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REPUPLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

CIVIL CAUSE NO. 140 OF 2018

Before the Honorable Justice D Madise

BETWEEN

PETER MANJOLO AND CLIFFORD MBULUMA .....CLAIMANTS

AND

BLANTYRE CITY COUNCIL.....DEFENDANT

CORAM: THE HONOURABLE MR. JUSTICE D. MADISE

Mr. C Gondwe of Counsel for the Claimants

Ms T. Mauluka of Counsel for the Defendant

Mr. Mathanda, Official Court Interpreter

Madise, J

JUDGMENT

Introduction

1. The claimants in this matter took out a wit of Summons against the defendant on 25th May, 2018 claiming K49, 920,000.00 as damages for breach of contract for the 1st claimant and K15, 000,000 as damages for the 2nd claimant. The defendant have disputed the claim and they have called the claimants to strict proof.

The Facts

2. The first to testify for the claimants was Peter Manjolo of C/O P.O Box 3489, Blantyre. He told the court that on 1st November, 2015, he won a tender and entered into a contract of Traffic Management with the defendant in which he was supposed to provide services for a period of two years from 2015 to 2017 (PM 1).
3. The terms of the contract obliged the witness to manage Lot 1 which covered Limbe bus depot, Market and Minibuses Terminals. When the witness went to start work on sites, particularly Limbe Minibus Terminal on 1st November, 2015 he found that the site was already under the control and management of Minibus Owners Association of Malawi (MOAM) and he was unable to start work.
4. He stated that he notified the defendant and he was told by the Chief Executive Officer Dr Chanza that he must start work on the available sites that is Market and Bus depot. He was told there were some conflicts with MOAM but that the matter was in court and will be resolved soon and he will have access to the sites.

5. When the contract period expired the witness wrote the defendant a letter to extend the contract on the Limbe Bus Terminal where he was unable to work during the contract period. That to his surprise the defendant refused to extend the contract on the basis that the contract had expired. (PM 2,3)
6. He stated that the defendant never resolved the conflict with MOAM until the end of the contract and he was unable to perform his part of the contract and he lost money in the process. In conclusion he stated that the defendant breached the terms of the contract by failing to provide access to the sites. In cross/reexamination, he stated that the defendant did not take action to evict members of MOAM.
7. The second witness was Clifford Mbuluma of C/O P.O Box 30434, Chichiri, Blantyre. He told the court that on 26th October, 2015 he entered into a Traffic Management Service Contract with the defendant to provide services for a period of two years (CM 1). The contract was to provide the services at Mibawa bus terminal, Blantyre bus stands and minbus terminal opposite Blantyre market.
8. That when he went on the sites to start work he noted that the defendant continued to allow MOAM to manage and control the premises since they were the ones who had been awarded the contract before. That he reported the matter to the Chief Executive Officer of the City Assembly and he was assured the matter will be resolved. That he then went to court where he obtained an injunction against MOAM. That the defendant joined the case 5 months later, but failed to contribute towards legal expenses.
9. That the injunction finally forced MOAM to leave the sites. That he was unable to work for five months on the sites and lost K15, 000,000 as

revenue. In cross/re-examination he stated that he obtained an injunction against MOAM because they were stopping him from accessing the sites. He denied that it was MOAM which frustrated the contract. That marked the close of the claimants' case.

10. The defence summonsed Mphatso Matandika from Blantyre City Assembly. He told the court that when the contracts were signed Blantyre City Council went to remove MOAM staff from the premises. The process of removing MOAM took long and frustrated the performance of the contract. That MOAM members were violent and even the police failed to evict them.

11. That when the claimants went to court, the defendant joined them and vigorously pursued the case and in the end the court ordered MOAM (Minbus Owners Association of Malawi) to vacate the premises and refund the money they have been collecting. That MOAM only paid K150, 000.00. That this showed that the defendant tried its best to make sure the contracts were performed but MOAM members were violent. He blamed MOAM for frustrating the contracts. The witness blamed the claimants for going to court instead of pursuing arbitration.

12. In cross/re-examination the witness told the court that the defendant never entered into a contract with MOAM but with the claimants. That he only knew of the presence of MOAM on the sites when the Claimants wanted to commence work. He admitted that employees of Blantyre City Council were manning the premises.

13. That the defendant failed to remove MOAM even after the police were engaged. He admitted that MOAM has not left the sites but they only stopped chasing employees of Blantyre City Council and that the

claimants never took possession of the sites. He blamed MOAM for frustrating the contracts. That marked the close of defence.

The Issues

14. There are three issues for determination before me.

(1) Was there a valid contract between the claimants and the defendant?

(2) Was there breach of contract?

(3) Who was responsible for the breach?

The Law

Burden and Standard of Proof

15. . The burden and standard of proof in civil matter is this. He who alleges the existence of given facts must be the first to prove as a positive is earlier to prove than a negative. He who alleges must prove. The burden of proof rests on the party (the plaintiff) who substantially asserts the affirmative. It is fixed at the beginning of the trial by the state of pleading and remaining uncharged through the trial. See ***Joseph Constantine Steamship Line vs. Tamperial Smelting Corporation Limited*** **[1942] AC 154,174.**

16. In *Joseph Jonathan Zinga vs. Airtel Malawi Limited,* Civil Cause No. 74 of 2014 (Mzuzu District Registry) (unreported), the court said *"In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the quantum of evidence that must be adduced to satisfy the court on that*

point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other carry the day". [Emphasis added] The standard required is on a balance of probabilities. Denning J in ***Miller vs. Minister of Pension*** **[1947] All E.R 572** said if the evidence is such that the tribunal can say; we think it more probable that not the burden is discharged but if the probabilities are equal it is not. See also ***Mhango vs. Opportunity Bank Malawi Limited*** **Civil Cause No. 446 of 2015.**

What is a contract?

17. The law of contract is concerned with the legal obligations arising out of an agreement between two or more persons to do or not to do some act or acts intention being to create legal relations and not merely to exchange mutual promises. See ***ICT Malawi Limited vs Attorney General Commercial*** **Case No. 86 of 2016 (unreported)**

18. It is an agreement between private parties creating mutual obligations enforceable by law. The essential elements of a contract are offer, acceptance, adequate consideration, capacity and legality. A contract is a promise that the law will enforce. If a promise is breached, the law provides remedies to the harmed party often in form of monetary damages or in limited circumstances in the form specific performance of the promise made.

Claimants Submissions

19. The claimants argued in submission that the law of contract is generally concerned with the legal obligations arising out of an agreement between two or more persons to do or to abstain from doing something or act, their intention being to create a legal relations and not merely to exchange mutual promises. They cited ***ICT Malawi Ltd vs Attorney General*** **Commercial Case no. 86 of 2014(unreported)**

20. That the agreement itself lays down precisely what each party has undertaken to do in order to say whether each had performed or not performed its part of the agreement. This agreement will contain statements some of which will be more inducement or representations while others will be terms of the contract. Where a statement forms a term of the contract, a court must consider the importance of that statement in the contract as a whole. Not all of the obligations created by a contract are of equal importance.

21. It is necessary for a court to distinguish the vital or fundamental obligations form the less vital, the expression condition being applied to the formed and the expression warranty to the latter. **See Smith and Keenan's English Law (ninth Edition ELBS/Pitman 1990, London at page 187.**

22. In the case of ***Chidanti Malunga vs Fintec Consultants and Bua Consulting Engineers***, **Commercial case no. 6 of 2008(unreported) .** Dr. Mtambo J stated the following important point on contract:

"For there to be a valid contract one of the essential elements is that there must be an agreement. The

agreement is made up of offer and acceptance. An offer is an expression or willingness by one person, the offeror to enter into a relationship with another person the offeree with an intention that the relationship shall be binding on the offeror as soon as the offer is accepted by the offeree"

23. As per the agreement of the contract in writing, and as per the evidence from both the claimants and the defendant, it is clear that there was a contract that was signed and agreed upon by the parties in this matter. It is clear that the contract was that the 1st claimant was to manage lot 1 at Limbe Market, and depot and limbe bus terminal while the 2nd claimant was to provide services at Mibawa bus terminal, Blantyre bus stands and also minibus terminal opposite Blantyre market.

24. That it is also clear that the claimants performed their contract by doing all it took to operate on the said places, however, the defendant did not perform their obligation by failing to provide the spaces to which the claimants were to operate their obligation under the contract. The defendant are guilty of breach of the terms of the contract and should be held liable for their failure to provide the said space for the claimants to operate the contract. The defendant alleged that the contract was frustrated and this takes us to look at the law on frustration of contract to see if at all the defendant have proved that the contract was frustrated.

<u>Frustration of a contract</u>.

25. The claimants submitted that the doctrine of frustration is a principle whereby an event occurs after the contract has been entered into which brings a contract to an end. Parties to a contract have been frustrated because the circumstances have changed and the contract does not actually equate to a good commercial deal. In the case of ***Davis Contractors vs Fareham UDC*** *(1956) AC 696, at 723* stated the following on frustration of a contract:

> *"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.... It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".*

26. For example the case of ***Pioneer Shipping Limited vs BTP Tioxide Limited(the Nema)*** **1982 AC 724** outlined that an event which caused an "imprudent commercial bargain" was not deemed to have been frustrated. That the doctrine will not apply if the frustrating event occurred as a result of the act or election of the contracting party which is seeking to rely on it.

27. The claimants submitted that there was a factor which limits the operation of the doctrine of frustration which is the general rule that an

event which was foreseeable, and therefore within the contemplation of the parties at the time of entry of into the contract, does not operate to frustrate the contract. A frustrating event is one that was not foreseen and was not foreseeable by the parties. They cited ***Ocean Tramp Tankers Corporation vs V/O Sovfrancht,*** **The Eugania (1994) 2 QB 226. Court of Appeal.**

28. In the present circumstances, the defendant alleged that the contract was frustrated due to the conduct of the third party thus MOAM's conduct by failing to move out of the said places which were meant for the claimants to operate their obligation under the contract.

29. That from the facts of the defendant's witness during cross examination, the witness admitted that they knew that prior to the contract, MOAM was still carrying out their activities on the said places. Furthermore, the witness told the court that the defendant's employees were chased on the said place when they wanted to take over the place. This was prior to entering the contract.

30. That this was evident enough that the defendant had prior knowledge of the problems between the defendant and MOAM and despite these problems the defendant entered into the contract with the claimants. It is the submission of the claimants that the defendant cannot rely on the doctrine of frustration when they had foreseen that MOAM were causing problems prior to entering into the contract with the claimants.

31. Furthermore, the defendants failed to evict MOAM on the said premises in order to allow the claimants occupy the places so that they could operate their contract. They further submitted that the defendant

in their evidence failed to prove that the contract was frustrated. The defendant failed to adduce evidence to satisfy the court as per the above case authority on how the contract was frustrated. That the at this stage the defendant cannot claim that the contract was frustrated when they did not plead the same in their defence.

32. In conclusion the claimants submitted that there were contracts between the claimants and the defendants for the 1st claimant to manage lot 1 at Limbe market, bus depot and Limbe bus terminal, while the 2nd claimant was to provide his services at Miawa bus terminal, Blantyre bus stands and also minibus terminal opposite Blantyre market.

33. That it is clear also from the contracts that the contract was for a period of two years for both the 1st and 2nd claimants. It is also clear that when the claimants went to the said designated areas to start executing their obligations under the contract, the claimants found that the premises were being occupied by MOAM who are the parties that had previous being engaged with the defendant.

34. That it is the submission of the claimant that the defendant breached the terms of the contract by failing to move out MOAM on the said premises for the claimants to operate their obligation under the clear terms of the contract.

Defendants Submissions

Frustration of Contracts

35. The defendant submitted that under *the doctrine of frustration, a contract may be discharged if after its formation events occur making its performance impossible or illegal..*" Treitel, The Law of Contract (Edwin Peel, Ed.) 14th Edition, Paragraph 19-001. That it was also stated in the case of ***National Carriers Ltd v Panalpina (Northern) Ltd*** **[1981] AC 675** that

> *" Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of the of its stipulations in the new circumstances; in such a case the law declares both parties to be discharged from further performance."*

36. That a contract terminates upon occurrence of an event that frustrates a contract – **see Hirji Mulji v Cheong Yue SS Co Ltd** [1926] A.C. 497 at 505 and **BP Exploration (Libya) Ltd v Hunt** [1979] 1 W.L.R. 783 at 809. It has also been held that the court may hold that the contract was frustrated even though the parties for some time after the event went on behaving as if the contract still existed – see ***The Agathon*** [1982] 2 Lloyd's Rep. 211 at 213 and ***G F Sharp & Co v McMillan*** [1998] I.R.L.R. 632. In some cases, the Courts have refused to decide that a contract was entirely frustrated. The Courts have held

that a party was supposed to perform when conditions allowed for him to perform. See ***Clark vs. Lindsay*** (1903) 19 T.L.R. 202 and ***Victoria Seats Agency vs. Paget*** *(1902) 19 T.L.R. 16.*

37. The defendant stated that in applying the doctrine of frustration, the courts take into account a number of factors.

Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances." -- ***The Sea Angel*** [2007] EWCA Civ 547; [2007] 2 Lloyd's Rep. 517 at [111].

38. That in the case of ***Bunge SA vs Kyla Shipping Company Limited*** [2012] EWHC 3522 (Comm); [2013] 1 Lloyd's Rep. 565 the owners of a chartered vessel could not rely on frustration because they had provided a warranty that they would maintain an insurance for the risk they claimed frustrated the contract.

39. The defendant stated in submission that the contract was frustrated because MOAM acted violently against agents of the claimants. The claimants stated that there was no frustration as to them, it was foreseeable that MOAM would react violently towards agents of the claimant. That no evidence has been given that shows that the defendant was in a position to know that MOAM would react violently as it did.

40. That in the absence of evidence indicating that it was foreseeable on the part of the defendant that MOAM would react violently to deployment of officers of the claimants to the minibus terminals, violence perpetrated by MOAM against the claimants and their employees qualify as intervening event that frustrated the contracts. That in fact, as was found by the Court in the case of ***Clifford Mbuluma t/a Kand N Consult and Blantyre City Council vs. Minibus Owners Association Limited and Minibus Owners Association of Malawi*** (Civil Cause Number 86 of 2016) it was demonstrated that there was no contract between MOAM and the Council allowing MOAM to operate the minibus terminals.

41. That the Council being the owner of the bus terminals could not foresee any basis for MOAM to resist deployment of its agents who were the claimants. As was said by Vaughan Willims LJ in Krell ***vs. Henry*** [1903] 2 K.B. 740 at 752 that "*The test [of frustration] seems to be whether the event which causes the impossibility was or might have been anticipated ...*" the defendant argued that the Council had no reason to anticipate that MOAM would resist deployment of the claimants' employees in the absence of any contract between the Council and MOAM.

42. That in this case the contract was frustrated and terminated when MOAM and its agents violently resisted deployment of the claimants and their employees to minibus terminals which the claimants through the contract entered with the Council were supposed to manage. That the contracts were frustrated and terminated remains the case even though the parties later behaved as if the contracts had not been frustrated by allowing the claimants to manage the minibus terminals

when the Court had granted injunction against MOAM and the Malawi Police Mobile Service B Company had by use of force enforced the injunction– see Treitel, The Law of Contract (Edwin Peel, Ed.) 14th Edition, Paragraph 19-090 and ***The Agathon*** [1982] 2 Lloyd's Rep. 21

Stay of Proceedings Pending Arbitration

43. Section 6 of the Arbitration Act states that the Court may stay proceedings where either party to proceedings refers a dispute to arbitration. Furthermore, Malawi on 4th March 2021, acceded to the New York Convention and became its 167th State Party. See- https://www.newyorkconvention.org/news/malawi+accedes+to+the+new+york+convention

That Article II.3 of the New York Convention (1958), states that

> "The *court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article [viz an arbitration agreement], shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.* "

44. The defendant argued that a contract is a solemn undertaking by the parties that they will abide by what they have undertaken to do. In this matter, the parties under Clause 16.2 agreed that where there is a dispute, either party may refer the dispute to arbitration. In this case, the claimants were the ones who were aggrieved and wanted the dispute resolved. It was their obligation to refer the matter to arbitration.

45. That in light of Malawi's accession to the New York Convention 1958, all what is required for the Court to refer a matter to arbitration is a request from one of the parties. The issue as to whether a party has taken a step in the proceedings does not arise under the Convention. Thus it is submitted that under the New York Convention (1958) the present matter can be referred to arbitration even at this stage. It is therefore submitted that the claimant's case be dismissed and referred to arbitration.

The weakness of the Claims in Light of the Whole Contract

46. That under the Special Conditions of Contract (at page 26 of the Consolidated Trial Bundle), the claimants undertook to insure all risks. The claimants have not shown that they took out the said insurance. In the absence of proof that they took out the insurance, it can be concluded that the claimants breached this clause which was meant to safeguard the claimants. Having breached the contract that way, the claimants cannot turn around to claim against the defendants that which they could have claimed from their insurers had they done what was required of them under the contract.

47. That the claimants cannot benefit from their own wrongs. See- ***Sympathy Katengeza Chisale v Willie Mphoka Phiri*** (Commercial Case Number 29 of 200). In other words, by undertaking to ensure against all risks, the claimants undertook to ensure themselves against acts such as were perpetrated by MOAM against the claimants.

48. That the other weakness with the claimants' claim is that it erroneously excludes the amounts that would be payable to the Blantyre City Council. As item GCC 23.1 at page 26 of the trial bundle shows, it was the claimants who were supposed to pay money to the Blantyre City Council by buying receipts from the Council which would have been sold to residents as parking receipts. The difference between the fee which motorists pay, and the amount paid to the Council by the claimants would have been the commission payable to the claimants. At page 10 of the consolidated trial bundle there is the compliance sheet.

49. That the sheet runs to page 12 of the consolidated trial bundle. In those pages are things which the claimants had to do for them to discharge their obligations under the contract. These things include the scope of their obligations, the type of officers they were supposed to employ, facilities and equipment they were supposed to purchase. The commission described above would have therefore been reduced by provision of the stated personnel, facilities, equipment and discharging of various obligations under the contract.

50. That if the details of these were made known the court would have been in good position to determine the exact amount that the claimants may have lost. There is no evidence which shows that during the period MOAM prevented the claimants from discharging their obligations, the claimants still spent on the personnel, facilities and equipment stated above. It is therefore wrong to state that what they actually lost is the contract price mentioned in the contract. In terms of compensation, what the claimants could have claimed could have

been what the claimants actually lost after doing all that they were required to do under the contract.

51. That the cardinal principle in awarding damages is *'restitutio in integrum'* which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as they were before the injury was sustained. See Halsbury's Laws of England 3rd Ed. Vol. II p.233 para 400.

52. ***Livingstone vs Raywards Coal Co*** (1880) 5 App Cas 25 at 39 contains a statement by Lord Blackburn that captures the state of the law. He said "where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as they would have been if they had not sustained the wrong for which they are now getting compensation or reparation.

53. In this case therefore, the position in which the claimants were before the injury should be presumed to include the obligation to recruit and pay the officers who were required by the contract and purchase and provision of facilities and equipment also required under the contract.

54. The defendant stated that the other issue which has partially been dealt with above, is the issue of the proper party to these proceedings. The issue that the present claims could have been claimed from the insurers has already been discussed. It is submitted that the claimants could have also claimed damages from the tortfeasor themselves, MOAM.

55. The claimants had the opportunity to do so. In fact the 2nd claimant utilized that opportunity and sued MOAM. The 2nd claimant and the defendant succeeded against MOAM. They both therefore had the right to claim damages from MOAM. The 1st claimant slept on his rights and chose not to claim against MOAM who prevented him from managing minibus terminals assigned to him. Both having elected not to claim MOAM, the wrongdoer, they cannot turn around to claim against the defendant.

56. That for the 2nd claimant, bringing of these proceedings against the defendant amounts to abuse of court process – see ***Speedy's Limited v Finance Bank Malawi Limited*** **(Commercial Cause Number 49 of 2007)** where it was stated that;

> *"The categories of abuse of process are never closed but it is widely recognized that the court will prevent an improper use of its machinery as a means of vexation and oppression in the conduct of the litigation. The cases of* ***Castro vs Murray*** *(1875) 10 Ex. 213 and* ***Dawkins vs Prince Edward of Saxe; Willis vs Earl Beauchamp*** *(1886) 11 p. 59, per Bowen L.J. at 63 are illustrative of the principle. Learned Counsel for the Plaintiff Mr. Kasambara has elaborately analysed the known categories of abuse of the process of the court such as where there is re-litigation, the proceedings are brought for a collateral purpose, the claim is spurious, and the proceedings are hopeless amongst others. I may also add that if the complaint could have been resolved through agreed contractual machinery, rushing to*

court without attempting to exhaust such available avenues may amount to an abuse of the process of the court whose time could have been well spent on worthy activities."

57. The defendant argued that in this case there are three reasons this matter ought to be dismissed. First is that in the case of the 2nd claimant, the claim herein is being re-litigated though with a different party. Having succeeded against MOAM, the 2nd claimant was supposed to proceed claiming damages against MOAM. The 2nd claimant is not justified when it insinuates that it has brought the present proceedings against the defendant because the defendant delayed claiming against MOAM when the 2nd claimant has had all the liberty to claim damages from MOAM. So too the 1st defendant. It had all the liberty to claim against the party that prevented it from collecting parking fees. It chose not do so.

58. The second reason why the present proceedings are an abuse of court process is that looking at the provisions of the contract, it is clear that the risk for performing the contract is on the claimants. That risk is supposed to be transferred to the insurers by the claimants. In fact, the defendant ought to have counterclaimed for all the losses that it incurred because of the claimant's failure to take out insurance cover for performance of the contract.

59. In light of the insurance clause in the contract these proceedings have been erroneously brought against the defendant as the defendant through the insurance clause is not liable for acts of third parties. The claimant's insurer is liable and in extension the third party.

60. That these proceedings have therefore been brought before the court for collateral purposes of obtaining compensation from the defendant without due regard to where risk or liability lies under the contract. For that reason, it is submitted that the claim by the defendant ought to be dismissed.

61. That the third reason why the present proceedings ought to be dismissed as an abuse of the court process has already been discussed above. The contract already provided how the parties were going to resolve their disputes. The claimants have decided to abandon what they agreed with the defendant instead of resolving the matters by arbitration. This is an abuse of court process which goes against the overriding objectives of civil procedure rules as laid down under Order 1 Rule 5 of the Courts (High Court) (Civil Procedure Rules) 2017.

62. In conclusion the defendant submitted that the contracts that the claimants and the defendant entered was frustrated by violent acts of MOAM and therefore terminated even though the parties later acted as if it had not been frustrated.

63. That the Contract provided that all disputes under the contract would be referred to arbitration and this matter ought therefore to have been referred to arbitration. The Court therefore can stay the proceedings pending arbitration (**Section 6 of the Arbitration Act**) or refer the matter to arbitration under **Article II.3 of the New York Convention (1958).**

62. That the contracts provided that the claimants were supposed to insure all risks. The claimants failed to take out insurance and cannot therefore benefit from their breach of the contract by claiming that

which they could have claimed from their insurers had they insured themselves against all risks. The amounts claimed by the claimants ae not supported by the contract as what they may have reasonably lost through actions of MOAM.

63. That the claims made by the claimants are an abuse of the court process and ought to be dismissed. The proceedings are re-litigating a claim on the part of the 2nd claimant, they are being pursued for collateral purposes other than establishing liability as liability is already provided for by the insurance clause in the contract. The proceedings are also an abuse of the court process as they have been pursued in contravention of express provision of the contract stipulating an alternative dispute resolution. The claims herein therefore ought to be dismissed with costs.

The Finding

64. First and far most an agreement itself lays down precisely what each party has undertaken to do in order to say whether each had performed or not performed its part of the agreement. The agreement will contain statements some of which will be more inducement or representations while others will be terms of the contract. Where a statement forms a term of the contract, a court must consider the importance of that statement in the contract as a whole. Not all of the obligations created by a contract are of equal importance.

65. In this matter before me there is no dispute that the claimants entered into a contract with the defendant to provide Traffic Management Service in Limbe and Blantyre bus terminals and markets. The

contracts were for 2 years for each claimant entered on 1st November, 2015 and 26th October, 2015 respectively. When the claimants went on the sites to commence work they found members of MOAM operating on the sites. MOAM had previously been allowed to perform the Traffic Management Services.

66. When the claimants notified the defendant, the latter promised to resolve the issue. According to the evidence MOAM refused to vacate the sites and became violent towards the claimants and employees of the defendant. As time passed the defendant tried to use the Police but MOAM members refused to move out of the premises.

67. In the end the two years expired and the claimants were only allowed to work on very few sites and for a short period of time. The claimants are blaming the defendant for breach of their duty in the contracts by failing to remove MOAM and give access to the claimants in fulfillments of the contract. The defendant is denying liability claiming it was MOAM which frustrated the contract. They called it the actions of a third party. In law a contract is frustrated where there is an unforeseen event which occurs after the contract has been signed which brings a contract to an end.

68. The evidence is that the contract was between the claimants and the defendant and not MOAM. The sites in question belong to the defendant and not MOAM. The defendant were duty bound under these contract to give unfettered access to the claimants for them to perform their part of the contract. The defendant were duty bound to remove MOAM from the sites either through the court or any other lawful means.

69. The defendant's witness admitted that they knew that prior to the contract, MOAM was still carrying out their activities on the said places. Furthermore, the witness told the court that the defendant's employees were chased on the said places when they wanted to take over the sites. This was prior to entering into the contracts. This is evident enough that the defendant had prior knowledge of the problems between the defendant and MOAM and despite these problems the defendant entered into the contracts with the claimants.

70. The defendant cannot plead that the contracts were frustrated by a third party to wit MOAM. That the doctrine will not apply if the frustrating event occurred as a result of the act or election of the contracting party which is seeking to rely on it. In this case the defendant cannot plead frustration.

71. I do believe that the defendant as a landlord cannot fail to remove a former tenant or trespasser from its land. The defendant failed the claimants by allowing MOAM to continue to be on the sites. Their inability to perform their part of contract is disturbing to the core. Additionally when the contracts expired the defendant refused to re new the contracts while knowing that the original and previous contracts were not performed due to their own actions.

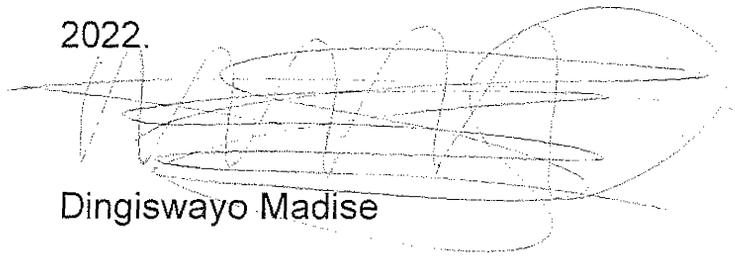
72. On the issue of insurance, the defendant cannot plead that the claimants did not take out insurance when there was none performance on their part or partial performance. If the contracts were allowed to run and something happened in the course then the issue of insurance could have risen. The claimants lost money because they were denied access to the designated sites which were in the contracts.

73. The defendant is claiming that the claimants did not take out insurance because they knew from the start of the contract that they will not perform their part of the contract and wanted to push the blame (bill) to an insurer. They cannot be allowed to use the insurance clause to run away from liability. In this regard the insurance clause notwithstanding, the defendant failed the claimants but signing contracts which the defendant knew could not be performed because of the presence of trespassers.

74. The issue of arbitration cannot make these proceeding fatal. The claimants chose this forum and this court cannot turn them away. The contracts provided that all disputes under the contract would be referred to arbitration. In this matter there was no dispute. The contracts had been fatally breached. If the contracts had been allowed to run and there were disputes during the course then the issue of arbitration could have been raised. In this case there was no dispute but a substantial breach. From the evidence and the law and on a balance of probabilities I therefore find that the 1st claimant must be paid damages on the sites did not work. I find that the 2nd claimant must be paid damages for the 5 months that he did not work.

75. I agree with the defendant that the figures that the claimants have brought to court must be substantiated. The claimants have 14 days to file summons for assessment of damages before the Registrar. The defendant could have mitigated loses by awarding the claimants another term of 2 years after the expiry of the first contacts. I condemn them in costs.

Pronounced in open court at Blantyre in the Republic on 10th February 2022.



Dingiswayo Madise

Judge.