IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And MAIGE, J.A.)

CIVIL APPEAL NO. 287 OF 2020

PUMA ENERGY TANZANIA LIMITED ..... APPELLANT

VERSUS

RUBY ROADWAYS (T) LTD ..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division), at Dar es Salaam]

(Songoro, J.)

dated the day of 9th of June, 2017
in
Commercial Case No. 86 of 2015

.....

JUDGMENT OF THE COURT

18th October, 2021 & 21st April, 2022

MWAMBEGELE, J.A.:

This is an appeal against the judgement and decree of the Commercial Division of the High Court in Commercial Case No. 86 of 2015 pronounced on 09.06.2017. In that suit, the respondent Ruby Roadways (T) Ltd sued the appellant, Puma Energy Tanzania Limited, praying for; **one**, a declaration that the appellant was in breach of contract; **two**, special damages of: Tshs. 4,713,658,570/= as per paras 3, 4 and 16 of the plaint, USD 300,000.00 as per paras 3 and 17 of the plaint and Tshs. 535,000,000/ as per paras 3 and 8 of the plaint; **three**, commercial interest; **four**, interest at the rate of 12%

per annum from the date of judgment to the date of payment in full; **five**, general damages; **six**, costs of and incidental to the suit and; **seven**, any other reliefs which the court might have deemed fit and just to grant.

The Respondent's case was predicated on the Transportation Agreement (Exh. P1; henceforth "the Agreement") entered between the parties to this appeal and which the appellant had allegedly breached. She thus filed the suit the subject of this appeal claiming the foregoing reliefs.

The appellant filed a Written Statement of Defence denying the respondent's claims. She also raised a counter-claim of Tshs. 94,457,982/85 being the value of fuel and lubricants allegedly suppled to the respondent.

The High Court found that the appellant breached the contact and, as a result, granted the respondent Tshs. 800,000,000/= as compensation for loss of expected earnings for the remaining contractual period. The respondent was also awarded Tshs. 100,000,000/= as general damages, thus making a total of Tshs. 900,000,000/=. On the other hand, the appellant succeeded in her counter-claim. She was awarded the claimed sum of Tshs. 94,457,982/= which was set-off in the respondent's award. Eventually, after the set-off, the respondent was awarded Tshs. 805,542,982/= with costs and interest at

the rate of 8% per annum on the decretal sum. The rest of the claims by the respondent were found as not proved.

The appellant was aggrieved with the decision of the High Court. She thus preferred the present appeal to the Court on four grounds of grievance, namely:

1. The trial judge erred in law and fact in finding that the appellant did not issue a notice of termination to the respondent prior to the termination of the agreement;

2. The trial judge erred in law and fact in finding that the letter from the appellant dated 7th March, 2014 addressed to the respondent did not constitute a notice of termination;

3. The trial judge erred in fact in finding that the appellant did not conduct two audits before terminating its agreement with the respondent and that accordingly the termination was done without any reason; and

4. The trial judge erred in law by awarding damages for losses which were not proved by the respondent.

The respondent, on the other hand, lodged a notice of cross-appeal constituting four grounds of complaint, that is:

1. That, the trial court erred in holding that the contract the subject of the dispute was for three years;

2. The trial court erred in law for failing to apply the correct principle of law in awarding the damages after finding that the appellant breached the contract;

3. That, the trial court erred in law and fact in holding that there was no proof that the respondent was expecting to earn the sum of Tshs. 4,713,648,570/= from the terminated contract and

4. That, the trial Judge erred in deciding that the plaintiff was not entitled to the compensation of the sum of US $ 300,000.00.

At the hearing of the appeal before us, the appellant was represented by Mr. Gaspar Nyika, learned advocate whereas the respondent had the services of Mr. Beatus Malima, also learned advocate. Both learned advocates had earlier filed their respective written submissions for or against the appeal and cross appeal which they sought to adopt as part of their oral arguments. The learned advocates had little to clarify on some points at the hearing.

In arguing the appeal, Mr. Nyika adopted wholly the arguments in respect of the first, second and third grounds of appeal as submitted in the written submissions in support of the appeal. He had little to clarify in respect of the fourth ground of appeal. He argued that the High Court awarded the damages which were not proved and that it did not state the basis on which the quantum of damages was awarded. He contended that

the figure of Tshs. 800,000,000/= was just plucked from the air and put in the judgment. Mr. Nyika cited our decisions in **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 and **M/S Universal Electronics and Hardware (T) Limited v. Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017 (both unreported) to reinforce the point that an award on damages must have a basis upon which it is pegged. He thus beseeched us to allow the appeal with costs.

Responding, like Mr. Nyika, Mr. Malima did not have much to add to the reply written submissions earlier filed. With regard to the quantum of damages awarded, Mr. Malima submitted that Tshs. 800,000,000/= awarded was not picked from nowhere but was pleaded in that it is part of Tshs. 4,713,648,570/= claimed to be expected profits which the respondent would have earned had the appellant not terminated the contract. He concluded that the appeal was without merit and implored us to dismiss it with costs.

In a short rejoinder, Mr. Nyika reiterated that there was no evidence to justify the award of Tshs. 800,000,000/=. He added that the volumes referred to by the respondent were not certified/guaranteed and therefore they could not be used as the basis to calculate expected profits. PW2, he

argued, just said what they were supposed to earn and that 20% of it was Tshs. 4,713,648,570/= but everything was speculative.

Having stated as above, we go straight away into the determination of the grounds of appeal. In the written submissions supporting the appeal, Mr. Nyika argued the first and second grounds together. The two grounds seek to fault the trial court for holding that there was no notice of termination issued to the respondent and that a letter from the appellant dated 07.03.2014 did not constitute a notice of termination. The learned counsel submitted, in essence, that the appellant issued the respondent a notice of termination through the letter referred to above which was tendered in evidence as Exh. D4. He argued that the letter constituted a notice of termination in terms of Clause 1.84 and 1.84.1 of the the Agreement because it informed the respondent that "a full audit will be conducted on your company during the first week of June, unless a score of 95% is achieved, the transportation agreement will be terminated". After the audit, he argued, the threshold of 95% score was not met and thus the letter constituted sufficient notice of termination in terms of the Agreement. The learned counsel relied on the definition of the term "notice" given by **Black's Law Dictionary** (Eighth Edition) to buttress the point that the letter under reference met the purpose.

Responding, the respondent's counsel resisted the two grounds of appeal with some force. He submitted that the High Court could not be faulted for its findings on both grounds. Seeking reliance from Clause 2.13 of Exh. P1, he submitted that the parties had agreed on the form and modality on which the notice of termination could be served on the other party. Mr. Malima argued further that the letter relied upon by the appellant had nothing to do with termination of contract in terms of clause 1.84 and 1.85 of Exh. P1. The learned advocate concluded that the High Court cannot be faulted for so holding.

In determining the two grounds of appeal, we think the take off point should be clause 1.84 of the Agreement (Exh. P1). This clause gave the right upon either party to terminate the Agreement for the reasons given. In terms of clause 1.87, such notice would become effective on the date of delivery of it to the other party.

The issue on which the learned counsel for the parties have locked horns is whether the letter by the appellant to the respondent dated 07.03.2014 (Exh. D4) constituted a notice of termination of the Agreement in terms of the Exh. P1. For ease of reference, we find it apposite to reproduce

the said letter hereunder as appearing at p. 128 of the supplementary record of appeal:

"7 March, 2014

Ruby Roadways Ltd
Plot No. 102 Charambe
Mbagala
Dar es Salaam.

Dear Sirs
Re: Aviation Transportation Agreement

Further to our meeting held in Dar es Salaam on Thursday 27 February, 2014, we hereby put Ruby Roadways Limited on 3 months' notice in terms of the Aviation Transportation Agreement that was entered into between ourselves on 1 June 2013.

The decision was based on the following:

- *Policies and procedures requested during initial assessment dated 23 July 2013 not received by deadline date;*
- *It was agreed at the tender award that the vehicles had to be upgraded to meet Puma Energy Standard Vehicle Specifications: vehicles are not on spec:*

- *Not making available sufficient capacity to meet Puma Energy aviation transportation requirements;*
- *Tankers not de-branded as requested numerous times;*
- *No indication of vehicle replacement policy and planning.*

A full audit will be conducted on your company during the first week of June; unless a score of 95% is achieved the transportation agreement will be terminated.

We appreciate your immediate attention to the Puma Energy requirements and specifications.

S. Pake

Regional Supply & Logistics Manager"

The High Court discussed at pp. 830 - 832 of the record of appeal, what clause 1.84 through to 1.89 provided in the event of breach and termination of the Agreement and concluded at p. 832 that there was no notice of termination issued to the respondent.

Clause 1.85 of the Agreement provides for the mode of termination agreed by the parties. We find it compelling to reproduce the relevant clause here. The clause reads:

> *"**In the event of default** on a part of a Party (the defaulting Party), the other Party (the non-defaulting Party) **may serve a notice of termination** of this agreement on the defaulting Party and the defaulting Party shall, **following the receipt of such notice,** immediately **commence to remedy such default. If the defaulting Party shall have failed to remedy such default within twenty five (25) days** of the non-defaulting Party's notice this agreement shall terminate subject to clause 0."*

What we discern from the clause is that the right of a party to terminate the Agreement was intended to be exercised by issuing a notice to the other party. The termination was not, therefore, an automatic remedy available to any of them. The appellant who was a non-defaulting party, was bound to serve the notice of termination on the defaulting party (the respondent) and upon receipt of such notice, the respondent was obligated to remedy the default. In case of failure, the appellant had the right to terminate the contract within 25 days. With respect, the letter the appellant claims to have been a notice in terms of the Agreement, did not meet the dictates of the clause to constituted a notice of termination.

We subscribe to the finding of the High Court on the two grounds. Like the High Court, we find difficulties in agreeing with the appellant that the

letter under reference constituted a notice of termination in terms of the Agreement. If anything, the letter was meant to inform the respondent that a full audit would be conducted "during the first week of June" and that if a score of 95% would not be achieved, the transportation agreement would be terminated. Even though the letter made reference to the termination of the Agreement, it was not a notice of termination of the agreement within the meaning envisaged in the Agreement. A notice of termination in terms of the Agreement would only be issued after carrying out the intended full audit and after failure by the respondent to achieve the score of 95%; the minimum threshold. The letter was not meant to have a retrospective effect as Mr. Nyika would have us hold.

In view of the above discussion, the first two grounds of appeal collapse.

The third ground of appeal seeks to challenge the High Court for holding that the appellant did not conduct two audits before terminating the agreement and the termination was without any reason. Mr. Nyika argued that parties to a contract are free to terminate it at will or on occurrence of events. He cited paragraph 22 – 48 of **Chitty on Contracts**, Volume 1, 33rd Edition to support this argument. He submitted that the respondent had

minimum performance requirements to meet which she did not and therefore the appellant had the right to terminate the contract provided that the termination was preceded by a notice.

Mr. Nyika went on to submit that the appellant conducted two audits with the first one undertaken on 23.07.2013 (Exh. D3) whereby the respondent scored only 59.8% agaist the pass rate of 95%. After the first audit the respondent was accorded time within which to rectify the defaults so as to meet the minimum performance requirements. On 18.06.2014 another audit was carried out and the respondent scored only 68% thereby failing to meet the minimum score of 95%. He argued that the contract was terminated after the two audits were carried out and therefore the termination was not without any reason.

On the other hand, Mr. Malima argued that giving the other party the reasons for termination was a term of the contract which the appellant did not comply. He went on to argue that in accordance with clause 1.84 of Exh. P1, the appellant was required to give reasons to the appellant for terminating the agreement. The respondent's counsel argued that the purported audits were not signed by the maker, neither was there any

evidence of the respondent receiving them. He thus argued that the High Court was correct to find and hold that there were no audits conducted.

Upon consideration of the rival arguments by the learned counsel for the parties in respect of this ground, we think any discussion on its merits or demerits will be unnecessary. We say so having found and held that the Agreement was terminated without notice and thus the issue whether the respondent gave reasons for termination becomes superfluous. For this reason, the third ground of appeal, in so far as it could stand only if there was a valid notice of termination of the agreement, must fail.

In the fourth ground of appeal the High Court is faulted for awarding damages for losses which were not proved. Mr. Nyika argued that in awarding Tshs. 800,000,000/= as specific damages, the trial judge did not adhere to the principle that there must be a causal connection between the defendant's breach of contract and the plaintiff's loss. The learned counsel cited section 73 (1) of the Law of Contract Act, Cap. 345 of the Revised Edition, 2019 (the Law of Contract Act) and Pollock and Mulla's **Commentary on the Indian Contract Act 1909** (2nd Edition) for this principle. He argued further that the respondent did not tender any financial records to prove its profits and therefore the loss of earnings to be

attributable to the termination of the contract is highly doubtful. The learned advocate added that even though there was reduction from Tshs. 4,713,570/=, the amount was not specifically pleaded and proved. Worse more, he added, the trial judge failed to explain the basis of the award of Tshs. 800,000,000/=.

On his part, Mr. Malima agreed with counsel for the appellant on the principle under section 73 (1) of the Law of Contract Act which was enunciated in **Hadley v. Baxendale** (1854) 9 Exch. 341, 354. He also cited sufficient case law on the principle. The learned counsel spent considerable energy on this issue submitting, in principle, that the respondent brought enough evidence to prove that she would have earned Tshs. 4,713,570/= as 20% profits if the appellant would not have terminated the contract. Out of the fifteen-page reply written submissions, eight of them are dedicated to this ground of appeal. However, the kernel of his argument is that the amount was proved through; **one**, the agreement itself (Exh. P1) in which the volume and fee payable were provided thereby showing how the respondent would have earned if the contract had not been terminated; **two**, request for quotation (Exh. P3) which contains information on the expected volume which the respondent would have supplied in the duration of the contract; **three**, email correspondence of 23.04.2013 (Exh. P4) which shows

that the parties had agreed before signing the contract on the service fees or the price per litre to be transported. **Four**, the testimony of PW2 who testified that the respondent would have earned Tshs. 4,713,570/= as 20% profit if the contract had not been terminated; **five**, invoices and payment receipts (Exh. P12) which were issued pursuant to clause 1.66 of Exh. P1 and, **six**, part payment of Tshs. 535,000,000/= in year one which was used to purchase motor vehicles which proved that the respondent partly earned that amount during the first year of the agreement.

The respondent had an alternative argument that even in the absence of the exhibits referred above, the trial court could still have assessed the damages. He cited a passage in **Pollock and Mulla, the Indian Contract Act 1872** (14th Edition) at p. 1219 to support his proposition.

The respondent's counsel added that the appellant's argument that the Tshs. 800,000,000/= award was not pleaded cannot stand because there is no law which stipulate that requirement. He referred us to **Mutekanga v. Equator Growers (U) Limited** [1995 – 1998] 2 E.A. 219 at p. 299 to support this argument.

In considering this ground, we take note that the dispute in the matter before us is one for breach of contract. Remedies for breach of contract, as

rightly put by the appellant's counsel and conceded by the respondent's counsel, and to our mind rightly so, are provided under Part VII of the Law of Contract Act, Cap. 345 of the Revised Edition, 2019. Section 73 (1) thereof provides that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss or damage caused to him by the other party. The compensation must arise from the usual course of things from such breach, or which the parties knew will happen or were likely to result from the breach of contract. With special damages, however, the law is settled that they must be specifically pleaded and proved. We discussed this point at some considerable length in **M/S Universal Electronics and Hardware (T) Limited** (supra) cited to us by Mr. Nyika. In that case, we made reference to several previous decisions on the point to buttress the point that special damages must be specially pleaded and strictly proved. These cases include, **Zuberi Augustino v. Anicet Mugabe** [992] TLR 137, **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation**, Civil Appeal No. 54 of 2009 (both unreported). It was Lord Macnaghten who laid down the principle in **Stroms Bruks Aktie Bolag & Others v. John & Peter Hutchison** [1905] AC 515 at page 525 in the following terms:

> *"Special damages on the other hand are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore,* ***they must be claimed specifically and proved strictly.****"*
> [Emphasis supplied]

The above principle was endorsed by the Court as a correct statement of the law in our jurisdiction in **Stanbic Bank Tanzania Limited** (supra) and **Nyakato Soap Industries Ltd** (supra) in which, reiterating its earlier position taken in **Zuberi Augustino** (supra), the Court held:

> *"Although not as comprehensively expressed, this Court in one of its decisions -* ***Zuberi Augustino v Anicet Mugabe*** *[1992] TLR 137, at page 139 said:- It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

In the matter before us, it is obvious that the respondent specifically pleaded Tshs. 4,713,658,570/= as loss of expected profits. It is should be remembered that loss of expected profits falls under the category of special damages – see: **Masolele General Agencies v. African Inland Church Tanzania** [1994] TLR. 192. The respondent was awarded the amount of

Tshs. 800,000,000/=. However, the record is silent on how the figure was arrived at. At p. 834 of the record of appeal, the High Court held:

> *"... Exhibit P2 a sale agreement is not related to aviation transport agreement but in my view it is persuasive and credible which establishes that the appellant spent the sum of Shs. 535,000,000/= to buy trucks from the defendant to undertake aviation transport business of the defendant which was unilaterally terminated midway. So the fact that the plaintiff spent a huge sum of money in a contract which was terminated definitely the plaintiff, her trucks, drivers and other staff were left with no work to do and expected earnings vanished. It seems to me from the testimony of PW1 and PW2 that they had a 3 years contract but was terminated without a notice, that establishes in the remaining period of contract, there was a legitimate expectation of earnings from the remaining contractual period of aviation transportation agreement which may not be realized due to termination of the contract. So, honestly, I find a claim of loss of business earnings and damages have been proved."*

The High Court refused the claim of Tshs. 4,713,658,570/=, at p. 836 of the record of appeal, for being "not substantiated and on the high side" and having so observed, it went on:

> *"... the court finds that since the contract was wrongly terminated midway by the defendant, the court assesses the loss of profits and earnings on the basis of the remainlng period the contract was terminated midway and award a sum of shs. 800,000,000/=. The awarded sum is for loss of expected earnings and compensation for the terminated contract which the plaintiff suffered as a result of the defendant breach of contract ...."*

In the above excerpts from the decision of the High Court, we note two ailments. The first is that the learned trial judge seemed to treat general and special damages as one and the same thing. We discern this from the way the special damages were treated and awarded. The statement that "I find a claim of loss of business earnings and damages have been proved" is also suggestive of the fact that special and general damages were treated as one and the same. In our considered view, there was no sufficient evidence to substantiate how the respondent would have suffered such loss in the remaining contractual period of three years. The whole thing was speculative, as Mr. Nyika put it, and to our mind, rightly so. It was the duty

of the respondent to prove the extent of the loss she would suffer from the anticipated profit in the remaining contractual period of three years.

The second ailment is in the finding that the claim for Tshs. 4,713,658,570/= was "not substantiated" but at the same time finding that it was "on the high side". We think, with unfeigned respect, having found that the claim of Tshs. 4,713,658,570/= was not substantiated, the High Court ought to have dismissed the claim for want of strict proof. Awarding Tshs. 800,000,000/= out of the Tshs. 4,713,658,570/= which was not substantiated, we respectfully think, was not appropriate. The learned trial Judge fell into error. He could not run with the hare and hunt with the hounds. As the Court held in **NBC Holding Corporation v. Hamson Erasto Mrecha** [2002] T.L.R. 71 at p. 77:

> *"We think reasonableness cannot be the basis for awarding what amounted to special damages, but strict proof thereof."*

Much as we agree with Mr. Malima that the claim of special damages of Tshs. 4,713,658,570/= was specifically pleaded at para 19 (b) (i) of the plaint, and that the Tshs. 800,000,000/= was part of it and thus perhaps reasonable to award it, we fail to understand how the amount awarded was strictly proved. In the premises, and in view of the above discussion, we

agree with Mr. Nyika that there was no basis upon which the award of special damages in the amount of Tshs. 800,000,000/= was pegged. We allow this ground of appeal.

In the end, we allow the appeal to the extent stated. The appeal fails in the first three grounds but allowed in the last ground. The amount of Tshs. 800,000,000/= awarded as special damages is set aside. The award of Tshs. 100,000,000/= as general damages remains intact as it was not challenged by the appellant. That means, the amount now awardable to the respondent is only Tshs. 5,542,982/=, with interest as ordered by the High Court.

That is all with the appeal.

We now turn to determine the cross appeal the grounds of which have been enumerated at the beginning of this judgment. As already intimated above, both learned counsel for the parties adopted written submissions for or against the cross appeal which they earlier filed. They had very little to clarify at the hearing. We hasten to remark that much of the discussion that ought to have been canvassed here is now redundant as the same have been covered in the appeal. The written submissions in respect of the cross-appeal were as lengthy and detailed as were in respect of the appeal.

The first ground in the notice of cross appeal seeks to challenge the High Court for holding that the contract the subject of the dispute was for three years. We really have found difficulties in understanding the gist of the respondent's complaint in this ground. We say so because the duration of the contract as per the Agreement was three years (thirty-six months) with an option for extension. The basis upon which the respondent claims that the Agreement was for five years is the timeline indicated in the Request for Quotation (Exh. P3). But the respondent agrees that the duration of the Agreement was thirty-six months as per clause 1.59 of the Agreement. The Agreement also states in this clause that, pursuant to clause 1.60, there was an option for extension at the appellant's discretion in consultations with the respondent. There is no evidence that the Agreement was extended for two more years. If anything, the two years' extension to the Agreement was optional, the respondent cannot thus claim that the Agreement was for five years. The Request for Quotation (Exh. P3) cannot supersede the Agreement. The complaint in the first ground of cross appeal is therefore without merit.

The second ground of cross appeal challenges the High Court for failing to apply the correct principle of law in awarding the damages after finding that the appellant breached the contract. It is the respondent's argument

that, having found that the appellant was in breach of the agreement, the High Court ought to have granted the amount prayed for as the respondent had proved the same. We have already found and held in the appeal that the respondent pleaded the special damages but the evidence fell short of strict proof as required by case law cited. This ground of cross appeal is likewise dismissed for want of merit.

The third ground of cross appeal faults the High Court for holding that there was no proof that the respondent was expecting to earn the sum of Tshs. 4,713,648,570/= from the terminated contract. We have found and held in the appeal that the High Court cannot be faulted for holding that the sum of Tshs. 4,713,648,570/= was not strictly proved. The third ground of cross appeal is also without merit.

The last ground of cross appeal is that the High Court erred in deciding that the plaintiff was not entitled to the compensation of the sum of US $ 300,000.00. In refusing this claim, the High Court stated at p. 839 of the record of appeal that there was no evidence to substantiate that the amount was paid to Simba Trucks. Apart from the invoice, the respondent brought no other evidence to prove that the amount was actually paid. No bank pay-in slips, no document to show that the amount was paid by telegraphic

transfer, etc. We think the High Court cannot be faulted for refusing to award US $ 300,000.00.

In view of the above discussion, we find no merit in the cross appeal and dismiss it.

In the upshot, the appeal is allowed to the extent stated. The cross appeal is dismissed with costs.

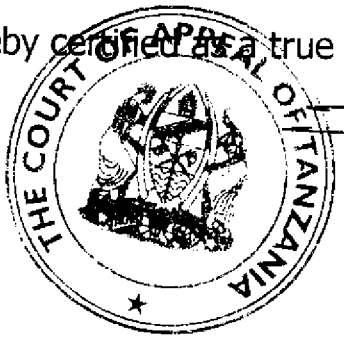
DATED at **DAR ES SALAAM** this 19th day of April, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 21st day of April, 2022 in the presence of Mr. Antonia Agapit holding brief for Mr Gasper Nyika, learned counsel for the Appellant, and Mr. Beatus Malima, learned counsel for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL