



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 637 OF 2013

BETWEEN:

KARIM CHAPEYAMA t/a NSAMALA BANJA WEEDING

CONTRACTOR

PLAINTIFF

AND

ILLOVO SUGAR (MALAWI) LIMITED

DEFENDANT

CORAM: JUSTICE M.A. TEMBO,

Matumbi, Counsel for the Plaintiff

Dziwani and Phiri, Counsel for the Defendant

Kakhobwe, Official Court Interpreter

JUDGMENT

This is this court's judgment on the plaintiff's claim for damages for breach of contract against the defendant.

The plaintiff is a sugarcane field weeding contractor. The defendant is a sugarcane grower and producer of sugar. The plaintiff claims that the defendant breached a contract it had entered into with the plaintiff for provision of weeding services by unilaterally terminating the same in breach of the contract. The plaintiff seeks the following declarations and orders

1. A declaration that the defendant in unilaterally terminating the contract has acted in bad faith and did not in any way have regard to the interests of the plaintiff.
2. A declaration that in all the circumstances of the case, the defendant failed to take reasonable precautions in the manner of exercise of the power of termination under clause 19.1 of the contract.
3. A declaration that the termination of the contract and the reasons advanced for the termination are not supported by evidence and not grounded in facts prevailing in the circumstances.
4. An order that the defendant is liable to pay damages for breach of contract.
5. An order that the defendant is liable to pay special damages:

Particulars

- a. As a business, the plaintiff employed staff whom he will have to pay severance pay and other dues which the plaintiff has failed to pay up to now due to the breach of contract by the defendant. The plaintiff therefore claims from the defendant all the dues the plaintiff's staff are entitled to under their contracts of employment and under general labour laws.
- b. To better execute the business with the defendant, the plaintiff had to buy land and construct a building which was the plaintiff's office. Due to the breach of contract by the defendant, the said office and land lay to waste. The plaintiff therefore claims from the defendant the value of the land and building for the projected period of the contract.
- c. To run the business efficiently, the plaintiff purchased office furniture and staff gear, all of which will now go to waste on account of the defendant's breach of contract. The plaintiff therefore claims the value of the furniture and staff gear from the defendant.
- d. To better execute his part of the contract with the defendant, the plaintiff had to purchase a motor vehicle on loan and which loan the plaintiff has failed to service on account of the defendant's unilateral action of terminating the contract. The plaintiff therefore claims from the defendant the outstanding loan balance as well as the interests accrued so far.
- e. To make the vehicle stated in paragraph 5 (c) hereof roadworthy, the plaintiff had to insure the said vehicle with Reunion Insurance Company

and on account of the defendant's breach of contract, the plaintiff has fallen into insurance premium arrears of K1, 071,585.66. The plaintiff therefore claims from the defendant the said sum of K1, 071,585.66.

6. The plaintiff also seeks an order of costs against the defendant.

The plaintiff's case was commenced by originating summons which this Court later ordered to stand as a statement of claim in view of the contentious nature of the facts in this case. The defendant was ordered to serve its defence. And thereafter there was discovery of evidence and exchange of witness statements.

Both parties gave oral testimony in support of their respective contentions and also written submissions after the hearing of this matter. This Court is grateful for the submissions that were helpful in resolving the issues in dispute.

This Court has to determine several issues herein. Whether the defendant in unilaterally terminating the contract acted in bad faith and did not in any way have regard to the interests of the plaintiff and thereby breached the implied term to perform the contract in good faith and exercise reasonable skill in making judgment.

Whether in all the circumstances of the case, the defendant failed to take reasonable precautions in the manner of the exercise of the power of termination under clause 19.1 of the contract and thereby breached the implied term to use reasonable skill in making judgments against the plaintiff.

Whether the termination of contract and the reasons advanced therefor are not supported by evidence and not grounded in facts prevailing in the circumstances and thereby the defendant breached the duty to act fairly implied under the contract.

Whether the defendant is liable to pay damages for breach of contract.

Whether the defendant is liable to pay special damages.

Whether the defendant is liable to pay costs.

This Court is aware of the standard of proof in civil matters such as the instant one. That standard of proof is on a balance of probabilities and the burden of proof is borne by the party that asserts the affirmative.

The facts of this case are fairly contested as far as the alleged breach of contract is concerned.

The plaintiff is a businessman currently based in Mulanje. His late father had entered a contract with the defendant in August 2010 to provide weed eradication services. The contract was to run for five years, that is, until 31st March 2015. The plaintiff's father passed away in 2011 and the defendant asked the plaintiff to carry on with the contract. He tendered a copy of the contract in evidence which was marked as exhibit P1. This contract had been terminated on 9th January 2012 following the death of the plaintiff's father as per exhibit P2 but was reinstated and continued with the plaintiff herein. The contract involved removal of weeds from specified fields of sugarcane owned by the defendant.

The plaintiff explained that he would get a work order from the defendant indicating which sugarcane field to weed. He stated that he would get workers from around the defendant's sugarcane estate. He further explained that there were other contractors like himself working for the defendant and that he competed with such contractors for labour. This competition was based on how well the wages paid by each contractor were. The plaintiff claimed that the defendant was paying a higher wage to its workers than were paid by contractors like the plaintiff even when the contractors sat down together to fix prices.

The plaintiff indicated that then contractors were paying K300 per day to their workers and the defendant was paying K600 per day to its workers. He stated that when workers discovered this they would leave and go to work for the defendant and the plaintiff would go looking for new workers.

The plaintiff informed this Court that he would pay his workers from the cost he would charge the defendant for work done per hectare called the variable cost. He was using the same variable cost to pay for his fuel cost and his motor vehicle maintenance cost in the course of the contract work herein. The plaintiff stated that he set the K300 daily wage so that the other money should be adequate to cover fuel and maintenance costs and profit. He stated that if he paid K600 per day he would not make a profit.

The plaintiff further stated that on 25th November 2013, the defendant wrote a letter terminating the weeding contract herein with immediate effect. He stated that

the contract was terminated due to the plaintiff's quality of work which the defendant said was below that required by the defendant. A copy of the letter of termination was tendered in evidence and marked as exhibit P3.

The plaintiff stated that he was previously never told at all by the defendant that his work was below the required standard set by the defendant. The plaintiff stated that he was only previously asked by the defendant to increase the number of his workers because there were so many weeds.

The plaintiff stated that he did raise a complaint about the wage disparity issue mentioned above involving workers for contractors like himself and workers of the defendant. The plaintiff produced the minutes of the meeting of 29th April 2013 where himself and other contractors discussed with the defendant about the work on the weeding contracts herein including the wage disparity issue. The minutes were tendered in evidence and are marked as exhibit P4. These minutes show that the purpose of the meeting was to allow weeding contractors explain why they were struggling with their weeding work as they were failing to raise enough labour. The minutes show that each contractor was given a chance to explain and several reasons were given by contractors as follows. The contractors stated that labour was difficult to find because the defendant was also recruiting casual labour and was paying them more than the contractors. Further, that recent fuel price hikes then paralysed the contractors' transportation of labourers. Further, that some of the contractors vehicles were not road worthy such as that of the plaintiff which was waiting for a fuel pump to come from the Republic of South Africa to be fixed. Still further, that heavy rains that fell for two weeks delayed the weeding operation. Further, that workers were running away to smart rouging contractors where the job involved removing sugarcane offshoots which was regarded as simpler than hand weeding. Lastly, that there was an increase in man days per hectare due to the change in the weeding standard that then required water grass and star grass to be hand weeded.

The minutes of the said meeting show the following resolutions. That with or without the company recruiting casuals the contractor still found it difficult to raise labour. That the main cause of failure to raise labour was poor management of the workers by contractors since contractors conceded that they pay less, do not provide transport and do not provide recognition for better work by labourers. That

when there is a fuel price hike the adjustments in variable cost rates per hectare payable by the defendant is supposed to be instant. That heavy rains came after things were already out of hand. That transport problems are not the responsibility of the defendant. That the contractors signed that they would provide labour for weeding and must do so. That safety must be observed at all times so that unroadworthy vehicles must not be used to ferry labourers, no labourers shall work without personal protective wear. Contractors promised that they would improve. That the variable cost rate would be revised.

The minutes of the said meeting ended with a warning that the defendant is in business therefore that underperformers shall not be entertained. That contractors who believe that they cannot improve should honourably come forward and resign. That those who decide to remain in contract should start doing the right thing first time. And lastly, that the defendant's area managers and Farm managers would be given the task to monitor the progress and give a feedback every week about individual contractors.

The plaintiff then pointed out that the copy of the minutes that he received herein was not signed and dated at the end. The plaintiff was shown a copy of the minutes of the same meeting of 29th April 2013 that were to be tendered by the defendant's witness, who is the defendant's field manager, Mr Roben Shaba. Mr Shaba's copy of the minutes was different in three material ways from the one tendered by the plaintiff. That copy was signed for although the name of the one who signed is not indicated. The minutes were also dated 8th May 2013. That copy of the minutes also contained a last sentence under the last item titled as warning, to the effect that underperforming contractors will be punished as individual contractors and that this is a final warning. The plaintiff stated that the three items are not included on the copy of the minutes of the meeting of 29th April 2013 that he got herein.

The plaintiff stated that weeding became more difficult because of the newly introduced requirement of hand weeding.

Further, the plaintiff stated that he paid less to labourers due to the payment he got from the defendant for weeding done per hectare. He also stated that for low weed infestation he would put two workers per hectare, for medium weed infestation he

would put four workers per hectare and for high weed infestation he would put ten workers per hectare.

The plaintiff was then shown the defendant's weeding manual that he said was used by him as a contractor for assigning weeding jobs in the defendant's sugarcane fields. The manual was marked as exhibit P5. The plaintiff referred to paragraph 7.2 of the weeding manual which provides that for light weed infestation 2 to 4 man days per hectare are required, for medium weed infestation 5 to 6 man days per hectare are required and for heavy weed infestation 7 to 8 man days per hectare are required. It further provides that hand weeding is to be done before weeds flower and that in general a field is to be weeded twice or thrice per season. The same paragraph provides for the field section supervisor to inspect fields before weeding to establish tasks and to keep records of completed field hand weeding report and weekly weeding quality report. It further provides how the weeds are to be disposed of in the sugar cane field generally and during wet conditions.

The plaintiff stated that this manual is used in assigning weeding work and that the number of weeders affects the variable cost. The plaintiff repeated that he was never informed that his weeding work was below the standard set by the defendant.

The plaintiff was then referred to the claim by Mr Shaba in his witness statement to the effect that on 12th July 2013 whilst Mr Shaba was on routine inspection of the fields he found some workers weeding in field number 1232 whilst not putting on any foot protection and personal protective clothing whom Mr Shaba photographed and who confirmed upon being interviewed that they were the plaintiff's employees. The plaintiff stated that he remembers working in the particular field mentioned by Mr Shaba.

But on being shown a copy of the picture of the employees in issue dated 12th July 2013 the plaintiff stated that he does not know the people said to be his employees. The plaintiff further stated that he could not tell from the picture what the field number was where the picture was taken. He further stated that the people in the picture were not his employees due to the absence of the field number. Further, because his employees wear uniforms and use hoes with wooden handles but the people in the picture had no uniforms and had a hoe with a metal handle. He also

stated that the wooden handle is used as a matter of safety precaution in the course of transportation of workers. The plaintiff also stated that he never received a copy of the picture of his alleged employees and never signed for the same. Further, that the Agriculture Manager for the defendant did not sign on the picture. The plaintiff wondered that may be his contract was terminated because of his alleged employees in the picture but he did not know why his contract was terminated.

The plaintiff was then shown an inspector's safety book where he recorded worker safety provisions and he tendered the said book in evidence as exhibit P6. He pointed out that under protective clothing it showed that it was ok. This Court notes that the safety inspection book exhibit P6 referred to is for July 2012 and it shows ok for suitable protective clothing provided.

The plaintiff then tendered in evidence exhibit P7 unpaid invoices for outstanding motor vehicle insurance premiums that his late father owed Reunion Insurance Company Limited. He stated that he had not paid the outstanding premiums due to problems of profits due to high weeds. He stated further that he should have paid the premiums by 2015.

The plaintiff then tendered in evidence exhibit P8 which are weekly weeding quality reports for 4th, 7th, 8th, 14th, 13th and 18th June 2013 for weeding in various different fields. He pointed out that on these reports he was given a grade of good. The grade on the weekly weeding quality reports is in three categories being excellent, good and poor. This Court has noted that the plaintiff produced weekly weeding reports for 4th, 7th, 8th, 14th, 13th and 18th June 2013 which showed a grade of good weeding.

The plaintiff then tendered the defendants monthly safety audit check list on his firm and it is exhibit P9. He stated that for protective clothing, such as work suits and gum boots, being in good state of repair and being worn, his firm scored 5 out of 5 for the checklist dated 15th November 2011. For the checklist dated 10th December 2012 the plaintiff scored 4 out of 5.

The plaintiff insisted that his work was not below the standard set by the defendant. The plaintiff stated that he was accused of below standard work due to less workers but that he actually brought enough workers to the field as per the

exhibit P10 which is the report for man days prepared by the plaintiff for the period from January 2013 to November 2013.

The plaintiff stated that he was never warned before his contract was terminated.

During cross-examination, the plaintiff was referred to exhibit P10 and he indicated that he had prepared the said document in December 2013 and further that he had done weeding work for 26 days in the month of November 2013. The plaintiff however stated that his contract with the defendant ended on 25th November 2013. He then changed that he did not do work for the plaintiff for 26 days but rather that his administrator would be in a better position to clarify on the matter of days worked in November 2013. When questioned further on exhibit P10 the plaintiff stated that his firm prepared the same using daily labour records which were not brought in this Court having been lost due to the violence that took place at his office at the end of November 2013 after the plaintiff's workers rioted about insufficient pay. The plaintiff indicated that he was not sure as to exactly when the violence took place in November 2013. He then stated that he thought the violence took place in December 2013. The plaintiff stated that the violence took place in December 2013 after he had paid his workers in November 2013. He said further that he had prepared the exhibit P10 on 4th December 2013. He denied using guess work in preparing exhibit P10. In re-examination, the plaintiff stated that he had worked for 26 days in November 2013 and his contract was terminated on 26th November 2013.

This Court observes from the foregoing that it is hard to understand how the plaintiff prepared a compilation of man days in exhibit P10 on 4th December 2013 when the source documents, being the daily labour records, were actually lost in November 2013 prior to the compilation. The administrator who the plaintiff said can explain on Exhibit P10 did not testify. This makes exhibit P10 suspect.

When questioned about the terms of the contract herein which the plaintiff took over from his late father, the plaintiff stated that he understood the terms of the said contract to be the ones to govern the contract he had with the defendant herein.

The plaintiff confirmed that according to the weeding contract herein he was required to remove weeds before they flowered. Further, that he was to provide personal protective clothing to his workers.

With regard to the issue of adequacy of number of workers, the plaintiff initially stated that he would employ an adequate number of workers. He however later stated that he would fail to employ an adequate number of workers because the defendant was paying workers higher wages than himself. He said he would pay a daily wage of K300.00 whilst the defendant was paying K480.00 daily wage. He then indicated that the defendant's daily wage was K680.00 and that the defendant knew its own daily wage.

The plaintiff told this Court that the minimum daily wage was not prescribed in the contract herein. However, upon being referred to clause 11.6 of the contract herein, exhibit P1, the plaintiff changed and said that in fact a daily minimum wage is prescribed. That clause provided that, furthermore to the plaintiff complying with the Employment Act, the plaintiff was required to comply with employee minimum wage for weeding as specified in annexure C on weeding wages. And that this was a daily wage rate based on eight hours of work for six day workers and shall be applied pro rata for task related work.

The plaintiff was referred to annexure C and he said that as from 2010 the prescribed daily rate for his workers was K319.44. He initially stated that he did not breach this prescription by paying daily wage of K300.00 but he later conceded breaching the prescribed rate.

The plaintiff stated that whenever the daily wage rate was increased by the defendant, it would also increase the contract price with the plaintiff.

The plaintiff said that in 2013 the defendant increased the daily wage rate to K423.00. He stated that this was to cover five hours which is the time spent weeding. The plaintiff alleged that the defendant would pay the contract price based on a six hour working day and that this was not in the contract herein. He however said the contract prescribed an eight hour working day. The plaintiff then conceded that he had to pay his workers K676.80 daily wage based on an eight hour day as per the contract herein. He said that this was the daily wage that the defendant paid its workers.

The plaintiff said that if he weeded a hectare he would be paid K676.80 per day per man. He further said that his daily rate would depend on the agreement between himself and the defendant's farm manager. The plaintiff stated that he would pay each of his workers K300.00 per day instead of K676.80 per day. And he said the defendant was to blame for this underpayment. But he also said that the defendant did not tell him to be paying K300.00 daily wage in 2013. In re-examination, on this issue of the prescribed wage in annexure C, the plaintiff stated that for example the defendant would pay him for 30.1 hectares weeding. For that weeding he would normally put in 20 workers but that due to heavy weed infestation he would not pay 20 workers but more than 50 or 70 workers and some would run away. Further that some would go to work for the defendant who was paying better. He stated further that his workers knocked off at 12 o'clock noon whereas the defendant's workers knocked off at 9.00 o'clock. He stated further that the defendant would pay the same contract price to him per hectare whether there are a lot of weeds or not and he would determine number of workers according to weed infestation levels. The plaintiff stated that a worker could not work to earn K676.80 per day and that he would assign workers lines to weed and pay them K300 after they finished the assigned portion of work. The plaintiff said he did not know the relevance of the eight hour daily wage.

The plaintiff was then asked about the meeting he had with the defendant's officials on 25th April 2013. He stated that he attended that meeting which was also attended by the defendant's Agriculture Manager Mr H. Chimbu. The plaintiff stated that at the said meeting he never heard the defendant's officials complain about the work of weeding contractors including himself. This is clearly contrary to the lucid minutes of the said meeting. The plaintiff however stated that explanations were given as to why contractors slackened in weeding including that there were transport problems and fuel price hike.

The plaintiff was referred to exhibit P4, the minutes of the meeting of 29th April 2013 and he stated that after this meeting the defendant did not issue and warning at all.

The plaintiff conceded again that upon entering the contract with the defendant herein he was under a duty to raise an adequate number of workers per hectare to be weeded but that he could not raise the required number of workers due to some

reasons. He stated further that due to his failure to raise the required number of workers weeding work would suffer. Some work would remain undone. In re-examination the plaintiff repeated that he could not raise the requisite number of workers due to the low daily wage he paid and also because prospective workers went to work in their own fields.

The plaintiff repeated that he never had a meeting with the defendant's officials where they complained about his standard of work. He however stated that he remembers being penalized for failure to weed timely. He stated that despite being penalized he was never given a letter of warning about sanctions for failure to weed timely. The plaintiff agreed that around September or October 2013 the defendant penalized him by imposing a 7.5 per cent deduction from his pay for failure to do timely weeding but that he was never written any other letter of warning apart from the penalty letters which he had in fact exhibited to his affidavit in support of an injunction herein.

The plaintiff was then referred to clause 19.1 of the weeding contract herein and he stated that there are two conditions in which the defendant could terminate the contract. Firstly, on breach of any terms of the contract and secondly on thirty days prior notice to terminate.

The plaintiff then conceded that the defendant was right to terminate the contract herein on breach.

The plaintiff was referred to exhibit P8 and stated that it was a weekly weeding quality report for June 2013. He stated that that exhibit covered all the work he had done but he also said it did not cover all the hectares he had weeded.

In re-examination, the plaintiff repeated that the minutes for the 29th April 2013 meeting did not have a warning. He however said he was penalized but that he never got any warning letter about his work and only saw the defendant's letters warning him when he appeared in this matter in this Court. He then stated that he just admitted that the defendant was right to terminate his contract but the defendant was not reasonable in terminating the contract since he had problems raising the required labour due to low pay and prospective workers going to work in their own gardens.

The plaintiff said that the defendant would call him to inform him of daily rates revisions. He clarified that the meeting of 29th April 2013 was not called by the defendant. Further that he had problems servicing his vehicle. He stated that the defendant had promised to fix the problems he had raised with fellow contractors but the said problems were not fixed.

The plaintiff then called one witness. This witness is Mr John Nguleti who was the plaintiff's fellow weeding contractor with the defendant. Mr Nguleti informed this Court that he knew the plaintiff's late father and the plaintiff as fellow weeding contractors with the defendant. He stated that his weeding contract with the defendant was terminated by the defendant on 25th November 2013 without any prior warning.

Mr Nguleti was referred to exhibit P4 and he stated that he was at the meeting of 29th April 2013 which was attended by fellow contractors and the defendant's field managers. He noted the difference in the last paragraph of the minutes of the meeting of 29th April 2013 as produced by the plaintiff and the defendant respectively. With the former showing that field managers were to monitor performance and give feedback and the latter showing that underperforming contractors would be punished and that this was the last warning. Mr Nguleti stated that he got his minutes which have similar closing paragraph to those produced by the plaintiff via mail. These were marked as exhibit P10.

Mr Nguleti stated that the reason for terminating the contracts herein were not given. He stated that he actually met the defendant's Mr Shaba who said he had instructed the termination herein and asked him if he had followed the correct procedure.

Mr Nguleti referred to paragraph 7.2 of exhibit P5 and stated that it talks of weed levels and man days per hectare. He further stated that the level of weeds changes throughout the year but that the rate of variable cost paid by the defendant per hectare weeded is the same throughout the year. He stated that as contractors they coped by reducing wages to workers. He further stated that they talked with the defendant on wages and variable cost and the challenges they had but the defendant did not give any positive feedback.

During cross-examination, Mr Nguleti stated that his contract was terminated at the same time with that of the plaintiff. He stated that he had come to testify because he was unhappy with the termination.

He stated that he was working with the plaintiff at the defendant's field at Area 1 and that he does not remember any field weeded by the plaintiff where the weeds were tall. He however said he cannot say about the other fields where the plaintiff weeded other than at Area 1.

He further stated that at the meeting of 29th April 2013 the defendant complained in general terms over the whole estate about delayed pace of weeding by contractors. He however said he did not remember any warning being issued at that meeting that those who could not manage should give up their contracts.

Mr Nguleti stated that in December and January prospective workers would go to work in their own fields hence low availability of labour. He stated that the meeting in issue herein was in April 2013. He further stated that there was a lot of rain in this particular year and there were also a lot of weeds as a result.

The plaintiff's view is that the conduct of the defendant herein in terminating his contract is unlawful and should not be condoned.

On its part the defendant brought two witnesses to testify in its defence. These were Mr Chrispine Mphaluwa, the defendant's area manager and Mr Roben Shaba, the defendant's field manager.

Mr Mphaluwa told this Court that he is area manager at the defendant's sugar estate at Nchalo. He further told this Court that in terms of structural organization of the defendant's sugar estate he is aware that an area is made up of a number of sections. That a section is made up of a number of blocks. And that a block is made up of a number of fields.

He further stated that as area manager he is responsible for sugar cane production at area level. And that this includes overseeing that all agricultural practices in sugarcane growing such as planting, weeding, fertilization and disease control are done effectively and timely.

Mr Mphaluwa further stated that the defendant engages various contractors to implement the agricultural practices associated with sugarcane growing. And that each contractor is assigned to work in designated sugarcane fields.

He further stated that, in carrying out the agricultural practices assigned to a contractor, the contractor works hand in hand with the farm managers and at times with the area manager. Further, that farm managers report to the area manager whilst the area manager reports to a field manager.

Mr Mphaluwa then stated that by a contract, between the plaintiff's late father and the defendant, the plaintiff was assigned to carry out weeding in designated sugarcane fields in area 1, area 2 and area 3 covering an approximate area of 2,100 hectares of sugarcane belonging to the defendant. He tendered in evidence the contract and it is marked as exhibit CT1. It is the same as exhibit P1.

Mr Mphaluwa went on to state that, in as far as weeding is concerned, it is the policy of the defendant that weeds be removed before they flower. This is to ensure that the sugar crop does not compete with weeds for soil nutrients. He explained that a report on research conducted by South African Sugar Experiment Station revealed that failure to weed may result in about 50 per cent reduction of the anticipated yield which results in loss of profits on the part of the defendant. He tendered a copy of the research report in evidence and it is marked CT2.

He further stated that removal of weeds after flowering increases the costs of weeding. And that this is so because some seeds of the weeds may get buried under the ground where they remain dormant only to emerge after a number of years.

He further stated that clause 3.2 of the contract entered between the plaintiff and the defendant herein expressly placed an obligation on the plaintiff to ensure that contractual fields are hand weeded with hoes before weeds flower.

Mr Mphaluwa went on to state that around December 2012 and January 2013 and October 2013 during his routine inspection of the fields the plaintiff had been assigned to remove the weeds, he noticed that the plaintiff was not weeding the weeds before flowering as agreed under the contract herein. Further, that the plaintiff had numerous fields in which there were weeds that were beyond the

flowering stage. He stated that this was also reported to him by farm managers under his supervision.

He explained that he had a number of personal discussions with the plaintiff where he expressed concern on the plaintiff's failure to effectively and timely do the weeding as required under the contract herein. He stated that the personal discussions were followed by letters which he wrote the plaintiff dated 18th December 2012, 10th June 2013 and 18th October 2013. These letters are marked as exhibit CT3a, CT3b and CT3c respectively. Mr Mphaluwa stated that by these letters he was requesting the plaintiff to ensure that all weeds were removed timely. This Court notes that exhibit CT3a indeed points out that the plaintiff is behind schedule in weeding and imposes a penalty on the plaintiff of 7.5 per cent deduction of remuneration and appeals to the plaintiff to improve his work. In CT3b the same situation arose and a similar penalty was also imposed and an appeal made to the plaintiff that such delayed weeding would not recur in the new season. However, CT3c is not about weeding. It is about a violation of motor vehicle transport safety by the plaintiff who is said to have used an unsecured truck.

Mr Mphaluwa further stated that besides complaints that he made to the plaintiff, in regard to failure to weed timely, he is aware that other area managers also raised similar complaints to the plaintiff. He tendered in evidence as exhibit CT4a, CT4b and CT4c copies of letters of complaints against the plaintiff's weeding made by area managers for area 3 and area 2 and which letters are dated 21st October 2013, 11th December 2012 and 2nd January 2013 respectively.

Mr Mphaluwa further stated that the number of workers engaged by the plaintiff to carry out the weeding was far below the turn out required to enable the plaintiff fulfill his obligations under the contract herein. And that he believed that this is the reason why the plaintiff had many fields that were not weeded before the flowering stage as contracted. He tendered in evidence copies of daily labour statistics for the plaintiff which are marked as exhibit CT5a, CT5b, CT5c, CT5d, CT5e, CT5f and CT5g.

This Court notes that exhibit CT5 a, CT5c and CT5e are the same document covering the period from 31st October 2012 to 10th April 2013 and are simply

headed daily labour statistics for the weeding contractor. Exhibit CT5 b, CT5d, CT5f and CT5g are the same document showing dates and man days for the plaintiff for the period of 29th April 2013 to 4th May 2013 and then from 13th May 2013 to 18th May 2013. There is no indication as to who signed these documents but they bear the heading weeding contractor daily labour statistics. At the bottom of these documents is typed Augustine Mwanyada.

Mr Mphaluwa explained that despite the foregoing discussions and correspondence the plaintiff did not improve in his performance. And that this compelled him to report the plaintiff's lack of improvement to his supervisor Mr Roben Shaba by email dated 21st October 2013 a copy of which was tendered in evidence and marked as exhibit CT6.

He stated further that because the defendant did not want the sugarcane crop to fail as a result of competing with weeds, the defendant engaged casual labour to rescue the crop. He stated that this defeated the purpose for which the defendant contracted the plaintiff which was to reduce costs associated with the defendant hiring its own staff.

He went on to explain that the contract herein gave the defendant the right to terminate the contract immediately if the contractor breached any of the terms of the agreement. Further, that before the defendant terminated the contract herein it gave the plaintiff ample time within which he was asked to improve his performance. Further, that the plaintiff was also penalized with deduction of remuneration for nonperformance and there was no indication that the plaintiff would improve.

Mr Mphaluwa was extensively cross-examined on his evidence. During cross-examination he told this Court that he had worked with the defendant since 1991 and held various positions until he became an area manager in 2003. Further that he holds a Diploma in Agriculture obtained from Bunda College of Agriculture in 1991. And that he also holds certificates in sugarcane production obtained locally and abroad and has good knowledge on sugarcane production.

Mr Mphaluwa explained that hand weeding is the removal of unwanted weeds by using hoes. He stated that in his field of experience there is no such thing called hand hoeing. He was then referred to exhibit CT2 which also explains how weeds

are to be controlled. He was specifically referred to paragraphs 2.3.1 and 2.3.2 of exhibit CT2. He read paragraph 2.3.1 which states

Hand weeding (i.e. pulling weeds out by hand): Expensive- high labour costs. Hand weeding is useful for weeds in the cane row, to prevent them from seeding, e.g. *sorghum bicolor* and *Panicum maximum*. The soil should be sufficiently moist to allow roots to be pulled out.

He also read paragraph 2.3.2 which states that

Hand hoeing: Expensive- high labour costs. Can be ineffective, as weeds are merely transplanted if hoe enters too deeply. Hoeing actually encourages growth of some weeds, such as *Cyperus rotundus*, as the tubers are stimulated. An advantage is that weeds in the row can be controlled if care is taken not to damage the cane. Also useful as a follow-up to herbicides to kill a few missed weeds.

He conceded that hand weeding and hand hoeing are indicated as different activities in the said paragraphs. He further stated that *Cyperus rotundus* is scientific name for water grass which in Chichewa is called Dawe. He stated that hand hoeing is not encouraged for water grass.

Mr Mphaluwa insisted that the plaintiff failed to deliver on the contract herein. He stated that the plaintiff did not do his best. He did not agree that the defendant made it difficult or created harsh conditions for the plaintiff to fulfill his contract. He was then referred to paragraph 3.6 of exhibit CT1 which states on weeding procedures that do not hand weed water grass or Dawe. He stated that this means that water grass is not to be removed by hand. He however stated that as per paragraph 2.3.2 in exhibit CT2 water grass should not be hand hoed. He stated that the plaintiff was using hoes in weeding. He stated further that the plaintiff was not allowed to use hands but hoes to remove water grass. He stated that the water grass was to be left alone and the contract herein was not about weeding water grass. He stated this after reading paragraph 4.1 of exhibit CT1 which states that

The contractor shall eradicate all weeds except water grass from approximately 2,100 ha (two thousand one hundred hectares) of designated sugar cane fields each year as referred to in Part 2 of schedule 1 appearing hereinafter.

Mr Mphaluwa was then asked whether he knows about zero weeding. He stated that he was not aware of the same even though he has 24 years experience in the

field of sugar cane production. He was referred to paragraph 4.2 of exhibit CT1 which states that occasionally, in the event of rain there will be a requirement (at Illovo's discretion) for a reduced or even possibly a 0 (zero) weeding. He stated that he was reading about this zero weeding for the first time. He stated that it means in cases of rain there may be reduced weeding. And further that if there is too much rain there is a chance that there would be no weeding, for instance if it rained for the whole day. He further stated that if there is rain there can be no weeding even if weeds are present and that there would be no breach of the contract if there is rain and resulting no weeding. He further stated that he would not say the plaintiff had breached the contract by not weeding during rains in light of paragraph 4.2 in exhibit CT1.

Mr Mphaluwa was then asked about the meeting of 29th April 2013 whose minutes are in exhibit P4. He stated that he was only told by his field manager Mr Majamanda that management of the defendant had invited the contractors herein to a meeting. Further, that the meeting proceedings were not explained to him as it was at a higher level. He stated that Mr Shaba who is his supervisor was present at the said meeting. He was then referred to exhibit P4 and explained that casuals are people who the defendant recruits on short term basis say for a week or two. And these are paid at the defendant's daily rate. He noted that the defendant undertook to revise the rates to weeders as per paragraph 3 of the minutes of exhibit P4.

When asked to comment whether it was shocking that contractors complained in paragraph 2 of exhibit P4 that they experienced increase in man days per hectare due to a change in the weeding standard that now required hand weeding of water grass and star grass, Mr Mphaluwa said that he was not shocked by this. He stated that the contract herein said that water grass was not to be weeded. He however said that he knew the reason why water grass and star grass is to be weeded. That the reason came out of a discussion. He stated that contractors were right to complain that their labour was affected due to change in standard of weeding, that is, that water grass was to be weeded despite the contract herein saying that water grass was to be left alone. He said further that he would in a way agree that inclusion of water grass for weeding resulted in increase of man days per hectare. And further that the said increase in man days per hectare meant more money to be spent by contractors such as the plaintiff.

Mr Mphaluwa then stated that he would blame the plaintiff for failing to work because after he had expressed a concern about the change in the standard of weeding there was a promise that the rates payable by the defendant would be increased. He however stated that he could not say if the said rates were indeed increased. He stated further that he would not blame the plaintiff for complaining about the new standard of weeding where the rates were not revised despite increase in labour requirements brought about by the new standard of weeding to include water grass.

Mr Mphaluwa was then asked about the variable cost and he said it is money paid by the defendant for weeding work done by the plaintiff as per the hectares covered. He however did not know what the composition of the variable cost is. But on being referred to exhibit C1 in paragraph 8.2 he stated that the variable cost has three elements namely fuel and lubricants, vehicle maintenance and tyres and weeders wages. He stated that weeders are labourers who do the weeding. He stated that the variable cost rate per hectare is K1, 146.75 as per exhibit CT1 at page 19. He stated that a prudent contractor had to use the variable cost to cover the three elements. He however admitted that life was hard for the plaintiff since labour requirements increased due to change in the standard of weeding in that water grass was to be weeded for the same wage element in the variable cost although weeding water grass was not part of the contract. He agreed that the defendant should have understood the difficult circumstances faced by the plaintiff and did understand. He noted that area managers complained about contractors work as per exhibit CT4 but he does not agree fully that the area managers should have understood or appreciated the contractors problems.

Mr Mphaluwa then told this Court that failure to weed would result in 50 per cent loss in revenue by the defendant due to reduced yield according to research findings in exhibit CT2. He however conceded that the findings are a generalization and that other factors other than weeding, such as rainfall and disease also affect the yield. And further that if sugar cane grew quickly lack of weeding would have less effect on yield. He also stated that if you weed before the weeds flower you get maximum yield.

Mr Mphaluwa was then referred to exhibit CT5a and CT5b and agreed that there was nothing to show that this was a daily labour statistic for the plaintiff. He stated

that he did not prepare the same but that it was his junior Mr Mwanyada a farm manager who prepared the same. That makes it hearsay. He stated that for 29th April 2013, which indicates 17 man days for the plaintiff, his opinion is that the plaintiff did not bring enough labour. He stated that one man day is a person who works in a day. He stated further that the plaintiff had to weed 2,100 hectares. He further stated that the man days required increased due to inclusion of weeding of water grass. And that the more the weeds equals more man days used. He stated that he does not go to the sugar cane field daily but does so every other day. Further that on 29th April 2013 he did not go to the field and did not see the level of weed infestation on that day. He however insisted that he knew how many man days were required on that day. He then stated that one can only say the man days are few after looking at the level of weed infestation. He conceded that exhibit CT5b does not tell us what the weeds level was and so it is a useless document.

Mr Mphaluwa was then referred to an Agriculture Works Manual-Weed Control of the defendant which is exhibit CT10A. He was referred to paragraph 7.2.2.1.1 on hand weeding tasks. He stated that this shows that weed levels determine man days per hectare depending on whether the weed infestation is light, medium or heavy. He agreed that exhibit CT5b does not state how many hectares were worked using that labour. He further agreed that exhibits CT5a to CT5g inclusive do not show the level of weed infestation and how many hectares were covered by the man days. He stated that for heavy weed infestation if you put 2 to 4 man days that would be less labour since what is required is 7 to 8 man days per hectare as per paragraph 7.2.2.1.1 on tasking in exhibit CT10A. He then stated that it is correct that weeds level and number of hectares need to be known for one to say that the labour was not enough. He agreed that exhibits CT5a to CT5g inclusive do not say much in that context. He however asked this Court to treat these documents as useful since they come with an explanation. This Court however finds it difficult to find the said documents useful in the state they are in.

Mr Mphaluwa then stated that he would propose a penalty to be imposed by management of the defendant on any contractor who did not improve in weeding after he spoke to such a contractor. A penalty would be 7.5 per cent of a contractor's remuneration. He stated that it was up to management to decide from which part of a contractor's remuneration to deduct the penalty. He further stated

that the penalty covers the past mistake and that the same mistake would not be used later against a contractor.

Mr Mphaluwa then stated that under the contract herein between the plaintiff and the defendant each party had obligations to perform. Further, that if either party did not respect the contract it would be acting in bad faith. He was then referred to clause 21 of exhibit CT1 on notices and it reads as follows

21.1 Any notice, decision, direction, approval, authority, permission or consent under this agreement shall be in writing and shall be served on or conveyed to either party by prepaid registered post or recorded delivery at its address specified hereafter

To: Illovo Sugar (Malawi) Limited, Private Bag 580, Blantyre

To : The Contractor, at the address shown in Part 1 of the schedule appearing hereinafter

21.2 The aforesaid addresses may be changed upon notice in writing to the other party.

He was also referred to Part 1 of the schedule which reads that

The particulars of the contractor are as follows

Name	:	Nsamala Banja
Registered number	:	25210
Postal address	:	P.O. Box 95, Nchalo
Main place of business	:	Nchalo
Contact number	:	0888353851

Mr Mphaluwa stated that either party had to write about any changes to the above address. He was then referred to exhibit CT3a, CT3b and CT3c and he stated that these are letters notifying the plaintiff of certain developments. He stated further that these letters contain notices or decisions as per par 21.1 of exhibit CT1. He then stated that he understood what a registered post is and also recorded delivery where one has to sign for delivered mail. He stated that he was not aware of any

change of the plaintiff's address. When referred to exhibits CT3a, CT3b and CT3c he conceded that these did not comply with the requirement that they be sent by either registered post to the plaintiff or that they be signed for by the plaintiff. He did not have proof of either registered post or recorded delivery. He conceded the same when referred to exhibit CT4a, CT4b and CT4c. He stated that these documents could be written and any date would be put on them and as they are there is no proof that they were brought to the attention of the plaintiff. Hence, the plaintiff must have been surprised by the penalties imposed on him.

Mr Mphaluwa was then referred to exhibits CT16a and CT16b which the defendant claimed are pictures of the fields that were not weeded by the plaintiff in breach of the contract herein. Mr Mphaluwa stated that some of the fields at the defendant's sugar cane estate have sign posts and others do not have. He stated that it is his field manager who took the pictures and that he was not there when the pictures were taken. He stated that the field numbers appearing on the picture were inscribed at the defendant's office. He admitted that there was no way of telling that the pictures were taken at the defendant's sugar cane fields.

Mr Mphaluwa was then shown exhibit CT8 which is a letter with a picture of people that the defendant claims are the plaintiff's employees working on the defendant's sugar cane fields without personal protective clothing contrary to the contract herein. He admitted that this letter is neither addressed to the plaintiff on the contractual address by registered post nor dispatched to the plaintiff by recorded delivery. He further stated that he does not know the people in the picture. He was also not there when the picture was taken. He further noted that the author of the letter and the Agricultural manager did not sign for the letter though a blank space was provided for the two to sign on.

Mr Mphaluwa then indicated that he recommended the termination of the plaintiff's contract so that he could protect his own job with the defendant.

He was then referred to IDD 1 which was a document indicating wage rates for the defendant's casual labourer's. He stated that the defendant's casuals' daily rate was K676.00 whereas the contract with the plaintiff provided labourer's daily rate of K319.00. He stated that labour would go where a higher wage was being paid.

Mr Mphaluwa was then referred to minutes of the meeting of 29th April 2013 which are in exhibit P4. He stated that he does not agree that rains would have affected weeding.

He then stated that fuel is part of the variable cost rate. Further, that if there was no fuel hike the plaintiff would have properly delivered labourers.

He further stated that if the plaintiff was not forced to weed water grass then his output would have been higher.

Further, that if exhibits CT3a, CT3b and CT3c had been delivered to the plaintiff there is a chance that he would have improved his weeding.

He further stated that as per exhibit P4 it was resolved that rates would be revised. He indicated that a Mr Chimbu signed on exhibit P4.

Mr Mphaluwa was then referred to exhibit CT14 and exhibit P4 which are all minutes of the meeting of 29th April 2013 bearing the same date. He stated that as an area manager he performed his duty of monitoring and giving feedback to contractors as per the last paragraph of the minutes that state that area managers were to give weekly feedback to contractors on the contractors' work. He further stated that he gave weekly feedback orally and in writing to his supervisor Mr Shaba.

Mr Mphaluwa then stated that under the contract he was to provide weekly weeding reports. He stated that he reported orally. He was then referred to exhibit CT10A the Agricultural Works Manual at paragraph 8.2 which provides that, for hand weeding, weekly weeding quality reports are to be retained for three years by the farm manager and to be destroyed after that period by the area manager. He stated that these written reports are there in files at his office. Further, that these reports are important for quality control in that they show whether the weeding was good or bad. He however said that such reports are different from those under exhibit P4. He also denied that he never brought to court the weekly weeding quality reports pertinent to the plaintiff because such weekly weeding reports spoke well for the plaintiff. He also denied that the weekly weeding reports would give this Court a good picture herein.

In re-examination, Mr Mphaluwa stated that his job was in danger because when the defendant stated that the plaintiff was not doing his job well then it meant even his job was not being done well. He stated that his core business was to ensure that sugar cane production reached production figures. He stated that weeding in area 1 was not going well.

He was then referred to exhibit CT11 which are copies of email communication and he stated that he wrote email messages to his superior Mr Shaba that the plaintiff was not improving in weeding. The emails are dated 21st October 2013 and 20th November 2013. He stated that the email communication was one of the written reports about the plaintiff's failure of progress herein. Further, that the plaintiff's contract was terminated for failure to perform the contract properly. He said that the plaintiff was not to weed after weeds had flowered but he weeded after the weeds had flowered so the defendant was having no benefit.

Mr Mphaluwa then stated that casuals wages were revised yearly but he could not say what the specific wage was in each year. On being referred to exhibit CT1 annexure C he stated that in 2010 the minimum daily wage was K319.44. He stated that the defendant was paying casuals that same rate of K319.44. He stated that he could however not say how much was being paid in 2010. On being shown document IDD1 he stated that it was on weeding contract rates but he did not know why the same was being sent to the addressee Clara Chikutiro in the defendant's human resources department. He further stated that the defendant had engaged five weeding contractors. And that the issue of remuneration was a private issue to the contractors and so he could not say whether weeders were paid low wages or well by the said contractors. He stated that it depended on the contractor's business.

Mr Mphaluwa was then referred to clause 11.6 of exhibit CT1 and he stated that both the plaintiff and the defendant were involved in the agreement on minimum wage.

He further stated that the defendant recruited casuals because contractors were failing to weed and the defendant wanted to protect the sugar cane crop. Further, that the casuals were deployed in fields where the contractors were supposed to work.

He then stated that every time there were meetings concerns were raised by the plaintiff to the defendant's management and resolutions should have been arrived at in such meetings.

He further stated that the area manager and the contractor would decide if there was to be no weeding or reduced weeding and he and the contractor would go together in the field for that purpose.

Mr Mphaluwa was referred to clause 4.2 of exhibit CT1 on zero weeding and he stated that the area manager would inform contractor not to come to weed when there is rain. Further, that the practice was that he would communicate in writing to the plaintiff but being an agricultural situation he would communicate verbally. The actual practice seems to have been verbal communication from what was said here.

He further stated that the defendant has an administrator in agriculture department who gets letters from all sectors and people come to him to collect those letters. And on being referred to exhibit CT3a, CT3b and CT3c he stated that the envelopes in which those letters were conveyed and are stamped must be with the plaintiff.

Mr Mphaluwa was referred to exhibit CT5a and stated that the data in that document was obtained from the plaintiff by another person who prepared that document. He stated that exhibit CT5a concerned weeding in a section with an area of about 700 hectares which required four man days per hectare for light weeding. He stated that the data in that document gave him a picture on whether weeding took place or not. The exhibit CT5a appears to be hearsay as the author of the same is not before this Court.

He then stated that those contractors who failed in their duty would be put on sanctions and if there is no improvement their contracts would be terminated. Further, that an area manager or farm manager would decide which part of the farm would be weeded and would go in the field to assess the weed levels and decide on man days required.

He then stated that he was not aware of the profit margin the contractors were supposed to get herein. He was then referred to exhibit CT1 annexure D which shows agreed profit element of 10 per cent of variable cost.

He was then referred to photos in exhibit CT16a, CT16b, CT16c and CT16d and stated that they were taken by his supervisor the field manager and he saw them the day they were taken. Having worked with his field manager for three years he believed the field manager. He also said he would know where these pictures were taken.

He then stated that the services manager awards weeding contracts but he only recommends the said contractors.

He also stated that the plaintiff knew he was penalized herein because his payment had less the penalty.

He further stated that weeds were flowering because the plaintiff was slow.

He reiterated that he was not present at the meeting whose minutes are in exhibit P4. He stated further that a farm manager reports to him and he in turn reports to the field manager. Further that he is a field worker and goes to the sugar cane fields frequently taking care of the sugar cane crop from day one to the time it is harvested.

Then the second witness to testify was Mr Roben Shaba. He stated that he is the defendant's field manager at Nchalo and that he is responsible for areas 1, 6 and 7 comprising the southern part of the defendant's Nchalo sugar estate.

He stated that the defendant is the biggest producer of sugar in Africa with operations in several countries other than Malawi. Further, that to ensure that its operations in all the countries where it operates are uniform, the defendant acquired certification for operations and quality management issued by the International Organization for Standardization (ISO). Further, that the defendant is routinely audited by ISO to ensure that all its operations and management systems comply with standards set by ISO. This is also a requirement by major customers of the defendant.

Mr Shaba the stated that under the contract herein, the defendant was engaged to weed in a number of the defendant's sugar cane fields which included field number 1232.

He further stated that under the contract herein, the plaintiff was under an obligation to ensure that all his employees were provided with protective foot wear and protective personal clothing to be put on during working hours. He stated that this obligation is in terms of paragraph 4.18 of the defendant's Occupational Health and Safety and Environment Rules and Regulations which form part of the contract herein. He tendered the said rules and regulations and they are marked as exhibit CT7.

He went on to state that on 12th July 2013 whilst on his routine inspection of the fields he found some workers weeding in field number 1232 who had not put on any protective foot wear and protective personal clothing. He stated that he took pictures of the workers which were tendered in evidence and marked as exhibit CT8. He stated that he also interviewed these workers and they confirmed to him that they were the employees of the plaintiff. He also stated that furthermore, that the plaintiff's claim for payment form for work performed on 12th July 2013 clearly indicates that the plaintiff's workers worked in the field number 1232 on 12th July 2013. He tendered in evidence the plaintiff's claim form for work done on 12th July 2013 and it is marked as exhibit CT9.

He then stated that for the plaintiff's breach of the obligation to provide protective foot wear and clothing the plaintiff was penalized by the defendant with a 7.5 per cent deduction from his remuneration. And that this was in line with the contract herein.

Mr Shaba further stated that the contract herein also required the plaintiff to ensure that weeds are removed before they flower and that removal of weeds after they flower reduces sugar cane yield by 50 per cent resulting in reduced profit for the defendant. He also stated that removal of weeds before they flower is one of the items on the ISO checklist. Non compliance with the same may lead to withdrawal of certification and loss of customers of the defendant who insist on compliance with ISO standards.

He further stated that pursuant to the contract herein, the plaintiff's late father was issued with an Agricultural Work Instruction Manual that he acknowledged by signing in what is called the Quality Assurance –Controlled Copy Register on 4th January 2010. He stated that a work instruction is issued before any activity is carried out at the defendant's sugar estate. He then stated that paragraph 7.2.2.1 of the Agricultural Work Instruction Manual issued to the plaintiff's father on the contract herein stipulates that hand weeding had to be done before weeds flower. He tendered in evidence the Agricultural Work Instruction Manual and the Register which are marked as exhibit CT 10A and CT10B respectively. He further stated that when conducting audits to check compliance with ISO standards the auditor compares what is contained in the Agricultural Work Instruction Manual against what actual performance is found on the sugar cane field. This Court observed that the Manual has two forms namely Completed Field Hand Weeding Report and Weekly Weeding Quality Report.

Mr Shaba stated that on 21st October 2013 he received email communication from his Area Manager Chrispin Mphaluwa complaining that the plaintiff was failing to weed timely and that the plaintiff had a lot of fields which had weeds that had flowered. Further, that this was followed by another email of 20th November 2013. He tendered copies of the emails in evidence and they are marked as exhibit CT11.

He further stated that during the period between December 2012 and November 2013 he also received communication from other area managers complaining that the plaintiff was failing to remove weeds before they flowered.

Mr Shaba then stated that around January 2013 the plaintiff was given a penalty of 7.5 per cent deduction of remuneration by the manager for area 2 for the plaintiff's failure to weed before weeds flowered. He tendered in evidence a letter from the area 2 manager to the plaintiff advising of the penalty and it is marked as exhibit CT12. He also stated that the manager of area 1 raised a similar issue with the plaintiff in June 2013 and wrote him a letter dated 10th June 2013 which was tendered in evidence and marked as exhibit CT13 also advising a penalty.

He further stated that on 29th April 2013 the plaintiff was invited to a meeting held to discuss the plaintiff's poor performance. He stated that at the meeting the

plaintiff was given a final warning. He tendered the minutes in evidence and they are marked as exhibit CT14.

He then stated that despite being talked to, warned and penalized for failure to remove weeds before they flowered the plaintiff did not show signs of willingness to comply with the contractual requirement to remove weeds before they flowered. He then tendered in evidence a letter of 21st October 2013 from the manager of area 3 warning the plaintiff for failure to weed before the weeds flowered. That letter is marked as exhibit CT15.

Mr Shaba then stated that during his tour of the sugar field which he undertook on 22nd October 2013 he took photographs of field numbers 2111, 2131,2171 and 2173 which were assigned to the plaintiff under the contract herein. He tendered the photographs in evidence and they are marked as exhibits CT16A, CT16B, CT16C and CT16D. He stated that the weeds in the said fields were masking the sugar cane and were past their flowering stage.

He then stated that exhibits CT14 and CT16A, CT16B, CT16C and CT16D demonstrate that the plaintiff was consistently failing to adhere to the stipulation of the contract and that there was no indication that he would improve. And that as a result, the defendant no longer had confidence to predict that all weeds in the fields assigned to the plaintiff would be removed before reaching the flowering stage as per the contract herein. Further, that therefore the defendant was left with no option but to exercise its contractual right to terminate the contract with the plaintiff after he had been warned and penalized several times and given ample time to improve in his performance.

In cross-examination, Mr Shaba stated that he has worked for the defendant for thirty years and holds a Diploma in Agriculture obtained in 1985. He stated that he has extensive experience in sugar cane production.

When he was shown the exhibit CT1 he stated that this is the contract and law between the plaintiff and the defendant and that anything contrary to this contract would be a breach to the said contract.

He stated that the plaintiff's employees are indirectly the defendant's employees but on being shown clause 11.2 of exhibit CT1 he agreed that the plaintiff's employees are not the defendant's employees.

He then stated that the defendant has a sugar cane field number 1232. And that for one to get to that field one would have to ask for directions as this field has no sign post. He also stated that some fields have sign posts. He further stated that the plaintiff worked in some of the defendant's sugar cane fields that are marked such as fields number 2612, 2611, 2613, 2615 up to 2622. He stated that the field number is written in paint on a pillar but an outsider would still need to ask for directions to get to a particular field. He then stated that the plaintiff had problems with weeding in some marked fields such as field numbers 2611 and 2612.

Mr Shaba then stated that exhibit CT8 was from him to the plaintiff. He then stated that the author of exhibit CT8 did not sign and so too the Agriculture Manager. He then stated that he does not know the people in the picture but that he can look for them and that they were the plaintiff's employees. He further stated that these people were standing on the edge of field number 1232. He denied that these people were standing on a road. He stated that without his comments nobody would tell that these are the plaintiff's employees.

He further stated that the plaintiff's employees were supposed to have identity cards. And that he would tell the plaintiff's employees by their identity cards and should have asked them for their identity cards. He stated further that he should have brought these people for identification by the plaintiff. But he did not agree with the suggestion by the plaintiff that on the evidence these were not the plaintiff's employees. He then stated that the Agriculture Safety Officer of the defendant who was with him at the time he took the picture in exhibit CT8 would know the field in question but not other people. He further stated that he did not take the names of these employees which he should have done to cross check with the plaintiff. He agreed that other people could easily pose as the plaintiff's employees.

Mr Shaba agreed that the exhibit CT8 was not sent to the plaintiff using the contractually agreed mode of sending mail namely registered mail or recorded delivery. He did not agree that it was heavy handed to impose a penalty on the

plaintiff on the basis of exhibit CT8 but agreed that the penalty may have been imposed on the basis of a picture of unknown people. He however did not agree that the people in the picture are not the plaintiff's employees.

He was then referred to exhibit CT10A at paragraph 7.2.1 and he stated that weeds level can be light, medium or heavy. And further that a man day is a weeder. He then stated that in order to determine labour turn out as low one has to see the weeds infestation in the field. Further, that the plaintiff had to weed 2,100 hectares and had to weed a few hectares at a time.

He was then referred to exhibit CT5b and he said he knew the same. He was referred to the labour statistic for 29th April 2013 to the effect that the plaintiff had 17 man days. He agreed that the exhibit CT5b did not indicate the hectares weeded or the weed infestation level. He however did not agree that the document was useless on account of not indicating weeds infestation level and hectares weeded.

He then stated that the meeting of 29th April 2013 herein was called to find out problems faced by the plaintiff and to see the way forward. He stated that exhibit P4 in paragraph 2 shows problems.

He then stated that the contract herein stated that the plaintiff was not to remove water grass. And that there was a genuine problem in that now the plaintiff was supposed to remove water grass which was not the case before. He stated that as a result the plaintiff had to use more labour and more time in weeding.

He then stated that the farm manager and the area manager were supposed to produce weekly weeding reports. Further, that that weekly weeding report would tell if the plaintiff was weeding well and without the same there would be no way to tell how the plaintiff's weeding quality was. He stated that since the matters herein arose weekly weeding reports are being done. He then stated that exhibit CT11 is not a weekly weeding report but a complaint. Further that exhibit CT12 does not have the plaintiff's address and he did not write the same. Further, that exhibit CT13 was written by Mr Mphaluwa and was not properly addressed to the plaintiff.

With regard to exhibit CT14, which is the same as exhibit P4 except that the former has an additional paragraph indicating a final warning to contractors that

the latter does not have, he stated that Mr H. Chimbu was chaired the meeting. But that there is no mention that Mr Shaba was the secretary of the said meeting.

He then stated that contractors like the plaintiff are to cover their fuel cost under the variable cost and that the defendant adjusts the rate of fuel in the variable cost if the fuel price goes up. He stated that even when there is a fuel price hike contractors have to ferry labourers to work on the defendant's fields. He however stated that by the time of the meeting of 29th April 2013 contractors were justified to complain on fuel rate not being increased in view of fuel price hike then.

He further stated that the rates in IDD 1, which he tendered in evidence as exhibit CT17, apply to the plaintiff's labourers since the contractors are paid the same rate per employee.

He further stated that the defendant would pay the plaintiff a fixed sum per hectare but the plaintiff had to deal with different levels of weed infestation. Further that the defendant paid K678.60 per day and there would be a problem if the plaintiff paid his workers less. Further, that the weeding would require eight workers per hectare but the defendant would pay K678.60 per hectare and that is not a problem.

In re-examination, Mr Shaba stated that the defendant would employ casual workers to do the weeding herein because the plaintiff was failing to cope with work. These casual workers were paid K678.60 per day which is the same wage that was to be paid to the plaintiff's employees. Further, that the plaintiff got paid by the defendant and the payment factored in daily wages but the plaintiff was paying half the wages to his employees that is K319.00 instead of K678.60. He stated that payment of less wages was a general problem to contractors.

He then stated that exhibit CT8 was delivered to the plaintiff by the defendant's administrative clerk. Further, that it is a bit difficult to identify the employees of the plaintiff as he knows some and not others. He said he only knows the supervisors. He however stated that when he took the picture in exhibit CT8 he found those people in the company of the plaintiff's brother who is not in the picture but who apologized for the lack of protective wear and did not dispute that the people in the picture were plaintiff's employees.

He then stated that the plaintiff had so many fields to weed. He also stated that there is no difference between exhibit CT11 and a weekly weeding report. This Court observed that it is not true that exhibit CT11 which is a copy of two emails is not different from a weekly weeding report that is in a specific format.

Both parties filed written submissions on the law and the evidence.

With regard to the applicable law in this matter, the plaintiff started by submitting on the best evidence rule that this rule requires a party to an action to produce before the court the best available evidence for purposes of proving relevant facts. See *Phiri vs Candlex Limited* MSCA Civil Appeal No. 2 of 2002.

He further submitted on the rule against hearsay that it is the general rule of evidence that, in a free standing actions, witnesses can testify only about events that they have actually observed, and of which they have firsthand knowledge. He stated that illuminating authorities on this point are the case of *The State and The Commissioner General of Malawi Revenue Authority ex parte Omar t/a Spider Corporation* Misc. Civil Cause No. 3 of 2001 (High Court)(unreported) and *Kaunde v Malawi Telecommunication Ltd* Civil Cause No. 687 of 2001 (High Court) (unreported).

The plaintiff then submitted on the contractual duty to act in good faith, that every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. He referred this Court to section 205 of The American Law Institute, The Restatement of Contract (2nd).

He further referred to the Australian case of *Renald Construction (ME) Pty Ltd vs Minister of Public Works* (1992) 33 Con LR 72 at 112-13, in which Priestly JA stated that

People generally including Judges and other lawyers, from all strands of the community, have grown used to the Courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations

He further referred to the case of *Reigate v Union Manufacturing Co(Ramsbottom)* [1918] 1KB 592 at 605 in which Scrutton J stated that

A term can only be implied if it is necessary in the business sense to give efficacy to the contract, ie if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties 'What will happen in such a case?' they would have both replied 'of course so and so will happen. We did not trouble to say that; it is too clear.

He further referred to the case of *Trollope and Colls Limited vs North West Metropolitan Regional Hospital Board* [1973] 2 ALL ER 113 at 124 in which Lord Pearson said

An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

The plaintiff then further submitted on the terms implied in a contract. He submitted that in a case of contract of employment, the House of Lords has held that there is ample authority for implying in the employer's favour that the employee would serve with good faith and fidelity, *Robb vs Green* [1895] 2QB 315, and that he would use reasonable care and skill in the performance of his duty, *Harmer vs Cornelius* (1858) CBNS 236. Further that there were also reciprocal terms to be implied in favour of the servant. For the master it was implied that he must exercise due care in respect of the premises where the work is done, the way in which it should be done and the plant involved and he must not require the servant to do an unlawful act *Mattheu vs Kuwait Bechtel Corpn* [1959] 2 QB 57. In short, that both parties must act in good faith.

He further submitted that an implied term may be excluded in accordance with the general principle of common law, either by clear and unambiguous language or if its implication would be inconsistent with an express term of the contract. *Lynch v Thorne* [1956] 1 ALL ER 744.

The plaintiff then submitted an analysis of the evidence he has produced before this Court. He asked that the following findings be made by this Court regarding the evidence that he has produced herein.

With regard to exhibit P1, the contract herein, the plaintiff submitted that this is the governing document of the relationship between the plaintiff and the defendant.

He stated that the contract was never amended and remained intact during the subsistence of the relationship. This Court agrees that indeed the contract is the one governing the relationship between the parties herein.

Further, that the contract provides the method of service of documents under the contract. And that the contract provides the type of weed to be removed and expressly excludes water grass.

He then submitted that, implied in the contract is the general principle that the parties to the contract must perform the contract in good faith.

Based on the above, the plaintiff entreated this Court to find that that the contract is the only document regulating the conduct of the parties and therefore any act done against the clear provisions of the contract is an act done in bad faith and therefore a breach of contract.

With respect to exhibit P2 and P3, the letters of termination, the plaintiff submitted that these two documents prove that the contract was subsisting at the material time. Based on this, he entreated this Court to find that that the contract was still subsisting between the defendant and the plaintiff in spite of the contract being entered into between the defendant and the plaintiff's father. This Court finds indeed that there was a valid contract subsisting between the plaintiff and the defendant herein.

With regard to exhibit P4, the minutes of the meeting of 29th April 2013 the plaintiff submitted that it contains the grievances voiced by all contractors working with the defendant. Further that, this is relevant to the plaintiff's case as it reveals that the hardship faced by the plaintiff were common to all the contractors. Further, that the exhibit P4 further demonstrates that the plaintiff in spite of the challenges was doing all he could do to execute the contract.

Further that exhibit P4 reveals that the plaintiff was forced to weed water grass and this is contrary to the clear dictates of the contract. That this fact is relevant as it shows that the defendant was not abiding by the terms of the contract which clearly stated that the plaintiff was not to weed water grass. That this unlawful

introduction of an obligation to weed water grass also reveals that the defendant was heavy handed and acted in bad faith in the performance of the contract to the extent of forcing the plaintiff to perform more work for the same amount of money.

Further, that exhibit P4 reveals that the defendant was not responsive to the changing circumstances like the rise in fuel costs and this was causing the plaintiff hardship in the execution of the contract. And that this fact is relevant and material as it shows that the defendant was bent on making things hard for the plaintiff and thereby setting up the plaintiff for failure. Further that these facts further reveals that in spite of the hardship caused by the defendant, the plaintiff was doing all he could to perform the contract and cannot therefore be said to have been derelict in his duties under the contract.

The plaintiff submitted further that exhibit P4 reveals that the defendant was recruiting casual labourers and paying them more than the defendant provided for the plaintiff and thereby making it difficult for the plaintiff to recruit labour in other times of need. And that this fact is material because it reveals that the defendant was employing tactics which killed the competition on the labourer market and thereby making it difficult for the plaintiff to perform the contract.

Further, that this fact also reveals that the plaintiff was serious about performing the contract because in spite of the hardship, the plaintiff did all he could to perform the contract.

The plaintiff further stated that exhibit P4 reveals that the defendant was paying casual labourers more than the contract allowed the plaintiff to pay his employees. And that this fact reveals that the defendant was sabotaging its own contractors by making them loose bargaining power on the labourer recruitment process and thereby forcing the plaintiff to struggle in his performance of the contract. That this is an act of bad faith.

The plaintiff then submitted that exhibit P4 does not have a statement warning the contractors nor does it state that the meeting is the final warning to the contractors. And that this fact is material because it reveals the bad faith on the part of the defendant. The plaintiff claimed that exhibit P4 was not objected to and that the defendant produced a forged copy of the same document bearing a forged warning as exhibit CT14.

Based on the foregoing, the plaintiff entreated this Court to find that that exhibit P4 is the authentic copy of the minutes of the meeting of 29th April 2013 herein and that exhibit P4 reveals the various acts of bad faith as discussed above.

With regard to exhibit P5 which is the defendant's exhibit CT 10 A, the Agricultural Works Manual, the plaintiff submitted that it introduces a new dimension to the weeding/man day equation. He submitted that this fact is material because it takes out the notion of guess work regarding how many man days are needed per hectare. Further that the exhibit clearly states in paragraph 7.2.1 that light weed infestation needs 2-4 man days per hectare; medium weed infestation needs 5-6 man day per hectare; heavy weed infestation needs 7-8 man days per hectare.

The plaintiff further submitted that the unreasonable notion of guess work employed by the defendant as seen in exhibit CT 5 a-g to justify the termination of the contract with the plaintiff is negated by this crucial piece of evidence. And that the notion of 'number of man days' alone, as appear in exhibit CT 5 a-g, does not say anything unless paragraph 7.2.1 of exhibit P 5 is referred to.

He further submitted that any conclusions made in exhibit CT 5 a-g are sheer guess work because the crucial factor of 'level of weed infestation' was not incorporated into the assessment. That therefore exhibit CT 5 a-g is therefore guess work.

The plaintiff contended further that the guess work reveals that the defendant was unreasonable in its use of the termination clause under the contract in the sense that the plaintiff was blamed for allegedly putting less man days per hectare when the defendant was not aware nor did the defendant use the level of weed infestation when making the false conclusion that there were less man days per hectare. That there was therefore no reasonable ground to invoke the termination clause.

Based on the foregoing, the plaintiff entreated this Court to find that that under the contract and based on the implied contractual duty to act in good faith, the defendant was supposed to and in fact obliged to have regard to all relevant scientific facts as contained in paragraph 7.2.1 of exhibit P 5/CT 10A before alleging that the plaintiff was failing to perform under the contract, by producing less man days per hectare, and eventually terminating the contract. And that this is

an act of bad faith and unreasonableness in the use of the termination clause under the contract.

With regard to exhibit P 6, the Safety and Health Environment (S.H.E) Report, the plaintiff submitted that it is the official record of compliance on safety, health and environment as required under the contract.

He further submitted that the existence of exhibit P6 shows that any non-compliance was supposed to be recorded in the document but the document shows full compliance contrary to the defendant's unfounded allegation that the plaintiff failed to provide protective clothing for his employees. He submitted that exhibit P6 reveals that the plaintiff scored 'ok' on protective clothing denoted as PPE. Further that as the official record and which record was not contradicted by the defendant, it is conclusive proof that the plaintiff was in full compliance of PPE. Further, that exhibit P6 reveals that the defendant's allegations to the contrary are unfounded and unreasonable because the only proof of non-compliance would have been the records contained in the document.

Based on the foregoing, the plaintiff entreated this Court to find that exhibit P6 presents conclusive proof that the plaintiff complied in full with the PPE requirements. And that the allegations by the defendant to the contrary are baseless and the court should disregard them in full for lack of evidence. And therefore, that the defendant's act of terminating the contract on a false allegation of failure to comply with PPE is unreasonable, baseless and abuse of the termination clause under the contract. And that the defendant should not be allowed to get away with this gross illegality in contract law.

With regard to exhibit P7, the Reunion Insurance invoices, the plaintiff submitted that these prove the expenditure by the plaintiff on account of the existence of the contract which was illegally terminated by the defendant. He submitted that this fact proved by the documents shows that the plaintiff has suffered special loss and damage on account of the unreasonable, baseless and illegal use of the termination clause under the contract. Further, that but for the termination of the contract by the defendant, the plaintiff would not have gotten into the debt let alone fail to service the debts. As such the termination of the contract is causally linked to the harm the plaintiff has suffered.

Based on the foregoing, the plaintiff entreated this Court to find that that the defendant's illegal termination of contract has caused the plaintiff to suffer special damages and further that the defendant is liable for such loss and damage suffered by the plaintiff.

With regard to exhibit P8, the Weekly Weeding Quality Reports, the plaintiff submitted that these reveal that the record of the Plaintiff in delivering under the contract was unblemished. Further that these are the best evidence being original copies.

Based on the foregoing, the plaintiff entreated this Court to find that that the allegations that the plaintiff failed to deliver under the contract are baseless and unreasonable.

With regard to exhibit P9, the Safety Health and Environment Report for 2011/2012 the plaintiff submitted that it has the same probative value as exhibit P6 and entreated this Court to apply the arguments made under the said exhibit P6 *mutatis mutandis*.

And with regard to exhibit P10 indicating man days/month the plaintiff submitted that it proves the sufficiency of labour as provided by the plaintiff.

Based on the foregoing, the plaintiff entreated this Court to find that that the plaintiff was complying with the labour requirements under the contract herein.

With regard to exhibit P11 the plaintiff submitted that it is a document produced by the defendant as an alleged record of the meeting of 29th April 2013. He submitted further that exhibit P11 is a forgery because the one handed to the plaintiff after the meeting was not this copy. That this reveals the bad faith conduct on the part of the defendant to the extent that the defendant was forging documents to suit its case.

Further, that exhibit P11 has a signature of an unknown person. The signature is not identified and the author of the document is therefore unknown. Further, that exhibit P11 has an extra statement warning the contractors that the meeting constitutes the last warning. That this part of the document does not appear on the document handed to the plaintiff after the meeting of 29th April. That the existence of the added statement reveals that the document was forged by the defendant to suit its case. And that this action reveals the bad faith conduct on the part of the defendant as it is clear that the defendant was bent on finding false reasons to terminate the contract and went as far as forging a document.

Based on the foregoing, the plaintiff entreated this Court to find that that the document is a forgery and should not be used as evidence for the meeting but as evidence of the illegal acts of the defendant namely, forgery and creation of false evidence, so as to terminate the contract and cause the plaintiff the damage and loss the plaintiff has suffered.

The plaintiff then went on to analyse the defendant's evidence herein.

The following are the findings that the plaintiff prays that this Court should make in favour of the Plaintiff regarding the evidence produced by the defendant.

With regard to exhibit CT 1, the contract herein, the plaintiff submitted that this is the governing document of the relationship between the plaintiff and the defendant and the plaintiff entreated this Court to read the arguments made for exhibit P1 as applicable here mutatis mutandis.

With regard to exhibit CT 2, on Weeds biology and control, the plaintiff submitted that it is a scientific document revealing that water grass is neither to be hand weeded nor hoe weeded. Further, that it presents evidence that the presence of weeds has a direct impact on yield. And that it further talks of the general existence of weeds and not specifically on the effect of flowering of weeds on the yield.

Based on the foregoing, the plaintiff entreated this Court to find that the defendant was as unreasonable as to ignore scientific evidence, on the prohibition of hand weeding or hoe weeding of water grass, and forced the plaintiff to do the same prohibited acts only to blame the plaintiff. Further, that this act reveals the unreasonableness of the defendant in the execution and performance of the contract and how ready the defendant was to terminate the contract with the plaintiff without lawful reason.

With regard to exhibit CT 3 a, a letter dated 18th December 2012 with the title 'weeding', the plaintiff submitted that it is a letter written on a plain paper and without the defendant's letter head. He further submitted that this letter has no address for the defendant. That the letter has no address for the plaintiff. Further, that this letter alleges that blocks 214, 217, 212, 211 and 218 are dirty and that the blocks are the responsibility of the plaintiff. That this letter does not produce proof that the 2100 hectares under the contract comprised among others the said blocks. That this letter refers to a meeting but does not produce proof of the existence of the meeting or that the meeting took place indeed. Further, that this letter alleges that the plaintiff undertook to improve but does not produce evidence of such undertaking. And that this letter effects a punishment of 7.5 percent deduction on the plaintiff's remuneration for December 2012. That the letter does not show proof of delivery of the letter to the plaintiff. And finally, that the letter has three signatures, one alleged to be of Mr Mphaluwa but the other two signatures are not accounted for and no reason has been given for their existence on the letter.

Based on the foregoing, the plaintiff entreated this Court to find that that the letter makes baseless allegations not supported by evidence and that the letter does not have proof of delivery and therefore the plaintiff cannot and should not be said to have received the letter nor been made aware of its contents. Further, that the letter breaches the clear terms of the contract and deliberately so by the defendant so as to illegally terminate the contract with the plaintiff. That this is an act of bad faith and sheer disregard to the terms of the contract.

With regard to exhibit CT 3 b, a letter dated 10th June 2013 with the title 'weeding', the plaintiff submitted that this letter was written on a plain paper and without the defendant's letter head. That it has no address for the defendant. It has no address for the plaintiff. That although the letter alleges that field 2612 is the responsibility of the plaintiff, it does not produce proof that the 2100 hectares under the contract comprised among others the said field. Further, that this letter refers to a meeting but does not produce proof of the existence of the meeting or that the meeting took place indeed.

Further, that this letter alleges that the plaintiff agreed that a certain weedy patch was the responsibility of the plaintiff but the letter does not produce proof of the plaintiff confirming the said allegation. That this letter effects a punishment of 7.5 percent deduction on the plaintiff's remuneration but does not show proof of delivery of the letter to the Plaintiff. And finally, that this letter has one signature alleged to be of Mr Mphaluwa but the other two signatures found on Exhibit CT 3a are not accounted for and no reason has been given for their absence on this letter.

Based on the foregoing, the plaintiff entreated this Court to find that that the letter makes baseless allegations not supported by evidence and that the letter does not have proof of delivery and therefore the plaintiff cannot and should not be said to have received the letter nor been made aware of its contents. Further, that this letter breaches the clear terms of the contract and deliberately so by the defendant so as to illegally terminate the contract with the plaintiff. That this is an act of bad faith and sheer disregard to the terms of the contract.

With regard to exhibit CT 3c, a letter dated 18th October 2013 with the title ‘warning’ the plaintiff submitted that it is a letter written on a plain paper and without the defendant’s letter head. That it has no address for the defendant. That it has no address for the plaintiff. That it alleges that the plaintiff was using a vehicle against safety regulations but the letter does not produce proof of the plaintiff confirming the said allegation. That it recommends a punishment of deduction on remuneration. That this letter does not show proof of delivery of the letter to the plaintiff. That it is not signed at all. All the three signatures appearing on CT 3 a and CT 3 b are not accounted for and no reason has been given for their absence on this letter.

Based on the foregoing, the plaintiff entreated this Court to find that that this letter makes baseless allegations not supported by evidence and that the letter does not have proof of delivery and therefore the plaintiff cannot and should not be said to have received the letter nor been made aware of its contents. Further, that this letter breaches the clear terms of the contract and deliberately so by the defendant so as to illegally terminate the contract with the plaintiff. And that this is an act of bad faith and sheer disregard to the terms of the contract.

With regard to exhibit CT 4a, a letter dated 21st October 2013 with the title ‘warning for failure to execute duties at 240 block’ the plaintiff submitted that it is a letter written on a paper with the defendant’s letter head. That it has an address for the defendant. That it has no address for the plaintiff. That it alleges that block 240 is the responsibility of the plaintiff but does not produce proof that the 2100 hectares under the contract comprised among others the said block. Further, that this letter refers to a works order but the defendant does not produce the said order as proof. That this letter effects a punishment in the form of a serious warning. But that this letter does not show proof of delivery of the letter to the plaintiff. Further, that this letter has three signatures one alleged to be of the Mr Mphaluwa but the other two signatures found on exhibit CT 3a are not accounted for and no reason has been given for their absence on this letter. Further that this letter has a space where the plaintiff was supposed to sign but there is no such signature.

Based on the foregoing, the plaintiff entreated this Court to find that that this letter makes baseless allegations not supported by evidence and that the letter does not have proof of delivery and therefore the plaintiff cannot and should not be said to

have received the letter nor been made aware of its contents. Further, that this letter breaches the clear terms of the contract and deliberately so by the defendant so as to illegally terminate the contract with the plaintiff. That this is an act of bad faith and sheer disregard to the terms of the contract.

With regard to exhibit CT 4 b, a letter dated 11th December 2012 with title 'Delayed and Poor Work Performance' the plaintiff submitted that this letter was not authored by Mr Mphaluwa and therefore the content of the letter is sheer hearsay not fit for the consideration of the Court for any purposes whatsoever. Further that it is a letter written on a plain paper and without the defendant's letter head. That it has no address for the defendant or the plaintiff. That it alleges that blocks 227 and 260 are the responsibility of the plaintiff but the letter does not produce proof that the 2100 hectares under the contract comprised among others the said block. Further, that this letter refers to a meeting and an agreement but does not produce proof of the existence of the meeting or that the meeting took place indeed. Further, that this letter alleges that the plaintiff is bringing insufficient labour but the letter does not refer to the level of weed infestation in making such a false decision.

And that this letter does not show proof of delivery of the letter to the plaintiff. Based on the foregoing, the plaintiff entreated this Court to find that that this letter cannot be the defendant's evidence as it was not produced by its author and no reason was presented for such fatal anomaly. The letter makes baseless allegations not supported by evidence. Further, that this letter is an affront to rules of evidence and particularly the rule against hearsay. That this letter should be thrown out.

With regard to exhibit CT 4 c, a letter dated 2nd January 2013 with title 'Unsatisfactory performance' the plaintiff submitted that this letter was not authored by Mr Mphaluwa and therefore the content of the letter is sheer hearsay not fit for the consideration of the Court for any purposes whatsoever. Further, that it is a letter written on a plain paper and without the defendant's letter head. It has no address for the defendant or the plaintiff. It alleges that blocks 227, 280 and 260 are the responsibility of the plaintiff but the letter does not produce proof that the 2100 hectares under the contract comprised among others the said block. Further, that this letter refers to a warning given earlier but does not produce the said warning nor proof that the warning was given to the plaintiff. That although this letter alleges that the plaintiff is bringing insufficient labour and producing poor performance this letter does not refer to the level of weed infestation in making such a false decision. That this letter effects a punishment of 7.5 percent deduction of the plaintiff's remuneration. That this letter does not show proof of delivery of the letter to the plaintiff.

Based on the foregoing, the plaintiff entreated this Court to find that that this letter cannot be the defendant's evidence as it was not produced by its author and no reason was presented for such fatal anomaly. The letter makes baseless allegations not supported by evidence. Further, that this letter is an affront to rules of evidence and particularly the rule against hearsay. That this letter should be thrown out.

With regard to exhibit CT 5 a, 5 c and 5 e, documents with title 'Daily Labour Statistics for the Weeding Contractor' the plaintiff submitted these are hearsay and evidence of bad faith and unreasonableness on the part of the defendant herein.

On hearsay, the plaintiff submitted that these documents were not authored by Mr Mphaluwa. Further, that no notice under Order 38 r 21 of the Rules of the Supreme Court (RSC) was entered by the defendant to justify use of the evidence. That the identity of the author of the documents was not disclosed. No reason was proffered why the author of the documents could not be produced to testify on his or her own.

Based on the foregoing, the plaintiff asked this Court to find that that these documents are an affront to the court's rules on hearsay and that these documents should be thrown out and disregarded in their entirety.

On bad faith and unreasonableness, the plaintiff submitted that these documents allegedly indicate man days and the dates thereof. But that the documents do not reveal the name of the contractor producing the statistics.

The plaintiff further submitted that the documents do not reveal the number of hectares worked by the man days on the stated dates. That the documents do not reveal the level of weed infestation. That the documents are not signed by anyone. Further, that these documents present a false 'weeding/man day equation.' That this fact is material because it takes out the notion of scientific analysis, reasonableness and good faith, and instead uses guess work, unreasonableness and bad faith, regarding how many man days are needed per hectare. That the exhibit P 5/CT10A clearly states in paragraph 7.2.1 that 'light weed infestation needs 2-4 man days per hectare; medium weed infestation needs 5-6 man day per hectare; heavy weed infestation needs 7-8 man days per hectare'. That the unreasonable notion of guess work employed by the Defendant as seen in exhibit CT 5 a-g to justify the termination of the contract with the plaintiff is negated by the crucial piece of evidence in exhibit P 5/CT10A. And that the notion of 'number of man days' alone, in exhibit CT 5 a-g does not say anything unless paragraph 7.2.1 of Exhibit P 5 is referred to. That any conclusions made in exhibit CT 5 a-g are sheer guess work because the crucial factor of 'level of weed infestation' was not incorporated into the assessment. Therefore that exhibit CT 5 a-g is therefore guess work. Further that the guess work reveals that the defendant was unreasonable in its use of the termination clause under the contract in the sense that the plaintiff was blamed for allegedly putting less man days per hectare when the defendant was not aware nor did the defendant use the level of weed infestation when making the false conclusion that there were less man days per hectare. That there was therefore no reasonable ground to invoke the termination clause.

Based on the foregoing, the plaintiff asked this Court to find that that under the contract and based on the implied contractual duty to act in good faith, the defendant was supposed to and in fact obliged to have regard to all relevant scientific facts (paragraph 7.2.1 of exhibit P 5/exhibit CT 10A) before alleging that

the Plaintiff was failing to perform under the contract (producing less man days per hectare) and eventually terminating the contract. And that this is an act of bad faith and unreasonableness in the use of the termination clause under the contract because the evidence used to support the termination was deliberately incomplete and meaningless. The plaintiff made the same argument with regard to exhibits CT5 b, d, f and g.

With regard to exhibit CT6 copy of an email of 21st October 2013 the plaintiff submitted that this email alleges that the plaintiff is failing to catch up with weeds but does not produce the proof of the allegation. Further, that this email alleges that warnings were sent to the Plaintiff but does not produce proof of such warning nor the delivery thereof to the plaintiff. Further, that this email recommends replacement of the plaintiff on account of low labour turn up. But that, although the author of this email alleges that labour turn up is low, he does not disclose the level of weed infestation against the number of man days available per hectare.

The plaintiff further submitted that during cross examination, Mr Mphaluwa confessed that he had not been to see the field to examine the level of weed infestation nor did he learn of the number of hectares worked on the days mentioned. And that Mr Mphaluwa further confessed that the statistics contained in exhibit CT 5 a-g are useless on account of failure to disclose the level of weed infestation and the hectares worked on the days particularised therein. The plaintiff also submitted that Mr Mphaluwa as author of the said email is interested in saving his job, and has ill motive, instead of securing the interests of the defendant and the plaintiff's as well, the two being parties to the contract.

Based on the foregoing, the plaintiff asked this Court to find that the said email has no probative value in support of the defendant's case because it makes a baseless and unreasonable recommendation for termination of contract because the email does not produce proof of supporting the recommendation but that the author wants to save his job. However, that the email has high probative value in support of the plaintiff's case that the defendant was unreasonable and acted in bad faith in the use of the termination clause of the contract.

With regard to exhibit CT 7, Occupational Safety, Health and Environment Rules and Regulations for Contractors Agreement, the plaintiff submitted that this document is part of the contract between the defendant and the plaintiff. That this document provides for the Personal Safety and Equipment Facilities (PPE) in paragraph 4.18. That the approved PPE are hearing, eye, foot and overall body protection. That pursuant to paragraph 4.55.1 of the document, the plaintiff initialled and signed the document 'as acknowledgement of receipt of the rules and to certify that they have been received and understood'. Further, that the signing of the document by both parties is pursuant to clause 24.1 of the contract which stipulates that no amendment or cancellation of this agreement shall be of any force or effect unless reduced into writing and signed by the parties hereto.

Based on the foregoing, the plaintiff asked this Court to find that that exhibit CT7 introduces and affirms the contractual practice of signing for documents as proof of receipt and agreement and therefore that all documents or acts intending to amend the contract but which are not in writing and not signed by both parties are not valid and hence without any effect whatsoever.

The plaintiff then submitted with regard to exhibit CT 8, a letter of 12th July 2013 with a picture of people in a field, that it appears to be a letter written on a letter head bearing what appears to be the defendants corporate name of Illovo Sugar (Malawi) Limited. That exhibit CT8 does not have the address for the defendant's address as provided in the contract. That it has 'Private Bag 60, Blantyre Malawi' while the address for correspondence under the contract is 'Private bag 580, Blantyre'. Further, that exhibit CT8 is not signed by its author and appears to be a photocopy as evidenced by the hole puncher marks visible on the left hand margin of the letter. The original letter was not produced and no reason was proffered why the original was not produced. And that this is an affront to the best evidence rule. Still further, that exhibit CT8 does not have the plaintiff's address and this is contrary to the provisions of the contract in clause 21.1.

The plaintiff submitted that during cross-examination, Mr Mphaluwa stated that the plaintiff would become aware of penalties given to him by the defendant only after realising that his remuneration is less than usual and that it was only then that the plaintiff would query the defendant and learn of the penalty. That this is proof

that the letters, if they were even made at the material time or at all, were never delivered nor conveyed to the plaintiff in ways stipulated under the contract.

The plaintiff further submitted that exhibit CT8 alleged in annotation under the picture that the persons have no PPE (when in fact two of the persons are wearing PPE (footwear). That the field is field 1232 (the field is not marked at all) and that it was taken on 12th July 2013. Further that exhibit CT8 recommends a penalty of 7.5 percent against the plaintiff based on an unfounded allegation that the persons in the picture are the plaintiff's employees working without PPE.

The plaintiff submitted that exhibit CT8 does not reveal any proof that it was served on or conveyed to the plaintiff and this is contrary to clause 21.1 of the contract. Further, that there is no proof of registered postage nor recorded delivery as the contract demands.

The plaintiff submitted that exhibit CT8 contains a black and white picture of the following contents and qualities, namely, unknown and unidentified persons; unidentified and unidentifiable location; unidentified and unidentifiable bush in the background; the activity performed by the persons is unidentified and unidentifiable and unidentified and unidentifiable date and time when picture was taken.

The plaintiff submitted that during cross-examination, both witnesses for the defendant conceded that the document is useless for the points raised above.

That Mr Shaba alleged that the persons in the picture are employees of the plaintiff. That this allegation is hearsay and inadmissible because the said alleged fact of being employees of the plaintiff has no proof.

The plaintiff pointed out that the contract herein in clause 11.3.8 stipulates that it will be the contractors responsibility to provide identification cards for all his employees.

The plaintiff then stated that Mr Shaba alleged that the persons in the picture informed him that they were the plaintiff's employees. However, that during cross-examination, Mr Shaba conceded that the only way to tell if the persons are employees of the plaintiff was to check their identity cards and he did not do. Further that Mr Shaba conceded that the persons could be anybody, for example, passersby, impersonators, local farmers, another contractors' employees and that the list is endless.

The plaintiff pointed out that during re-examination, Mr Shaba attempted to save his credibility by alleging that the plaintiff's own brother informed him that the

persons were the plaintiff's employees. The plaintiff noted that this allegation does not appear in the witness statement, where Mr Shaba alleges that he interviewed the persons himself, nor in examination-in-chief where he alleged that the persons introduced themselves as such nor in the cross-examination, where he conceded that he did not do enough to identify the persons and further conceded that the picture was useless.

Based on the foregoing, the plaintiff asked this Court to find that exhibit CT8 has no probative value supporting the defendants claim. Further, that the persons have not been sufficiently identified as the plaintiff's employees since the defendant failed to inspect the persons' identity cards so as to conclude that the persons were the plaintiff's employees. That there is no proof that exhibit CT8 was conveyed to the plaintiff because there is no evidence of prepaid postage nor recorded delivery as the contract demands in clause 21.1 of the contract. The plaintiff also asked this Court to find that exhibit CT8 reveals that the defendant was unreasonable, acted in bad faith and failed to take precautions to safeguard the interests of the plaintiff when the defendant based the termination of the contract on the unfounded allegation contained in the letter.

With regard to exhibit CT9, a fields weeding contractor payment claim sheet for the plaintiff, the plaintiff submitted that this document appears to be a claim sheet submitted by the plaintiff to the defendant. That it appears to be signed by Mr Shaba and the plaintiff.

Further, that exhibit CT9 appears to be a photocopy as evidenced by the hole puncher marks visible on the left hand margin of the document. And that the original document was not produced and no reason was proffered why the original was not produced. That this is an affront to the best evidence rule which this Court must enforce on its own motion.

The plaintiff observes that exhibit CT 9 is dated 17th January 2013 and has 1232 and 1234 in the field number column. The plaintiff then stated that in his testimony and in paragraph 7 of his witness statement, Mr Shaba alleges that on 12th July 2013 he found workers in field number 1232 and that the persons had no PPE and that he took a picture of the persons on the same day. The plaintiff submitted that contrary to Mr Shaba's allegations, exhibit CT 9 is dated 17th July 2013 and this

date is different from the date 12th July 2013 when he alleges that he took the picture of the persons.

Based on the foregoing, the plaintiff asked this Court to find that exhibit CT9 has no probative value because since the document is dated 17th July 2013, a date different from the date Mr Shaba took the alleged pictures contained in exhibit CT 8, the exhibit CT 9 has no link to the alleged date of 12th July 2013 and therefore not proof that the Plaintiff was working in field 1232 on the 12th July 2013. Further, that exhibit CT 9 does not prove that the persons in the picture in exhibit CT 8 are employees of the plaintiff. And that exhibit CT9 affronts the best evidence rule which demands that the defendant must produce originals and only use copies when the originals cannot be produced.

With regard to exhibit CT10 A, Agricultural Works Instruction Manual –Weed Control, the plaintiff reiterated his submissions for Exhibit P 5 *mutatis mutandis*.

With regard to exhibit CT 10 B, Quality Assurance-Controlled Copy Register, the plaintiff submitted that it shows the plaintiff's signature appended on the document as proof of recorded delivery under clause 21.1 of the contract. Further, that Mr Shaba testified that the signature was proof of receipt and agreement to be bound by the terms of the works instruction manual which formed part of the contract herein.

Based on the foregoing, the plaintiff asked this Court to find that that under the contract recorded delivery or pre paid postage were the only means of proof of receipt or delivery of documents of notices under the contract.

With regard to exhibit CT 11, a copy of an email of 20th November 2013, the plaintiff submitted that it reveals that the defendant was relying on casuals thanks to the approval that was made to have contractors money transferred to casuals per the request of the author. Further, that both witnesses of the defendant conceded that the defendant was paying casuals more than the contractors were allowed to pay their employees under the contract. That IDD 1 is conclusive proof that the employees of the defendant were paid daily wage of K 675 when the plaintiff under the contract was to pay K 319 only. Further that exhibit P 4, the record of the meeting of 29th April 2013, reveals that the plaintiff and the rest of the contractors complained that the defendant's act of paying the casuals more was killing competition and making the contractor's recruitment of labour difficult.

Based on the foregoing, the plaintiff asked this Court to find that that the reason why the plaintiff had challenges recruiting labour was the defendant's own act of sabotage of paying casuals more than the plaintiff would pay its employees and thereby killing competition. And that the defendant was unreasonable, acted in bad faith and did not take precautions, by standardising the employees' pay across the board, to safe guard the interests of the plaintiff and therefore made it impossible for the plaintiff to perform fully under the contract.

With regard to exhibit CT 12, a letter dated 2nd January 2013 with title 'Unsatisfactory Performance', the plaintiff submitted that it was not authored by Mr Shaba. That no notice under Order 38 r 21 of the Rules of the Supreme Court (RSC) was entered by the defendant to justify its use in evidence. Further, that the identity of the author of the document was disclosed by the name and signature. And that no reason was proffered why the author of the document could not be produced to testify on his or her own. And the plaintiff repeated his submissions on exhibit CT 4C *mutatis mutandis*.

Based on the foregoing, the plaintiff asked this Court to find that that exhibit CT12 is an affront to the court's rules on hearsay. That it should be thrown out and disregarded in its entirety.

With regard to exhibit CT 13, a letter of 10th June 2013 with title 'weeding' the plaintiff repeated his submissions on exhibit CT 3B *mutatis mutandis*.

With regard to exhibit CT 14, minutes of the meeting of 29th April 2013, the plaintiff submitted that exhibit P4 is also a record of the same meeting of 29th April 2013. That this exhibit CT 14 has similar content to exhibit P 4 but that the exhibit CT 14 has an added statement that ‘underperforming contractors will be punished as individual contractors. This is a final warning’. Further, that the defendant has not explained how this statement came to be added to the document nor has the defendant explained how the statement is missing from exhibit P4. Further, that exhibit CT13 is not signed by its author nor does the document contain any proof that the contents of the record were verified to be true by the persons who were present at the meeting, let alone the plaintiff.

Further, that exhibit CT 14 appears to be a photocopy as evidenced by the hole puncher marks visible on the left hand margin of the document. That the original document was not produced and no reason was proffered why the original was not produced. And that this is an affront to the best evidence rule.

Based on the foregoing, the plaintiff asked this Court to find that the defendant has failed and or neglected to prove which set of minutes is the true copy of the record of the meeting. That exhibit CT14 is not admissible as it affronts the best evidence rule. And that the authentic copy is the one which the plaintiff produced.

With regard to exhibit CT 15, a letter of 21st October 2013 with title ‘warning for failure to execute duties at 240 block’, the plaintiff reiterated his submissions on exhibit CT4a since this is the same letter.

With regard to exhibit CT 16 A to D, which are pictures 2111, 2131 and 2171, the plaintiff submitted that these pictures have the following contents and qualities, namely, pictures of green bushes; no date when the picture was taken; no proof of location of the bushes and the type of bush has not been identified. Further, that there is no proof that the alleged fields were assigned to the plaintiff.

Based on the foregoing, the plaintiff asked this Court to find that the pictures could have been taken anywhere as there is no proof that they were taken at the defendant’s sugar cane fields herein and most importantly whether they were taken in the fields assigned to the plaintiff. Further, that these pictures have no probative value in support of the defendant’s case and that these pictures should be

disregarded as proof in support of the defendant and considered as proof of the defendant's acts of bad faith in creating false evidence against the plaintiff.

With regard to IDD 1/exhibit CT17, a schedule of wages for the defendant's employees, the plaintiff submitted that it clearly states that the wages structure applies to the defendant's employees only. That the employees of the plaintiff were not the employees of defendant and hence the IDD1 did not apply to them. Further, that IDD1 confirms that the defendant was paying its employee weeders more than the contractors were allowed to pay under the contract.

Based on the foregoing, the plaintiff asked this Court to find that the defendant acted in bad faith by sabotaging the plaintiff through paying its employees more than the plaintiff would manage under the contract and thereby deliberately killing competition.

In the final analysis, based on the above discussion of the law and applying it to the prevailing facts of the case, the plaintiff submitted as follows.

That the defendant in unilaterally terminating the contract acted in bad faith and did not in any way have regard to the interests of the plaintiff and thereby breached the implied term to perform the contract in good faith.

That the defendant employed casuals and paid them more than the contract with the plaintiff allowed and thereby made it difficult for the plaintiff to come by labour. In this way, the defendant sabotaged the plaintiff. That this is bad faith on the part of the defendant

Further, that the defendant forced the plaintiff to weed water grass contrary to the contract and thereby increasing the man days per hectare without increasing the plaintiff's remuneration. That this was geared to force the plaintiff to fail to perform the contract.

That in all the circumstances of the case, the defendant failed to take reasonable precautions in the manner of the exercise of the power of termination under clause 19.1 of the contract and thereby breached the implied term to use reasonable skill in making judgments against the plaintiff.

That the defendant was supposed to use scientific data, contained in the Works Instruction Manual Exhibit P 5/CT 10 A, to support its allegations against the plaintiff but instead the defendant used guesswork, exhibit CT5 a-g, and ignored the application of reason, a duty implied into the contract that proof of failure to

perform under the contract shall only be based on scientific evidence and not guess work.

Further, that the termination of contract and the reasons advanced thereof are not supported by evidence and not grounded in facts prevailing in the circumstances and thereby the defendant breached the duty to act fairly implied under the contract. That under the contract the defendant had an implied duty to act fairly and in the present case, the defendant was supposed to verify the identity of the persons in exhibit CT 8 and this was to be done by asking for the persons' identity cards, the contract in clause 11.3.8 provided that employees would have identity cards. The defendant merely took a picture of unknown persons and alleged they were the plaintiff's employees and on that allegation terminated the contract. That the defendant deliberately failed to take the unknown person to the plaintiff for verification before the ultimate penalty of termination of contract was used. That the defendant therefore breached the duty to act fairly.

Further that the defendant alleged that the plaintiff's field was full of weeds which had flowered. The defendant however failed to produce proof of that allegation. The pictures of the alleged fields and produced could have been taken anywhere and in any field. The pictures therefore do not substantiate anything but that the defendant was unreasonable and did not have any good reason to invoke the termination clause of the contract.

Further that the termination of the contract and the reasons advanced thereof are not supported by evidence and not grounded in facts prevailing in the circumstances. That under the contract, the defendant had an implied duty to act reasonably. This entails that the reasons advanced by the defendant for any act against the plaintiff must be substantiated by good evidence. That in the present case, the defendant has failed to prove the allegation that the plaintiff failed to provide PPE to its employees. The date the picture was taken is different from the date the plaintiff worked in field 1232.

Further, that the defendant alleged that the plaintiff was warned several times. But that there is no proof that the alleged warning were ever delivered to the plaintiff. and that the contract provided a clear mode of correspondence which the defendant never used or at all.

Further, that during trial, the defendant ignored the best evidence rule and without the sanction of the court, produced secondary evidence which is not applicable unless the lack of the best evidence has been accounted for and a reason is given

for such lack. Such that the allegations made by the defendant against the plaintiff therefore remain unsupported by evidence.

Further, that the defendant produced hearsay evidence which is not admissible and therefore, in law the defendant produced no evidence at all. With the result that the allegations made by the defendant against the plaintiff therefore remain unsupported by evidence.

The plaintiff submitted further that that the defendant's use of the termination clause is a careless act of bad faith and is therefore an affront to the principle of good faith performance of contract. That the defendant alleged that the plaintiff's assigned fields had flowering weeds. But that the defendant has failed to produce proof of the allegation. Further, that an attempt to fabricate the evidence for such is seen in the production of pictures of unknown bushes located at unknown locations.

Further that , by terminating the contract in spite of the lack of reasonable and legally admissible and relevant evidence, the defendant has breached the implied duty to act in good faith.

The Plaintiff therefore prayed that judgment be entered against the defendant on all reliefs prayed for. Further that costs be awarded to the plaintiff.

On its part the defendant submitted that the issues for determination are whether or not the plaintiff breached the terms and conditions of the contract herein.

Whether or not the plaintiff was given sufficient warning before termination of the contract.

Whether or not the plaintiff was given notice of termination of the contract herein.

Whether or not the defendant acted in bad faith in terminating the contract herein.

These issues are the same as captured in the issues that this Court indicated are due for determination in this matter. They are just expressed differently by the defendant.

With regard to the applicable law the defendant submitted on the law of contract as follows.

The defendant referred to the case of *Hillas & Co Ltd. v Arcos Ltd* (1932) All ER 494 at 503-504 where it is stated that

That...does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail...

The defendant also referred to the case of *Leasing and Finance Co (Mw) Ltd v Katundu Haulage Ltd* [2002- 2003] MLR 143, in which the Supreme Court of Appeal held that in the nature of the relationship and the circumstances between the appellant and the respondent the court was entitled to take into account the total evidence surrounding the dealings between the parties. It quoted the case of *Azioni v Davidsons (Manchester) Ltd* (1952) 1 Lloyd's Rep. 527 where Lord Denning said:

it is this, if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.

The defendant further referred to the case of *Finance bank of Malawi v Hanks and others* [2000-2001] MLR 110 quoting with approval what Lord Diplock stated in the case of *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] AC 724 at 736 when he said that the object to be sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to legal obligations each assumed by the contractual words in which they sought to express them.

The defendant further stated that different terminology has been used by the courts to describe the nature of the failure of performance of contract required. The breach, it has been said must be fundamental in that it must go to the root or essence of the contract or to the foundation of the whole. The defendant cited *Anson's Law of Contract*, 23rd edition at p. 493-494; *Suisse Atlantique Societe D' Armement S. A. v Rotterdamsche Kolen Centrale* [1967] 1 A. C. 361 and *Mersey Steel & Iron Co. v Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, at p. 444.

The defendant then submitted that discharge from liability is not necessarily coincident with the right to sue for damages. And that the rule is usually stated as follows- that any breach of contract gives rise to a cause of action but not every

breach gives discharge from liability. The defendant referred to *Chitty on Contracts :General Principles*, Volume1, 29th edition at p.1365.

The defendant further submitted that in the case of *City Motors Limited v Unilever South East Africa (Pvt) Ltd* civil cause number 921of 2005 (High Court) (unreported), Justice Kapanda, as he then was, was of the view that the position at law is that where time is of essence of a contract, a breach of the condition as to time for performance will entitle the innocent party to consider the breach as a repudiation of the contact.

And further that in the case of *Murson International Corporation v Malemia* [1993] 16(1) MLR 356 (HC) at 359, the Court stated that

I am of the view that the term requiring payment of rent for six months or one year in advance was an important condition of the contract. A breach of such condition would entitle the innocent party to consider the contract discharged: see the case of *The Mihalis Angelos* [1971] 1 QB164. The plaintiffs here were guilty of a fundamental breach of contract when they failed to pay rent for six months in advance before occupation of the premises. The defendant was entitled to repudiate the contract on account of the plaintiff's breach. I am also of the view that whatever expenses and inconveniences suffered by the plaintiffs after the defendant repudiated the contract, were brought about by the plaintiffs' own breach of the contract. They must bear the full consequences of their failure to fulfil their own promise.

With regard to evidence and the burden of proof, the defendant further submitted that the principle is that the one who asserts must prove and that the standard of proof in civil cases has been discussed by Lord Denning L. J. in *Miller v Minister of Pensions* [1974] 2 All ER 372 at p. 374 in the following words

This means that the case must be decided in favor of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it is more probable than not the burden is discharged but if the probabilities are equal it is not.

With regard to documentary evidence the defendant submitted that the court in *Kamwendo v Bata Shoe Company Ltd*. Civil Cause number 3280 of 2003 (High Court) (unreported) said that rules on documentary evidence are very clear that a

document speaks for itself and that one cannot introduce parol evidence to contradict a document.

The defendant also referred to the case of *Chisiza v Minister of Education and Culture* [1993] 16(1) MLR 81(HC) in which Tambala J, as he then was, held that

In civil matters where evidence is by affidavits, it is common practice to attach copies of documents as supporting exhibits. The present application in which evidence was by affidavit only, is no exception. All the documents attached to affidavits are copies. Even the document which Mr Kondowe has attached to his two affidavits are copies...I find his objection on this particular document unfair.

The defendant further submitted that the High Court in the case of *Mchawa v National Bank of Malawi* [1991] 14 MLR 266 (HC) quoted with approval the classic case of *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970 where it considers what is hearsay and what is not hearsay as follows

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made ...

The defendant then submitted its analysis of the evidence and the law.

The defendant first submitted on whether or not the plaintiff breached the terms and conditions of the contract herein.

The plaintiff submitted that it was not in dispute at trial that the relationship between the parties was governed by the contract which was exhibited by both parties as exhibit P1 and exhibit CT 1 respectively. It was also not in dispute that the whole point of the parties entering into this contract was that the plaintiff would for a reward eradicate weeds on the defendant's sugar cane estate. Further that the drafted contract set down the terms and conditions of how these services were to be effectively rendered, the standard/quality that the defendant expected and how the plaintiff was to be awarded.

The defendant further submitted that the contract set down the weeding procedure, the quantity of weeding and the rate of weeding. That all this was to ensure that the weeding contractor maintains a satisfactory weed control at the estate. Further that the contract even set down a penalty of 7.5 percent of the contractor's remuneration where the prescribed quality and quantity standards are not met or adhered to.

The defendant submitted that this clearly shows that not only was the weeding a fundamental condition of the contract, but the quality and the quantity of the weeding services were also very important to the subsistence of the contract.

The defendant noted that the plaintiff alleges that the termination of the contract and the reasons advanced thereof are not supported by evidence and not grounded in facts prevailing in the circumstances. It stated that the letter terminating the contract dated 25th November, 2013 and marked as exhibit KC 4 in the plaintiff's exhibit supporting his application for an injunction herein, expressed that despite the on-going correspondence between the parties, the quality of the work delivered by the plaintiff continues to be below the minimum standard required by the defendant. The foregoing was the main reason the defendant gave for exercising its right under clause 19.1 to terminate the contract with immediate effect.

The defendant submitted that the plaintiff attempted to prove before the court by using exhibit P10 that he was providing sufficient labour and was complying with the requirements under the contract. However, that it was established in cross-examination that this document prepared by the plaintiff after the contract was already terminated. And that the plaintiff further unconvincingly alleged that the daily records from which he obtained the information in exhibit P10 had conveniently been destroyed during after alleged violence which had occurred even before the document was prepared.

The defendant further submitted that the plaintiff further contradicted himself by saying that he was not able to get enough employees due to stiff competition from the defendant itself on wages. However, that this allegation was rebutted when the plaintiff admitted at trial that he was underpaying his employees despite the defendant paying him the required minimum wage for his employees. The defendant submitted that it was therefore unfair and unreasonable for the plaintiff

to turn around and allege that he was failing to get laborers/employees because the defendant was paying them better than he was. That this was the plaintiff's own doing. Further, that in addition to this, it was clear that the defendant was compelled to employ these laborers to do work which was meant to be done by the plaintiff whenever he failed to perform.

In view of the foregoing, the defendant submitted that the plaintiff continuously and unreasonably failed to perform its weeding services to the quality that the defendant required. Further, that the plaintiff's evidence at trial had glaring discrepancies to the point of incredulity as regards his assertion that the defendant was solely to blame for his failure to weed according to the defendant's standards. The defendant submitted that the plaintiff therefore failed to prove on a balance of probabilities that his failure to perform was in any way due to the defendant's action. Therefore, that the defendant had adequate and reasonable grounds to allow it to exercise its power under clause 19 in terminating the contract.

On whether or not the plaintiff was given sufficient warning the defendant submitted the following. That the plaintiff himself in his witness statement in paragraphs 8, 10 and 12 narrates how the defendant kept complaining and imposing penalties due to his poor performance. Further, that the plaintiff can therefore not come around and contradict himself by saying that he was not given sufficient warning. The defendant wondered as to what kind of special warning the plaintiff wanted the defendant to give him before terminating the contract.

The defendant submitted that the plaintiff was sufficiently warned about his performance before the defendant terminated the contract. The defendant referred to letters which were exhibited by Mr Mphaluwa and which were marked exhibits CT3a, CT3b, CT3c. It stated that as regard these letters, the plaintiff contends that these letters do not have the address of both the plaintiff and the defendant. That there is no proof of delivery of the letter to the plaintiff. That they are not properly signed. That exhibit CT3a provides no evidence of the plaintiff undertaking to improve in his performance. The defendant submitted that the plaintiff conveniently forgets that these same letters were exhibited by himself earlier in his sworn affidavit which was supporting his application for an interlocutory injunction. He exhibits them as KC 2, KC 3A and KC 3B. He exhibits these letters as part of his evidence that he was getting warning letters from the defendant. This

then proves that despite the letters not containing his address or his signature acknowledging receipt, the plaintiff indeed received these letters and was very much aware of their contents.

The defendant submitted that in addition to this, the plaintiff submits that exhibits CT 4 A, CT 4 B and CT 4 C which are also warning letters should not be considered by the court because the contents of the letters were not authored by Mr Mphaluwa nor were they produced by the author and were therefore hearsay.

The defendant submitted that this is not a fatal anomaly as the plaintiff would like the court to believe. The rule of hearsay evidence as expressed in the case of *Subramaniam v Public Prosecutor* allows Mr Mphaluwa to present the letters despite not authoring them as proof of their existence. The defendant submitted that the intention of Mr Mphaluwa was merely to show that he was not the only one who had made complaints about the plaintiff's performance. That other Area Managers had also written the plaintiff to complain of and warn him about his poor performance.

The defendant submitted that Mr Mphaluwa gave evidence under oath that the plaintiff was sufficiently warned about his behavior. That Mr Mphaluwa exhibited a copy of a warning letter marked as exhibit CT 4 which was given to the plaintiff. That the letter complained about the plaintiff's poor performance and how he was unreachable whenever the defendant attempted to communicate with him. That this was also reiterated in Mr Mphaluwa's email to his boss Mr. Shaba exhibited as CT 11. The defendant submitted that this goes only to show that the parties did not strictly adhere to communication by letters properly addressed to the other. The mode of communication even went as far as to phone calls. The fact that the plaintiff was avoiding any communication between himself and the defendant only goes to show that he was fully aware of his own breach of the conditions of the contract.

On whether or not the plaintiff was given notice of termination, the defendant submitted that Clause 19 of the contract deals with termination of the contract. That in clause 19.1 it is stated that the defendant shall terminate the agreement in two circumstances, namely, where the contractor breaches any of the terms or by

giving the contractor 30 (thirty) days prior notice for any reason whatsoever, and whether the said reason is reasonable or not, in writing of its intention thereto.

The defendant referred to its earlier submissions and the letter of termination and submitted that the plaintiff had continuously breached a fundamental condition of the contract therefore it was entitled to terminate the contract. The defendant was therefore entitled to terminate the contract without giving the plaintiff any notice.

Further that, in any case, the defendant had constantly warned the plaintiff about his poor performance and the plaintiff was well aware of the consequences of his breach.

On whether or not the defendant acted in bad faith in terminating the contract, the defendant submitted that the plaintiff alleges that the defendant terminated the contract without reasonable grounds and therefore acted in bad faith. The defendant submits that the plaintiff failed to prove on a balance of probabilities that the defendant acted in bad faith in terminating the contract. Further that, all the reasons which were given by the defendant as ground for terminating the said contract were not only supported by documentary evidence but they were also supported by sworn testimonies of the two witnesses of the defendant.

The defendant submitted that Mr Shaba even went as far as to personally take photographs during one of his regular tours around the sugar cane field which were exhibited and marked as exhibits CT16A, CT16B, CT16C and CT16D. Further, that Mr Mphaluwa explained in his testimony that due to the plaintiff's continuous failure to weed on time forced the defendant to employ labourers to do the work which was the responsibility of the plaintiff and thus defeated the whole purpose of contracting the plaintiff in the first place.

The defendant submitted that the consequences of the plaintiff's failure to weed on time was that the weeds would grow out of control, reach a flowering stage and mask the growth of the sugarcane. Consequently the defendant's yield would be reduced by 50 percent and therefore cause loss of substantial profit.

The defendant therefore submits that the plaintiff did not in any way substantiate his allegation that the defendant had acted in bad faith when it terminated the contract. On the contrary, the defendant submits that it succeeded to prove on a

balance of probabilities that the decision to terminate the weeding contract was done on reasonable and justifiable grounds and it had at all times acted in good faith.

Therefore the defendant submits that the plaintiff continuously and unreasonably failed to perform its weeding services to the standard that the defendant required under the contract. That the plaintiff failed to prove on a balance of probabilities that this failure to perform was the defendant's fault or that the defendant had acted in bad faith when terminating the contract.

The defendant also submits that it succeeded to prove on a balance of probabilities that the decision to terminate the weeding contract was done on reasonable and justifiable grounds and it had at all times acted in good faith.

The defendant further submits that the plaintiff was sufficiently warned about his excessive poor performance before the defendant terminated the contract. That according to the contract, the defendant was not obliged to give the plaintiff notice of its intention to terminate where there was a fundamental breach or the terms and conditions. And that the defendant was therefore entitled under Clause 19 of the contract to terminate the contract herein.

It is the defendant's prayer that this Court finds that the plaintiff had continuously and unreasonably breached a fundamental term and conditions of the contract which subsequently gave the defendant adequate and reasonable grounds to allow it to exercise its power under clause 19 in terminating the contract.

This Court now has to determine the several issues herein.

The first issue is whether the defendant in unilaterally terminating the contract acted in bad faith and did not in any way have regard to the interests of the plaintiff and thereby breached the implied term to perform the contract in good faith and exercise reasonable skill in making judgment.

This Court agrees with both parties that a contract that is in writing can have terms implied into it. These terms that are implied into a contract are ones that are aimed at giving business efficacy to the contract. See *Reigate v Union Manufacturing Co(Ramsbottom)*, *Trollope and Colls Limited vs North West Metropolitan Regional Hospital Board* and *Hillas & Co Ltd. v Arcos Ltd.* This Court further agrees with the submission by the plaintiff that in employment contracts there is the incidence

of the implied term to act in good faith on the part of the employee. See *Robb vs Green*. However, this Court notes that there is no submission that the contract herein was one of employment to allow this Court as a matter of law to imply into the contract herein a duty to act in good faith in the performance of the said contract.

This Court has noted with grave concern the reliance by the plaintiff on the American Law Institute's , Restatement of Contract (2nd) and the decision from Australian as a basis on which this Court should hold that there exists a duty implied by law that every contract should be performed in good faith in this jurisdiction. It is unfortunate that the defendant did not canvass this issue. It is, however, the duty of this Court to point out that the common law that this country adopted at the appointed day as provided under the Constitution in section 200 is the English common law. This is the common law applicable in this country as developed from time to time by our courts. It is illegal to adopt the law of contract from any other common law jurisdiction such as the United States and Australia, as the plaintiff seeks to do in this matter, without proper reason and foundation as that would be unconstitutional. This Court did a search of the Malawi Law Reports and did not find that our law of contract has developed to the extent that there is now in existence a general duty implied by law into terms of commercial contracts to the effect that parties to such contracts have a duty to perform a contract in good faith. Even under the English common law the day has not yet come when a general duty implied by law is imposed on contracting parties to act in good faith in performance of a contract. This is recognized in the decision of Justice Leggatt who discussed this issue at length in the case of *Yam Seng Pte Ltd v International Trade Corp Ltd* where he said that

120. The subject of whether English law does or should recognise a general duty to perform contracts in good faith is one on which a large body of academic literature exists. However, I not am aware of any decision of an English court, and none was cited to me, in which the question has been considered in any depth.

121. The general view among commentators appears to be that in English contract law there is no legal principle of good faith of general application: see Chitty on Contract Law (31st Ed), Vol 1, para 1-039. In this regard the following observations of Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439 are often quoted:

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.”

122. Another case sometimes cited for the proposition that English contract law does not recognise a duty of good faith is Walford v Miles [1992] 2 AC 128, where the House of Lords considered that a duty to negotiate in good faith is “inherently repugnant to the adversarial position of the parties when involved in negotiations” and “unworkable in practice” (per Lord Ackner at p.138). That case was concerned, however, with the position of negotiating parties and not with the duties of parties who have entered into a contract and thereby undertaken obligations to each other.
123. Three main reasons have been given for what Professor McKendrick has called the “traditional English hostility” towards a doctrine of good faith: see McKendrick, *Contract Law* (9th Ed) pp.221-2. The first is the one referred to by Bingham LJ in the passage quoted above: that the preferred method of English law is to proceed incrementally by fashioning particular solutions in response to particular problems rather than by enforcing broad overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest not only in negotiating but also in performing contracts provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.
124. In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the Interfoto case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems – including those

of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives which use this concept are mentioned in Chitty on Contract Law (31st Ed), Vol 1 at para 1-043. Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission's proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.

125. It would be a mistake, moreover, to suppose that willingness to recognise a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. Any such notion is gainsaid by that fact that such a doctrine has long been recognised in the United States. The New York Court of Appeals said in 1918: "Every contract implies good faith and fair dealing between the parties to it": Wigand v Bachmann-Bechtel Brewing Co, 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in section 1-203 that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Similarly, the Restatement (Second) of Contracts states in section 205 that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."
126. In recent years the concept has been gaining ground in other common law jurisdictions. Canadian courts have proceeded cautiously in recognising duties of good faith in the performance of commercial contracts but have, at least in some situations, been willing to imply such duties with a view to securing the performance and enforcement of the contract or, as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into: see e.g. Transamerica Life Inc v ING Canada Inc (2003) 68 OR (3d) 457, 468.
127. In Australia the existence of a contractual duty of good faith is now well established, although the limits and precise juridical basis of the doctrine remain unsettled. The springboard for this development has been the decision of the New

South Wales Court of Appeal in Renard Constructions (ME) Pty v Minister for Public Works (1992) 44 NSWLR 349, where Priestley JA said (at 95) that:

“... people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.”

128. Although the High Court has not yet considered the question (and declined to do so in Royal Botanic Gardens and Domain Trust v Sydney City Council (2002) 186 ALR 289) there has been clear recognition of the duty of good faith in a substantial body of Australian case law, including further significant decisions of the New South Wales Court of Appeal in Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349, Burger King Corp v Hungry Jack's Pty Ltd [2001] NSWCA 187 and Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15.
129. In New Zealand a doctrine of good faith is not yet established law but it has its advocates: see in particular the dissenting judgment of Thomas J in Bobux Marketing Ltd v Raynor Marketing Ltd [2002] 1 NZLR 506 at 517.
130. Closer to home, there is strong authority for the view that Scottish law recognises a broad principle of good faith and fair dealing: see the decision of the House of Lords in Smith v Bank of Scotland, 1997 SC (HL) 111 esp. at p.121 (per Lord Clyde).
131. Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.

Considering that there is not yet a duty implied by law into every contract in this jurisdiction that the parties perform such contract in good faith this Court is of the view that the first issue cannot arise. There was no duty implied by law into the

contract herein that the parties perform the said contract in good faith. Consequently, the first issue is determined in the negative, namely, that defendant in immediately terminating the contract herein did not breach an implied term to perform the contract in good faith and to exercise reasonable skill in making judgment since there is no such term implied by law. This Court also arrives at this conclusion since plaintiff did not at all argue that the contract herein should be read to imply such a duty to act in good faith. This Court will therefore not deal with arguments aimed at showing breach of the implied duty to act with good faith as advanced by the plaintiff with regard to the alleged daily wage disparity between the plaintiff's and defendant's employees and the related labour competition issues.

The second issue is whether in all the circumstances of the case, the defendant failed to take reasonable precautions in the manner of the exercise of the power of termination under clause 19.1 of the contract and thereby breached the implied term to use reasonable skill in making judgments against the plaintiff.

This Court notes that the implied term that the defendant use reasonable skill in making judgments against the plaintiff seems to flow from the same implied term of fair dealing that is contained in the American Institute's Restatement of Contract (2nd). This Court finds, for similar reasons as expressed on the preceding question, that the said implied duty is not part of the common law applicable in this jurisdiction. Consequently, there was no duty implied herein that the defendant should use reasonable skill in making judgments against the plaintiff. The plaintiff has also not laid a foundation for a finding that such an implied term exists in the contract herein.

The third issue is whether the termination of contract and the reasons advanced therefor are not supported by evidence and not grounded in facts prevailing in the circumstances and thereby the defendant breached the duty to act fairly implied under the contract. In deciding this issue this Court will also simultaneously dispose of the three issues as presented by the defendant but reflected in the third issue being, whether or not the plaintiff breached the terms and conditions of the contract herein. Whether or not the plaintiff was given sufficient warning before termination of the contract. And, whether or not the plaintiff was given notice of termination of the contract herein.

This Court has borne in mind that clause 19.1 of the contract herein provides that Illovo may terminate the agreement hereby made immediately, without paying any further compensation or damages whatsoever, if the Contractor breaches any of the terms herein.

It has further borne in mind that the defendant terminated the contract herein immediately on 26th November 2013, by a letter dated 25th November 2013, for breach of the contract herein by the plaintiff's failure to weed to the minimum standard required by the defendant. This Court is prepared to find that there is an implied term in the contract herein that on terminating the contract unilaterally under clause 19.1 of the contract herein the defendant is supposed to act fairly otherwise the termination would be unlawful. This is because, as submitted by the defendant, a termination of the contract for breach has to be for reasons that go to the root of the contract or to the foundation of the whole contract. See *Anson's Law of Contract* at 493-494. Not every breach of the contract by the plaintiff can be treated as going to the root of the contract herein. Therefore, there is a duty implied herein under clause 19.1 of the contract that the defendant fairly terminate the contract herein only when the breach leading to the termination was fundamental as to go to the root of the contract or to the whole contract.

The defendant submitted rightly that on the contract herein failure to weed timely was fundamental to the contract herein and that a breach by way of failure to weed timely under the contract herein would lead to a fair termination of the contract herein.

This Court will therefore have to determine whether there was failure to weed timely and whether the defendant proceeded to terminate the contract fairly on the basis of the said failure to weed timely.

In answering this question this Court will address the questions whether the defendant warned the plaintiff in the course of the contractual relationship herein. And whether the plaintiff breached the contract fundamentally by failing to weed timely.

This Court notes that, as rightly submitted by the plaintiff, letters of warning that were sent by the defendant to the plaintiff herein were indeed not sent in compliance with the contractually agreed method of communicating between the plaintiff and the defendant as far as decisions and notices are concerned. This is clearly conceded by the defendant's witnesses who admitted that all the warnings that were sent to the plaintiff did not have the plaintiff's registered address and

were not delivered by recorded delivery. It may therefore be safely accepted that the warning letters allegedly sent by the defendant to the plaintiff were in fact never sent. However, that as maybe, it is clear to this Court that the plaintiff suffered several penalties for failure to weed timely. This is clear, as submitted by the defendant, since the plaintiff did acknowledge that he received penalties. In the letters advising of the penalties it is clear that there was an issue of failure to weed timely. The plaintiff was therefore aware that there was an issue that he was failing to weed timely.

This culminated in the meeting of 29th April 2013 when the plaintiff was called to explain why he was failing to weed timely. The meeting of 29th April 2013 is clear evidence that as between the plaintiff and the defendant there was an issue that both parties were aware of which was the plaintiff's failure to weed timely.

The essence of the contract herein was timely weeding by the plaintiff. Failure to provide timely weeding services would entitle the defendant to terminate the contract herein.

It must however be noted , as rightly submitted by the plaintiff and not disputed by the defendant, that according to the contract, that although there were issues about the plaintiffs weeding, the documents that are to be used to show or prove that the plaintiff was failing to weed to the required minimum standard or quality are the weekly quality weeding reports and the completed field hand weeding report as contained in the exhibit CT10 A, the Agricultural Works Instruction Manual – Weed Control. For a number of days in June 2013 that is 4th, 7th, 8th ,14th ,13th and 18th June 2013, the plaintiff proved that his weekly weeding quality report showed that his weeding was of good quality. This is according to exhibit P8. On the contrary, the defendant who claims that the defendant's weeding was not up to the required minimum standard has not produced a single weekly weeding quality report or a completed field hand weeding report. There is therefore no basis for the defendant to show that the plaintiff's weeding quality was below the minimum required by the defendant.

Even when this matter was called for trial, the defendant could not produce a single weekly weeding quality report or a completed field hand weeding report. The documents used by the defendant to prove that the weeding by the plaintiff was not up to the required standard, namely, the daily labour statistics for contractors marked as exhibit CT5a to CT5g inclusive, apart from being hearsay, do not show the hectares weeded and the weed infestation levels. They are not scientific as

rightly submitted by the plaintiff. These cannot be accepted as proof of weeding quality. The pictures of fields tendered by the defendant do not assist the defendant as they are unreliable for the reasons advanced by the plaintiff.

It is therefore impossible for the defendant to prove its contention that the plaintiff's work was below the minimum standard required by the defendant so as to justify the immediate termination herein. It is not surprising that Mr Shaba admitted that since the incident herein the defendant now insists on production of weekly quality weeding reports and completed field hand weeding report for its contractors. This is because these weeding quality reports are the ones that contractually are to be used to show or reflect the quality of weeding. The determination of the weeding quality had to necessarily involve the consideration of the man days per hectare in relation to the weed infestation level in the sugar cane field.

In view of the foregoing, this Court finds that the plaintiff has proved on a balance of probabilities that the defendant breached an implied term of the contract herein by terminating the contract herein unfairly under clause 19.1 of the contract herein in circumstances where the reason for termination is not justified by the weekly weeding quality reports or completed field hand weeding reports that are contractually supposed to show the plaintiff's weeding quality.

The fifth issue is whether the defendant is liable to pay damages for breach of contract. Since the defendant terminated the contract in breach of the said contract the plaintiff is entitled to general damages for breach of contract. These shall be assessed by the Registrar.

The sixth issue is whether the defendant is liable to pay special damages. The plaintiff has to prove that the special damages he is claiming flow from the defendant's breach herein. He shall prove those special damages before the Registrar on assessment of damages.

The last, but not least issue, is whether the defendant is liable to pay costs. Costs normally follow the event and shall be for the successful plaintiff herein.

Made in open court at Blantyre this 31st August 2015.

M.A. Tembo

JUDGE