary legislation. I find the following passage in the judgement of the said case to be both instructive and illuminating:

> *"Before resting, the Court wishes to observe that the [Courts] Amendment Act goes a long way to address a few questions that have vexed the legal fraternity over the last nine years, that is, whether (a) Divisions of the High Court could be established and (b) the jurisdiction of the (other Divisions of) the High Court could be whittled down by means of subsidiary legislation.*
>
> *It will be recalled that Order 1, r.4 (3) of the Rules purported (the past tense is used advisedly as the Rules are no longer in operation) to confer on the Commercial Division exclusive jurisdiction over commercial matters. To my mind, being part of subsidiary legislation, the Order could not have such legal effect. In this regard, in so far as the Rules sought to limit the jurisdiction of (other Divisions of) the High Court, the Rules were misconceived and were not worth the paper they were written on.*
> *…*
>
> *It is clear from the underlined words that the issue that lay at the heart of **Aziz Case** was whether the jurisdiction of the (other Divisions of) the High Court could be whittled down by means of rules. No authority for this novel and somewhat strange proposition has*

been, or can be, cited. It, therefore, comes as no surprise that the [Courts] Amendment Act 2016 had to be enacted to address the anomalous situation and concomitant legal problems arising therefrom. Fortunately, these problems are now behind us."

In the premises, it is my holding that this Court has jurisdiction to hear and determine the present matter.

Whether the Defendant wrongfully refused to pay the sum of K2, 915, 165.21 from the Claimant's invoices?

It is commonplace that the amount of K2, 915, 165.21 was not paid on the invoices that were raised by the Claimant. The amount of K2, 915, 165.21 is made up of two parts. The first part is contained in Exhibit 15 that has a total unpaid sum of K1, 848, 519.95. The second part is the sum of K1, 066, 645.26. This is an underpayment on invoice exhibited as GWK20 in the supplementary witness statement for the Claimant. The Defendant admits that the said sum was indeed not paid to the Claimant on the ground that the Claimant had inflated the agreed prices.

In considering this issue, it is necessary to start by stating what the parties are agreed at. The Defendant flighted an invitation to tender for fumigation services. It was an invitation to treat in the contract law language. The Claimant responded by submitting Exhibit IK2 wherein it offered to provide the fumigation services at the following rates:

"*Price/m^3 – Stalk*	=	*$231.04*
Price/40 feet container	=	*$25.840*
Price/m^3 – Mass fogging	=	*$10.64*
Price/m^3 – Mass Stalk	=	*$209.76"*

The Defendant accepted the offer. Having accepted the offer, a valid contract was formed between the Claimant and the Defendant under which the Claimant undertook to fumigate the Defendant's tobacco at the set prices and the Defendant undertook to pay for the said services at the quoted prices.

The case of the Claimant is that the quoted prices were mutually changed to the following Check GWK12:

"Stalk fumigation	=	*MK232.56/m^3*
40 feet container	=	*MK26,010.00/container*
Mass Stalk Fumigation	=	*MK211.14/m^3*
Mass Fogging Empty Warehouse	=	*MK10.71/m^3"*

The Defendant strenuously disputes being a party to having the quoted prices changed. It is necessary that the relevant part of the Defendant's submission be quoted at lengthy:

> *"6.2.2 ... the Claimant has sought to build his claim for the sum of MK2915,165.71 on* ***Exhibits EXP 2, EXP3, EXP12*** *and* ***EXP17.*** *The Court will note that* ***EXP 3*** *is the Defendant's letter of acceptance of the Claimant's offer to provide the given services at the quoted prices. In the second paragraph, the Defendant states as follows:*
>
> > ***"I am pleased to inform you that your tender application was successful at the following rates:***
> >
> > | | | |
> > |---|---|---|
> > | ***Price/m^3 – Stalk*** | ***=*** | ***$231.04*** |
> > | ***Price/40 feet container*** | ***=*** | ***$25.840*** |
> > | ***Price/m^3 – Mass fogging*** | ***=*** | ***$10.64*** |
> > | ***Price/m^3 – Mass Stalk*** | ***=*** | ***$209.76"*** |
>
> *It will be noted that the rates quoted in* ***EXP3*** *are the same as those quoted in the tender* ***Exhibit IK2*** *and in the letter of approval* ***IK3. Exhibit P3*** *in last paragraph, on the first page, states as follows:*
>
> > ***"I also refer to the telephone conversation between the Managing Director of Perfecto Pest Control – Mr. G. Kanyemba and the undersigned where it was agreed that the prices of the services will be calculated using the exchange rate as at the date of the award of the tender which is MK150.8002 per dollar (fixed)."***
>
> *It is important for the Court to note that the Defendant is not seeking clarification or further negotiation of the pricing mechanism but is stating a settled state of affairs and a mere written confirmation so that a formal contract can be drawn up. In response to* ***EXP3,*** *the Claimant wrote* ***EXP2*** *and in the second paragraph, on the first page, it states.*
>
> > ***"We write to confirm the telephone conversation between Mr. Kambilinya and the undersigned in respect of the matter above. We also write to confirm of our successful Tender application made at the rates as follows:***
> >
> > | | | | |
> > |---|---|---|---|
> > | ***(i)*** | ***Stalk fumigation*** | ***=*** | ***MK232.56/m^3*** |
> > | ***(ii)*** | ***40 feet container*** | ***=*** | ***MK26,010.00/container*** |
> > | ***(iii)*** | ***Mass Stalk Fumigation*** | ***=*** | ***MK211.14/m^3*** |
> > | ***(iv)*** | ***Mass Fogging Empty Warehouse*** | ***=*** | ***MK10.71/m^3"*** |
>
> *The court must note that in* ***EXP2,*** *the Claimant does not dispute the alleged agreement in* ***EXP3.*** *It does not say* ***"no we did not agree on fixed conversion***

rates as of 24th June 2010" *so that the Defendant would be alerted to any lack of agreement. The Claimant instead surreptitiously slots in the following phrase:*

> ***"NB: Please note that prices are subject to change should there be any Kwacha devaluation within the contract period****."*

It is important for the Court to keep in mind that by the time the Claimant is introducing the issue of fluctuating prices, its offer had already been accepted and a binding contract entered into between it had the Defendant. With this in mind, the proposal for a fluctuating price mechanism must be understood as a fresh counter-offer to vary the contract. If the Defendant accepted it, then the price quote contained in ***Exhibits IK2, IK3, EXP3 and EXP2*** *would have been modified accordingly. However, without the Defendant's consent, the Claimant did not have the legal power to unilaterally introduce this condition. The record will show that the Defendant never accepted the counter-offer to vary the pricing mechanism.*

About a week after the Claimant had written ***EXP2,*** *it wrote a follow up letter exhibited as* ***EXP 12*** *on 9th July 2010 and attempted to justify the charging of a fluctuating price more forcefully. In a rather contradictory tone to their own confirmation in* ***EXP2,*** *the Claimant states:*

> ***"As we had earlier mentioned that it would be improper for us to comment prior to receipt of the said letter and wish to advise that the letter is finally with us. First and foremost, we want to clarify on the issue raised in the letter that the use of fixed rate dollar will not be acceptable due to importing of chemicals for fumigation and the import price is always in American dollar."***

It must be noted that the tone of this letter is much firmer and straight forward than ***EXP2.*** *So, whereas in* ***EXP2,*** *the Claimant had coyly sought to introduce the fluctuating price by way of an* ***"NB",*** *in* ***EXP 12****, the Claimant is forthright. But again, this is coming after the Claimant had already confirmed its agreement to* ***EXP3.*** *Once again, the Defendant implores this Court to treat this as a counter-offer to vary the terms of the contract. Indeed, if the Defendant accepted it, the pricing mechanism would have been modified accordingly. However, as the record will show again, the Defendant did not accept this counter-offer.*

My Lord, to complete this series of attempts by the Claimant to vary the contract is ***Exhibit EXP 17*** *wherein the Claimant completely changes tune on the prices and writes as follows:*

> ***"Due to absence on the provision of the contract agreement the General Manager of Malawi Leaf has agreed that we should submit new fumigation rates rather than to withdraw our fumigation teams on sites to the Chairperson of the Tender Committee a Mr. Kambilinya before 2 o'clock in the afternoon today and the same be copied to the General Manager of Malawi Leaf Company Limited."***

In the third paragraph, the Claimant once again, unilaterally declared as follows:

> ***"Please note that in the absence of a written contract that contains conditions and a lot more issues, our prices will be transmuted and this means that the current prices will base on its fumigation activities at standard rates equitable to all customers"***

Based on the foregoing submissions, the Defendant contends that the proposal by the Claimant for new rates constituted a counter offer which was never accepted by the Defendant:

> *"Keeping in mind that by this time not only did a binding contract exist between the parties but there had also been parties of their respectable obligations,* ***EXP 17*** *must, once again, be treated as a fresh counter-offer to vary the prices of the fumigation services. Slightly* ***EXP 17*** *was addressed to the Chairperson of the Tender Committee obviously for his approval or acceptance, in contract law parlance. The record will show once again that the counter-offer in* ***EXP17*** *was never accepted by the Defendant.*
>
> *What this means my Lord, is that the governing terms of the contract between the Parties remained those contained in* ***Exhibit IK2, IK3, EXP 2 and EXP3****. In accordance with* ***EXP.2****, the Claimant undertook to provide the fumigation services at the rates set out in* ***EXP2.*** *The Court must note further that the prices in* ***EXP 2*** *are in fact quoted in Malawi Kwacha and not in United States Dollars which firmly confirms the use of fixed rates converted as of the date of contract, i.e 24th June 2010.*

On the face of it, the submissions by the Defendant appear to have considerable force but for the counter-offer. The Court has to examine the evidence and determine whether or not the counter-offer by the Claimant was accepted by the Defendant.

The general rule in law of contract is that an agreement does not have to take a specific written form in order for it to be deemed a binding contract. Often the contract will simply be made orally. See the case of **Hadley v. Kemp (1999) EMLR 589**: See also **Catherine Elliott & Frances Quinn, Contract Law, 7th Edn, (2009)** at page 83. A contract may also be partly oral and partly in writing: see **Shaba t/a Galera Minor Building Contractors v. Ng'oma [2008] MLR (Com Series) 119** at 123.

The case of **Capital Oil Refining Industries Ltd v. Catholic Relief Services [2005] MLR 16** is for the proposition that parties to a contract may choose to vary or amend their agreement by merely making an oral agreement varying the original one in respect of the price or sign a totally new agreement containing the new agreed price; but that whichever method is used it is merely technical.

In the present case, it is not in dispute that the issue of the new prices cropped up immediately after the Claimant was informed of being the successful bidder. CW testified that he visited the Defendant in Lilongwe on a number of occasions regarding inclusion of the new prices into the contract. When he saw that the Defendant was not serious on the issue of the contract, CW had a meeting with the Defendant during which he gave two alternative conditions, namely, pulling out the Claimant's fumigation team from the Defendant's premises where they were rendering the fumigation services or having the Claimant charge the Defendant prices that were applicable to all other clients of the Claimant with whom there were no specific contracts.

CW stated that the Defendant chose the second option and requested him to draw up the revised prices: See paragraphs 13 and 14 of CW's witness statement. This version of events is supported by Exhibit P17 which was written by the Claimant to the Defendant. Exhibit P17 is headed "**TENDER FOR FUMIGATION SERVICES OF TOBACCO AT MALAWI LEAF COMPANY LIMITED – REVISED RATES**" and part of this letter states as follows:

> *"We refer to the meeting held today at Malawi Leaf Company Limited, General Manager's office in respect of the above.*
>
> *Due to absence on the provision of the contract agreement the General Manager of Malawi Leaf has agreed that we should submit new fumigation rates rather than to withdraw our fumigation teams on sites to the Chairperson of the Tender Committee a Mr Kambilinya before 2 o'clock in the afternoon today and the same be copied to the General manager of Malawi Leaf Company Limited.*
>
> *Please note that in the absence of a written Contract Agreement that contains conditions and a lot more issues, our prices will be transmuted and this means that the current prices will base on its fumigation activities at standard rates equitable to all customers."*

The letter then contains the revised prices. Mr. Kanyemba was cross-examined on Exhibit P17. He stated that it contained reasons why the prices were revised. He was firm that he held a meeting with the Defendant on the matter and the Defendant agreed that the prices be revised upwards.

I am inclined to believe the testimony of CW because it was to a great extent corroborated by the evidence by DW. Firstly, there is the explanation for the late conclusion of the drafting of the contract. Mr. Songea was waiting to get the new prices from the Claimant. If the binding terms were contained, as contended by the Defendant, in Exhibit IK2, IK3, EXP 2 and EXP3, what information is it that the Defendant wanted to get from the Claimant that was not in these documents?

Secondly, this issue is also covered in paragraphs 6.11, 6.12 and 6.13 of DW's witness statement. Further, in cross –examination, DW admitted that he was aware that the Claimant was pushing for a contract, and that through its Managing Director, the Claimant threatened to pull out of the contract or revise the prices. DW admitted that (a) Mr. Kanyemba had a meeting with the Defendant's General Manager, Mr. Kasamale, (b) Mr, Kasamale called DW on the issue and (c) he received Exhibit 17 from the Claimant but that he did not respond to it. I momentarily pause to observe that the Defendant advanced no reason at all for not responding to such an important letter.

Thirdly, there is **Exhibit P 16**, wherein the Defendant's own officer (Mr. Edward Juma, Senior Logistic Officer) states that *"Charges will be based on your current rate"*, as distinguished from the old rate.

In view of the foregoing, the failure by the Defendant to pay the sum of K2, 915, 165.21 was a breach of contract by the Defendant. Having allowed the Claimant to continue supplying services on the basis of the revised rates, the Defendant is estopped from refusing to pay for the services at the revised rates. I, accordingly, find and hold that the sum of K2, 915, 165.21 is payable by the Defendant to the Claimant as per the invoices and the schedule in Exhibit P15.

Whether or not the Defendant wrongfully deducted from the Claimant's payments the sum of K4, 431,895.82, being the cost of re-fumigation of the tobacco which had been found to have been re-infested by beetles?

The case of the Claimant is that the deduction of the sum of K4, 431, 895.82 was wrongful and in breach of contract. Paragraphs 6.20 to 6.25 of the Claimant's Submissions After Trial are relevant and these read as follows:

> *"6.20 The claimant alleges that the sum of MK4, 431, 895.82 was wrongfully deducted from the payments that were due to the claimant. The defendant's defence is that the tobacco was re-infested when it arrived in Germany and that this was the cost of the re-fumigation.*
>
> *6.21 The evidence for the claimant is that the deduction was made unilaterally by the defendant. Mr Kanyemba stated in his evidence that he challenged that "I even challenged the defendant that I was ready to go to Germany at my cost to inspect the tobacco and see for myself that beetles were in the tobacco. But the defendant refused to do this." In cross-examination, Mr Kanyemba maintained his argument that it was not possible that the tobacco could have been re-infested.*

6.22 On the part of the defence, there was no evidence on this part. Mr Jimmy Gray Kasamale was supposed to testify on this aspect but he did not. It goes without saying that the evidence of the claimant was not controverted. It was unchallenged as far as this aspect of the claim is concerned. The cross-examination did not bring out anything favourable to the defendant.

6.23. It is noted that the defendant did not say how the figure was arrived at, what the rates were and for which containers. The rates of the currency that was used are not disclosed. Further, there was no written contract that was executed by the parties as to clearly establish whether the claimant was liable in such eventualities if at all they were proved.

6.24 Just to highlight these concerns, in paragraph 6.22 on page 55 of the defendant's evidence, it is stated that 5 containers were re-infested. On pages 106, 107 and 108 are the alleged invoices for the cost of re-fumigation. The invoice on page 108 has the cost fumigating one container and the total cost. When this is considered, the cost shows that it was for 11 containers.

6.25 This is part of the evidence of Mr Jimmy Gray Kasamale who did not testify. He was a very material witness and it is not clear why the defendant chose not to parade him. It is submitted that the court should draw adverse conclusion from the failure by the defendant to call a material witness. See the case of ***Mpungulira Trading Limited v Marketing Services Division*** *[1993] 16(1) MLR 346."*

The position of the Defendant is that the Claimant is not entitled to be paid the claimed sum of K4, 431, 895.82. The submissions by the Defendant on this issue are relatively lengthy but I deem it necessary to quote them in full for they go a long way in leading to a logical determination of the issue:

"6.3.1 ***Whether or not the Claimant warranted beetle free arrival of Tobacco to Germany***

We draw the Court's attention to ***Exhibit IK2*** *particularly on page 11 of the Defendant's Trial Bundle. In the first paragraph of its tender, the Claimant made the following undertaking:*

"PERFECTO PEST CONTROL (PVT) LIMITED is pleased to submit its Tender for tobacco fumigation services presumably 2010/2011 tobacco season. Our company has an *unprecedented track record of 100% beetle free consignments exported outside the country****. We are the first company to discover beetle resistance in the country and prescribe an average concentration of 800ppm in fumigation. Our investment in research and operation training at both local and international levels, has transformed Perfecto to be the leading Pest Control company in the country."*** *(emphasis supplied)*

The above is an important and key element to this case because it proves two key issues, namely:

(a) that the Claimant understood fully that its services were required expressly to treat the Defendant's tobacco so that the same would arrive in the export countries free from tobacco beetle infestation; and
(b) that the Claimant was fully aware of the notoriety of the tobacco beetles in resisting fumigation and therefore the potential to re-infest the fumigated tobacco before arrival in the country of export.

My Lord, even in the absence of a written contract, it must apparent, even to a lay person, that the Defendant sought the services of the Claimant precisely to enable it export beetle-free tobacco to its customers. The Claimant, in its tender, warranted that tobacco fumigated by it was not going to be re-infested in transit. This was the essence of this contract between the parties. It follows, therefore, that where tobacco fumigated by the Claimant arrived in the country of export and was found to be infested by beetles, the Claimant must be taken to be guilty of breach of the said warranty and would therefore be held liable for all losses or costs incurred by the Defendant as a result of this. This is basic contract law and there would be no argument unless the Claimant can prove otherwise.

The Defendant submits therefore that by its own tender documents, the Claimant had expressly promised and warranted to fumigate the Defendant's tobacco to a state where all the beetles were eradicated completely and that any such tobacco would be rendered beetle-free for export purposes. The Claimant's undertaking to do this was the very foundation of this Contract breach of which would go to the very roots of the agreement. The Claimant was bound by law therefore to achieve a beetle-free delivery of the tobacco to the Defendant's customers.

*6.3.2 **Did the Claimant Fumigate the Tobacco in Question?***

*My Lord, during cross-examination, **PW1** was shown **IDD2,** and he told this Court that the same was the Claimant's Fumigation Certificate No. MLC 135. He further admitted that the same was proof that the tobacco mentioned therein had been fumigated by the Claimant. The Court will note from the said **IDD2** that the consignee for the said tobacco was Contraf-Nicotex-Tobacco GmbH and that **PW1** had personally signed the certificate on 26th February 2011.*

*Again, during the said cross-examination, **PW1** was shown a series of emails identified as **IDD4** between him and the Defendant's Senior Logistics Officer, a Mr. Eddie B. Juma, advising him that shipments **MLC 135** and **MLC 136** had been re-infested by tobacco beetles enroute to Germany and in his response, **PW1,** had asked for a meeting with the Defendant. This court will note that the Claimant did not deny the fact that the tobacco which it fumigated was found with beetles on arrival in Germany. In paragraph 8 of its Amended Statement of Claim, the Claimant made the following undertaking:*

***"The Plaintiff states that the tobacco that was allegedly infested by the beetles was** not fumigated by the plaintiff and will at trial adduce evidence that the defendant deceitfully used fumigation labels from the plaintiff on cartons which*

> *were not fumigated but which formed part of the export **consignment."** [emphasis supplied]*
>
> *We invite the court to look at the totality of evidence adduced by the Claimant before this very court and assess whether the Claimant offered any evidence at all proving the allegation in paragraph 8 of its Amended Statement of Claim. In fact, during continued cross-examination on 25th January 2017, **PW1** informed this court of the procedure used in fumigation and loading of tobacco in containers. He gave this Court a water-tight explanation of the entire process including the sealing of the containers with special seals in the presence of the fumigator. Throughout this cross-examination, the Claimant failed to prove that the Defendant had swapped the tobacco. When pushed, **PW1** said that his evidence for the swapping was the document marked as **GWK17** in the Claimant's Trial Bundle which this Court had ruled inadmissible at the commencement of the trial. However, in the interest of justice, Counsel for the Defendant permitted him to make reference to **GWK 17** and asked him to compare paragraph 1 of **GWK 17** and the date on **IDD2** and was asked to confirm if Mr. Harold Mapemba was still employed by the Defendant on the dates shown on **IDD2** when fumigation took place. The record will show that **PW1** conceded that indeed Mr. Mapemba had retired in January 2011 whereas the tobacco in question was fumigated between 17th and 26th February 2011. This means that even if the said Mr. Harold Mapemba had testified in this Court and that GWK17 was properly introduced into evidence, he would not have been able to testify to the fumigation of the tobacco covered in Lot **MLC135** and **MLC136** as he had retired by then.*
>
> *In a nutshell, the Claimant failed to prove that the tobacco which arrived with beetles in Germany was not the same tobacco which the Claimant fumigated and which **PW1** certified in Fumigation Certificate Number MLC135 and got paid for. The Defendant submits, therefore, that there is no doubt that the tobacco in question is the same tobacco which the Claimant fumigated and warranted that it would be exported 100% beetle-free. It goes without say that the re-infestation of the tobacco amounted to breach of the warranty given by the terms of the entire contract. Delivering beetle-free tobacco was the root of the entire contract with the effect that failure on the part of the Claimant to keep its part of the bargain was a fundamental breach of the contract. The Defendant contends, therefore, that the Clamant was guilty of beaching the contract between it and the Defendant. The Defendant is the innocent party in these proceedings and not the Claimant.*

To buttress the Defendant's submissions, Counsel Dzonzi referred the Court to dicta in the judgement of the **Photo Productions Ltd v. Securicor Transport Ltd [1980] A.C. 827** wherein Lord Diplock said:

> *"If a party fails to perform what he has promised to do then this is a breach of a primary obligation. The consequence of the breach of this primary obligation is that it is then replaced by a secondary obligation, the most common one obviously being the requirement to pay damages."*

I have considered the submissions by both parties. It is a cardinal principle of the law of contract that a party who is guilty of breach of the terms of the contract is precluded from benefitting from such breach: See **Petroplus Marketing AG v. Shell Trading International Ltd [2009] 2 All ER (Comm) 1186** where the point was put thus at page 1192:

> *"It is a general principle of construction that prima facie, it will be presumed the parties intended that neither should be entitled to rely on his own breach of duty to obtain a benefit under a contract, at least where the breach of duty is a breach of an obligation under that contract: see Chitty pp 857-858 (para 12-082). This is sometimes presented not as a matter of contractual construction but an implied contractual term that a right or benefit conferred upon a party shall not be available to him if he relies upon his own breach of the contract to establish his claim."*

In the present case, the Claimant had warranted to eradicate beetles from the Defendant's tobacco but a total of seven containers were re-infested with beetles. I was hardly impressed by the Claimant's suggestion that the containers were swapped. The word "suggestion" is advisedly used because no evidence whatsoever was adduced in support of the said suggestion. The Claimant's attempt to rely on a witness statement of Mr. Harold George Mapemba, which statement was in the Claimant's Trial Bundle, was rejected, rightly so because the Mr. Mapemba did not testify.

The Court is fully satisfied, on the basis of the system of sealing and numbering of containers, that the tobacco which the Claimant had fumigated and whose loading the Claimant had supervised, was the same tobacco that arrived in Germany where it was found to have been re-infested.

It will be recalled that re-infestation was the very thing that the Defendant had hired the Claimant to prevent. In this regard, there cannot be any doubt that the Claimant breached the contract. That being the case:

(a) the Defendant was entitled to deduct all the direct costs incurred by it in having the seven containers re-fumigated in Germany;

(b) the Claimant cannot, under the law of contract, claim to be paid the sum of K4, 431, 895 because, in truth, the Claimant did not work for it;

(c) the claim for the sum of K4, 431, 895.72 must also fail for want of legal justification in that a party cannot claim benefit from his or her own breach of the contract: see **Petroplus Marketing AG v. Shell Trading International Ltd**, supra.

All in all, it is my holding that the deduction by the Defendant of the sum of K4, 431,895.82 from the Claimant's payments was not wrongful. Accordingly, the claim by the Claimant for the said sum is dismissed.

Whether or not the Claimant is entitled to paid compound interest on the sums due from the Defendant?

The Claimant contends that the circumstances of this case call for payment of compound interest on the sums due from the Defendant. The submissions by the Claimant on the matter are to be found in paragraph 6.35 and 6.36 of the Claimant's Submissions after Trial:

> *"6.35 A reading of the authorities on the matter clearly shows that courts have jurisdiction to award compound interest. One central theme running through the authorities is that there must be "wrongful and/or deliberate withholding" of the money by the defendant from the claimant. There are of course other considerations but they appear to be secondary to this one.*
>
> *6.36 In this case, the defendant withheld the claimant's money in the total sum of MK7, 347, 061.03. There was no legal justification for this. It is therefore submitted that this is a case where compound interest is payable to the claimant. The Court should accordingly order that the defendant is liable to compound interest on the amount that was withheld from the due date to the date of actual payment."*

The Defendant did not address this issue in its submissions.

In considering the issue, the point to note is that interest is awarded when it is provided by law, or when it is provided for in the contract or under the equitable jurisdiction of the court: See **Cottman McCann v. Securicor (M) Ltd [2013] MLR 49** and **Gwembere v. Malawi Railways Limited [1978-80] 9 MLR 369**. The latter case held that courts have discretion under section 11 of the Courts Act to award interest on debts. It is easy to understand why this ought to be so. In the words of Lord Herschell, L.C. in **London, Chatham & Dover Ry Co. v. South E. Ry. Co. (4) 1893 AC 429 at 437**:

> *"I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use."*

Having given the matter due attention, I agree with the Claimant that this is an appropriate case in which to award compound interest on the sums due to be paid

to the Claimant by the Defendant, that is, compound interest on the sum of K2, 915, 165.21. It is so ordered.

Whether or not the Claimant is entitled to recover collection charges from the Defendant by way of indemnification or at all?

This issue has been dealt with in two brief paragraphs of the Claimant's Submissions after Trial, namely, paragraph 6.37 and 6.38 which read as follows:

> *"6.37 The Collection costs are payable pursuant to Table 6 of the Legal Practitioners (Scale and Minimum Charges) Rules. In the case of **Shire Limited v City Building Limited** Civil Cause Number 437 of 2012 (High Court) (unreported) it was held that the claimant was entitled to 15% collection costs based on the said Table 6.*
>
> *6.38 It is submitted that the Court should hold that the claimant is entitled to an indemnity of the collection costs of 15% of the sums found due and owing to the claimant after factoring the interest."*

That the Claimant has addressed this issue in this manner is not surprising to the Court: the claim lacks merit and cannot be sustained. As was correctly observed by Counsel Dzonzi, according to Table 6 of the Legal Practitioners (Scale and Minimum Charges) Rules, collection charges are payable by the collecting party and only if the debt is paid without recourse to the Courts: see **J .L. Kankwangwa and Others v. Liquidator Import and Export MW Limited, MSCA Civil Appeal No. 4 of 2003 (unreported)** and **Mwalwanda v. Stanbic Bank Ltd, Civil Cause No. 3256 of 2005 (unreported).** The claim for collection charges is accordingly dismissed.

Conclusion

To sum up, the result of my judgment is that the Claimant has only succeeded in proving that the Defendant wrongfully refused to pay the sum of K2, 915, 165.21 from the Claimant's invoices. I, accordingly, enter judgement in favour of the Claimant in the sum of K2,915,165.21 plus compound interest thereon.

Section 30 of the Courts Act requires costs to follow the event, except when it appears to the Court that some other order should be made as to the whole or any part of the costs. In the present case, the Claimant has had partial success in his claims. In the circumstances, the Court will exercise its discretion by ordering each party to bear its own costs. I so order.

Pronounced in Court this 26th day of March 2019 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE