



INTERNATIONAL
BUILDING
QUALITY CENTRE

**AN OVERVIEW OF CONSTRUCTION DISPUTES
RESOLUTION IN MALAWI- BEST PRACTICES
FOR COST REDUCTION**

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OUTLINE

- Introduction
- Infrastructure development
- Construction disputes
- The legal framework
- Conclusion

INTRODUCTION

- Being a developing country and a small economy, Malawi has its own aspirations to achieve especially in terms of infrastructure development. This is evident when one looks at the Malawi 2063 Agenda, (hereafter the 2063 Agenda). The Malawi 2063 agenda is an official document and roadmap by the Malawi Government that details how as a country, we intend to become a self-reliant nation with a minimum per capita income of 4000 USD. This comes from our desire as Malawians ‘to be an inclusively wealthy and self-reliant industrialized upper-middle income country by the year 2063, we want to fund our development needs by ourselves.

THE ROADMAP TO DEVELOPMENT

- THE MALAWI 2063 AGENDA WHICH HAS 10 GOALS, 3 OF WHICH ARE RELEVANT TO THE DISCUSSION AT HAND:
 - vibrant knowledge-based economy with a robust competitive manufacturing industry that is driven by a productive and commercially vibrant agriculture and mining sector;
 - World-class urban centers and tourist hubs across the country with requisite socio-economic amenities for a high quality life;
 - Globally competitive economic infrastructure

INFRASTRUCTURE DEVELOPMENT

- Presently, there are noticeable developments going on in Malawi from renovation or construction of
 - Roads, E.G. the M 1 road (the main road in Malawi connecting different regions and all districts in Malawi is currently being rehabilitated.
 - Renovation of railways,
 - Construction of secondary schools, teachers training schools, Court buildings, etc.

CONSTRUCTION DISPUTES

- Construction being ‘a fertile source of disputes’, obviously Malawi is not an exception from construction disputes. Causes of such disputes include delays caused by a number of factors, payment, disagreements to modified or amended plans, and professional negligence. If not addressed or resolved, disputes can result in projects being delayed further or halted and this is not an option for Malawi as the economy is still young and struggling as already pointed out. As such each and every penny needs to be utilized for the benefit of the people.

THE LEGAL FRAMEWORK

- THE CONSTITUTION
- THE COURT'S ACT
- THE NATIONAL CONSTRUCTION INDUSTRY ACT
- THE ARBITRATION ACT
- THE COURT (HIGH COURT) CIVIL PROCEDURE RULES

THE CONSTITUTION

- The Constitution of the Republic of Malawi gives the High Court unlimited original jurisdiction. Thus, the High Court in Malawi can virtually preside over any matter under the sun, construction disputes being one of them. Section 108 of the Republican Constitution.
- The Court's Act has created different divisions within the high Court with different specialties.

THE COURTS (HIGH COURT) (CIVIL PROCEDURE) RULES 2017

- Once parties have subjected themselves to the jurisdiction of the Court, **The Courts (High Court)(Civil Procedure) Rules**, (hereafter called the CPR). The CPR has given a judge wide discretionary powers in how a case before him or her is to be resolved whilst keeping in mind the overriding objectives of the CPR, which include:

(a) ensuring that parties are on an equal footing;

(b) Saving expenses;

(c) Dealing with a proceeding in ways that are proportionate to the –

i. the amount of money involved;

- ii. importance of the proceeding; and

- iii. complexity of the issues

- Ensuring that a proceeding is dealt with expeditiously and fairly;

ACTIVE CASE MANAGEMENT AS A MEANS TO COST REDUCTION

encouraging the parties to cooperate with each other in the conduct of the proceeding;

identifying the issues for resolution at an early stage;

deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

deciding the order in which issues are to be resolved;

encouraging the parties to use an alternative dispute resolution procedure if the Court considers it appropriate, and facilitating the use of such procedure;

ACTIVE CASE MANAGEMENT, CONT'D

- assisting the parties to settle the whole or part of the proceeding;
 - (a) fixing timetables or otherwise controlling the progress of the proceeding;
 - (b) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (c) dealing with as many aspects of the proceeding as the Court can on the same occasion;
 - (d) making use of technology; and
- giving directions to ensure that the trial of a proceeding continues quickly and efficiently

MANDATORY MEDIATION

- ORDER 13 OF THE CPR

- The advantages are that if a matter gets resolved at mediation, the parties will go back in a conciliatory mood, relationship is not damaged, costs are reduced and time factor is also addressed
- in conducting a mediation session under this Order—
 - (a) the parties shall strive to reduce costs and delay in litigation, and facilitate the early and fair resolution of disputes; and
 - (b) the Judge shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.

MANDATORY MEDIATION CONT'D

- This is itself is a sure way of reducing costs in construction disputes. However, it has been noticed a number of times that other lawyers would not want a matter to end at mediation and encourage their clients not to be agreeable.
- Mostly this is done for selfish reasons, as it means that if a matter is to go for trial, the lawyer will get paid more than if ends at mediation.
- Thus whereas the process itself would be very cheap, it is costly for the main reason that the parties will have to pay their legal counsel for coming with them to Court as well as for preparing the mediation itself. Sight should not be lost to the fact that this mediation is Court driven and is a step within the proceedings before Court.

INJUNCTIONS

- Some parties either between main contractor and sub-contractor or between the employer and contractor have rushed to Court to get an injunction. Mostly they would be coming to Court to seek an injunction ex parte or without notice to restrain another party from acting or proceeding to act in a particular way.
- Performance Security Guarantee and Advance Payment Guarantee

INJUNCTIONS

- In all these instances, costs were incurred. However, through Court processes, it is obvious that more costs would have been incurred but for the Court's intervention through the CPR. Another notable fact is that all the matters were brought before Court as matters of extreme urgency which is indicative of the fact that the parties were in panic mode at the time.
- In turn, this is a sign that the parties do realise that a lot is at stake. More often than not, the parties would have tried to resolve the matter between themselves but that their discussions would not have been fruitful.

ARBITRATION AVENUE

- Arbitration of disputes is mainly guided by the Arbitration Act.
- Section 6(1) of the Arbitration Act
- The National Construction Industry Act
 - Arbitration Rules

CONCLUSION

- From the case statistics (which I have not confirmed, but it is obvious that there are not much construction disputes in the Courts), the cause of disputes in all the cases was in relation to the couching of key clauses within the contract. This is suggestive of the fact that where key clauses are clearly stipulated and fair, it automatically reduces disputes and in turn reduces costs in construction disputes.
- It cannot be denied that the COVID-19 pandemic was one of the contributory factors to delays in construction projects that saw employers or main contractors claiming Advance Payment Guarantee or/and Performance Security Guarantee. This goes to how clauses are to be couched in case of eventualities like the COVID-19 pandemic where the whole world was brought to a halt. Otherwise, the law is comprehensive enough and it only needs to be fully utilized.

Presented by Justices Namonde & Gondwe

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The views expressed in this paper are of the writers only and are not the views of any other body.



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