IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A. LEVIRA, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 88 OF 2019

GULF CONCRETE & CEMENT PRODUCTS CO. LTD ..... APPELLANT

VERSUS

D. B. SHAPRYA & CO. LTD .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Sehel, J.)

dated the 13th day of February, 2019
in
Commercial Case No. 23 of 2015

JUDGMENT OF THE COURT

14th March & 9th August, 2022

MKUYE, J.A.:

In the High Court of Tanzania (Commercial Division), the respondent D B Shapriya & Co. Ltd had successfully sued the appellant Gulf Concrete & Cement Products Co. Ltd for breach of a contract of sale of the ready mixed concrete (pre-mix concrete grade 25 Mpa) for construction of the raft foundation/basement floor. What can be gleaned from the record of appeal is that the appellant is a legal person incorporated under the laws of Tanzania and is engaged in the supply of building materials in the construction industry. The respondent is also

incorporated under the laws of the land engaging herself in the construction industry.

Sometimes in 2013, the respondent was engaged by a client known as ANSAK Limited for the construction of a multi storey residential building at Upanga on Plot No. 681 Mazengo Street within Dar es Salaam Municipality in Dar es Salaam Region (the suit project). After realizing that at the site there was no enough space for them to put up machine and equipment for the purpose of mixing their own concrete to be used in the construction of the said building, she (respondent) entered into a formal agreement through email correspondences with the appellant for the supply of ready mixed concrete for the construction of the raft foundation floor.

What is gathered from the record of appeal is that the appellant was to supply the ready mixed concrete that would produce the strength of 25 Nmm^2 after 28 days of hardening. The appellant on 9^{th} – 10^{th} March, 2013 supplied concrete to the respondent for raft foundation as agreed upon.

Then later the respondent unilaterally in the absence of the appellant conducted a test at Yara Laboratory owned by them and again at C-Lab to check whether the concrete so supplied to them was of the

required quality as agreed on. Out of the check up, it turned out that the concrete was not of quality standard agreed and did not achieve the strength of 25 Nmm^2.

The appellant was notified of the outcome but on her part she maintained that the concrete supplied was of the required quality and strength and on its part preferred its own tests at National Housing and Building Research Agency (the NHBRA) and Dar es Salaam Institute of Technology (the DIT) and the results thereof indicated that the concrete was of the required quality. The respondent later claimed that as a result of poor quality concrete supplied to them by the appellant, they had to abandon/demolish the respective raft foundation which ultimately led to an extra cost being incurred by them in the exercise and, therefore, claimed to be paid by the appellant a total sum of Tshs. 446,740,604.00/= for the loss incurred by the respondent.

On the other hand, the appellant did not agree with the respondent's demands and they countered by claiming to be paid the remaining balance of Tshs. 60,712,000.00/= for the premix concrete of grades 35Mpa and 25Mpa worth Tshs 148,079,200.00/= supplied to respondent earlier on for construction of the suit project.

Since the parties failed to resolve the dispute amicably, the respondent commenced a commercial suit in the High Court of Tanzania (Commercial Division) as alluded to earlier. The issues which were framed for determination by the High Court were as follows:-

1. *Whether the concrete mix supplied by the defendant was of poor quality contrary to the 25 Mpa grade as agreed in the contract for supply between the parties;*
2. *Whether the raft foundation was indeed abandoned and re designed;*
3. *If the answer in issue (2) is in the affirmative, then whether the abandonment and redesigning of the raft foundation was caused by either the poor quality in the supplied concrete or the poor workmanship of the columns and lift walls before demolition.*
4. *Whether the various tests conducted on the quality of cube, raft core, columns and lift walls were/are reliable; and*
5. *To what reliefs are the parties entitled.*

After a full trial, the High Court found among others that concrete mix supplied by the defendant to the plaintiff was contrary to the 25 Mpa grade as agreed in the contract for supply between the parties; that

as the concrete did not achieve the intended strength to be able to carry the load, the raft foundation was abandoned; that the reason for the abandonment was due to the advise given by the consultant as shown in Exh. P8 which was a final assessment issued by Norplan (PW4) upon analysation of various tests submitted to Norplan. As for the fourth issue, the trial court stated that:-

> *"... I do no see good reasons for not accepting the expertise opinion of PW4. I say so because after I have gone through Exh P8, I note that PW4 has candidly analysed the test results by using the approved British Standard Codes BS 6089, BS 12504 and BS 13230. Consequently, I fully rely upon the report issued by PW4 that the results of UDSM and DIT that showed concrete strength for raft is low are reliable."*

As to the reliefs, the trial court awarded the respondent payment of Tshs. 446,740,604/= and dismissed the counter claim raised by the appellant.

The appellant being aggrieved by the decision of the High Court, has now preferred this appeal on eight (8) grounds as follows:-

> *a) That, the trial court erred in law and/or in fact for failing to consider or recognize the*

project consultant's (Norplan) biasness against the defendant (appellant) given its role and interest in the project.

b) *That, the trial court erred in law and/or in fact by considering the evidence of PW4 as evidence of an expert witness.*

c) *That, the trial court erred in law and/or in fact by relying on comprehensive strength test that were unreliable.*

d) *That, the trial court erred in law and/or in fact by disregarding material important evidence in determining the dispute.*

e) *That, the learned trial judge misdirected herself in fact in deciding issue number one and erred by holding that the strength of concrete ranging between 27 -34 Nmm^2 was below grade 25 Mpa.*

f) *That, the trial court erred in law and/or in fact for awarding the sum of Tshs. 446,740,604 without any proof.*

g) *That, the trial court erred in law and/or in fact in failing to consider the defendant's uncontested counter claim and reliefs prayed in respect thereto.*

h) That, the learned trial judge erred in law and in fact by disregarding the submissions by the defendant that the abandonment was done long before the defendant supplied the concrete pre-mix by basing on the ground that the defendant in the pleadings raised no issue regarding drawings.

When the appeal was called on for hearing, the appellant was represented by Messrs Thobias Laizer and Anthony Mark together with Ms. Oliver Mark, learned advocates; whereas the respondent was represented by Mr. Roman S. L. Masumbuko also learned advocate. Each party adopted her written submissions filed earlier on in terms of Rules 106 (1) and (7) of the Tanzania Court of Appeal Rules 2009 respectively. Also, both parties made oral submissions clarifying their respective written submissions of which we are grateful for their industry, particularly in their written submissions. However, we wish to state that for the time being, we shall deal or consider what is relevant in relation to the matter before us and subject for determination.

Having examined the grounds of appeal, the record of appeal and the written submissions, we have observed that they all hinge or revolve around one crucial issue whether there was proof that the premix

concrete supplied by the appellant was below the quality agreed upon. Nevertheless, we shall deal with grounds (a) and (b) together, then ground (c), followed by grounds (d) and (h) together, then grounds (e), (f) and (g) separately.

In grounds (a) and (b), the appellant is complaining that the trial court failed to consider the project consultants (Norplan) biasness against the defendant (the appellant herein) given its role and interest in the project; and that the trial court erred in treating PW4 as an expert witness while he was employed by the respondent in whose favour he came to testify. It was argued that, PW4's evidence must have been geared towards impressing or protecting his employer in which case the trial judge was required to treat his opinion with extra care to ensure that it does not tend to favour the side which called him to testify for.

The appellant added that, had the trial court found it important to have an expert opinion, it should have arranged for an independent one instead of PW4. It was the appellant's view, therefore, that reliance on PW4 evidence and Norplan report was wrong as it emanated from a witness who had an interest to serve.

The respondent argued that the consultant was independent who worked to safeguard interests of the employer. Her duty was to

supervise the contractor and advise the employer as an expert. As such Norplan was not biased.

Upon our perusal of the record of appeal, particularly at page 903, it is vividly indicated that the consultant of the project was Norplan. She was hired by the respondent and managed by PW4 who was employed by Norplan as its consultant. It is also on record that the said consultant was engaged to design the structural drawings for the construction project as was testified by PW5 (see pg 903). The question which has heavily exercised our mind is whether given the relationship of client and customer between the consultant and the respondent, the consultant could have acted impartially without elements of biasness against the appellant.

In answering this nagging question, we wish to digress a bit on the manner tests were conducted on the alleged failed concrete premix and relied upon by the trial court in its decision. At page 1475 of the record of appeal, the trial court relied on the report compiled by PW4 which considered the test results conducted by the UDSM and DIT to reach to the conclusion that the concrete strength for the raft foundation was low/poor. However, it is notable that the UDSM test was commissioned by the respondent while the DIT test was commissioned

by the appellant. It would appear that other tests results by Norplan, C-Lab, NHBRA and Yara Laboratories were rejected because they did not comply with the British Standards requiring involvement of both parties in the testing. Being the consultant who had two roles to play in the project, as a structural engineer and the consultant of the project brings a signal that he might not have been an impartial or a neutral person over the tests conducted on the concrete as he so admitted himself when under cross examination by Advocate Laizer at page 622 of the record of appeal. Also, at page 817 – 818 of the record when answering question from Mr. Laizer, he said he was not impartial and added that he was not neutral. In the circumstances of this case, we agree with Mr. Laizer that the possibility of the consultant's biasness cannot be underrated.

As regards the other limb that the trial court erred to consider PW4 as an expert witness, we think, this issue should not detain us much. Looking at page 795 of the record of appeal, PW4 stated in evidence that he was a structural engineer by profession who designed the project and that he was employed by Norplan, the project's consultant. It should be noted that the consultant was employed by the respondent while PW4 was an employee of the consultant. The

relationship between the consultant and the respondent was that of the employer and employee. PW5, the Executive Director of the respondent, also at page 903 of the record that the consultant was also the structural engineer and was hired by the respondent.

In finding that PW4 was an expert witness, the trial court stated that:-

> *"It is pertinent to emphasize here that PW4 was a consultant of the project whose duty was to supervise the contractor and advise the employer. Any of his opinion or advice shall be taken as an* ***opinion of an expert witness as per the provisions of section 47 of the Evidence Act, Cap 6*** *which generally allows courts to receive, expert opinions."* [Emphasis added]

As we have stated earlier on, the consultant acted under two roles which were that of structural engineer for the project and project consultant. We do not have qualms with the trial court's finding that an expert opinion is admissible under section 47 of the Evidence Act. Even PW4 being a professional structural engineer as he stated at pages 620 and 795 of record of appeal could qualify him as an expert. The issue is

whether he could give an impartial expert opinion under the roles he had to play in the project.

In the case of **Samwel Japhet Kahaya v. Republic**, Criminal Appeal No. 40 of 2017 (unreported), the Court grappled with the issue of impartiality of the evidence of the expert witness and stated as follows:-

> *"... we need to emphasize that **expert witness evidence need to inspire confidence not only to the parties but also to the public at large.**"* [Emphasis added]

We think confidence in the expert witness evidence of PW4 was needed to the other party and even to the trial court by assurance that the evidence he gave was impartial. However, his impartiality was questionable as we have hinted herein above. In this regard, we agree with the appellant's advocate's argument that, had the trial court considered the need of an expert opinion, it could have arranged to procure an independent one instead of PW4. We, therefore, find merit in this ground and allow it.

In ground (c) of the appeal, the appellant is challenging the trial court's reliance on comprehensive strength tests that were unreliable. It

is argued that Exh. P8 which was heavily relied upon by the trial court was not credible and reliable because it was prepared by PW4 basing on tests results conducted by the respondent in contravention of procedures. It was elaborated that the said tests were conducted by the respondent in the absence of the other party in contravention of the British Standards BC 6089; 1981 titled "Guide to Assessment of Concrete Strength in Existing Structures" (Exh. P11) Clause 4.2 which provides:-

> *"Before any programme is commenced, it is desirable that* ***there is complete agreement between the interested parties on the validity of the proposed testing procedure, the criteria for acceptance and the appointment of a person*** *and/or laboratory to take responsibility for the testing."*

It was the appellant's further argument that apart from rejecting the Yara and C-Lab tests results for that reason, the trial judge ought to have rejected Exh. P8 for similar reason since it's analysis was based on test results conducted by the respondent at UDSM in the absence of the appellant and thus rendering the Exh P8 incredible and unreliable.

On her part, the respondent submitted that Exh P8 analysed the test results using British Standard Codes of BS 6089, BS 12504 and BS

132390. Besides that, PW4 relied on tests results of UDSM and DIT showing the concrete strength for the raft to reach to the conclusion that the concrete was of poor quality.

In its decision, the trial court relied on the tests conducted by UDSM and DIT in determining that the supplied premix concrete was below the standards. However, it should be noted that while the test result by the UDSM was that it was inferior at the average of grade 24.2 Mpa standards, the DIT result was that the concrete passed as it had average strength of 28.5 Mpa. As it is, it is not clear as to which test PW4 relied upon in reaching to his conclusion.

This being a crucial issue in this matter, we wish to first reiterate the standard regarding the proof in civil matters, which is that, the burden of proof lies on the person who alleges anything in his favour. This is as per section 110 of the Evidence Act. Moreover, in such cases the standard of proof required is on the balance of probabilities. And, normally the courts will look at the evidence which is more credible to the other and agree with it or uphold it. [See **Hamza Byarushengo v. Fulgencia Manya and 4 Others**, Civil Appeal No. 33 of 2017; and **Martin Fredrick Rajab v. Ilemela Municipal Council and Another**, Civil Appeal No. 197 of 2019 (both unreported) in which the plaintiff's

burden of proving the facts he alleges in his favour and the standard of proof which is on the balance of probabilities were explained.

In this case, it is not in dispute that both parties acknowledge or rather are aware of the existence of Standard Guidelines provided under the British Standard Guide for Assessment of Concrete Strength in Existing Structures (Exh PII). These Guidelines insists that, the involved parties must agree to a testing procedure, the criteria for acceptance and appointment of a person or laboratory for testing. However, in the matter at hand it was testified that, on various occasions, each party conducted its own tests without involving the other. It is not established in evidence that at one point in time parties agreed to a certain testing procedure as required by the said British Standard Guidelines to which both parties subscribe.

On top of that, the High Court relied on Consultant Report (Exh P8) which was prepared on the basis of the UDSM and DIT tests results which in essence came out with different results. Whereas the UDSM report showed the concrete strength was weak by attaining grade 24.2 Mpa and the DIT result showed that the concrete strength attained the average strength of 28.5 Mpa which was above the required 25 Mpa. We ask ourselves which one among the two results was relied on to find

that the concrete strength was weak as per Exh. P8 and the same be taken to have been reliable to prove the low quality or otherwise of the concrete in question. This is important, more so, when taking into account that it was the Consultant Report (Exh. P8) which influenced the change of structural drawings and abandonment of the raft foundation which culminated to the matter at hand. In our consideration view, we think that given the circumstances of this matter, the weakness or otherwise of the concrete cannot be said with certainty that it was proved. It was therefore a misdirection of the trial court to rely on such strength as were unreliable. In this regard we find that this ground is merited and we allow it.

With regard to grounds (d) and (h), the appellant is faulting the trial judge for disregarding the material or important evidence; and the submissions by the appellant that the abandonment was done long before the defendant supplied the concrete premix on the ground that the defendant did not raise the issue of drawings in her pleadings. In her written submission and the oral submission in Court, Mr. Laizer dwelt much on issue of architectural and structural drawings and their change and the point which he wanted to drive home is that any re-designing of the project (if at all was done) and the associated costs

were not caused by the alleged failed strength of concrete as the same was done before the appellant supplied the concrete mix to the respondent; and that this contradicted the contention that the re-designing was caused by poor concrete. The respondent has insisted that the trial judge disregarded the submissions on drawings on the ground that it was made from the bar which are not based or backed by pleadings and evidence.

The respondent further contended that there was no issue that was raised in that respect before the trial court. That, the appellant combined the two issues in her written submissions and thus came up with a new issue that abandonment was done before the supplied concrete. At any rate, it was argued that submission is not part of evidence; and that the issue of drawings was not pleaded except that what was pleaded by the appellant was poor workmanship on the casting and compacting of columns for basement and lift walls.

In the first place, we agree with the respondent that the issue of drawings which could have made a roadmap of the matters to be decided by the trial judge at page 1442 of the record of appeal was not included. We wonder how the trial judge could be faulted for not determining an issue which was not raised by either party. At any rate,

we find that the trial judge had considered and disregarded it when she reasoned that the said submissions on drawings were made from the bar and were not based or backed by pleadings and evidence.

It is trite law that submissions are not part of the evidence. This has been emphasized in numerous decisions of the Court. For instance, the Court in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006 (unreported) cited the case of **Bruno Weceslaus Nyalifa v. Permanent Secretary, Ministry of Home Affairs and Another**, Civil Appeal No. 82 of 2017 (unreported) and stated that:-

> *"Submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

In this case, it was expected that the appellant would have pleaded the issue of drawings in his written statement of defence and adduce evidence to establish such claim but that she did not do. As it

was, bringing that issue through submissions was not an appropriate approach and therefore the trial court cannot be faulted for disregarding the unpleaded matters brought by way of written submissions. We thus find grounds (d) and (h) lack merit and we dismiss them.

In ground (e) the appellant faults the trial judge in that she misdirected herself and erred in holding that the concrete ranging between 27 – 34 Nmm^2 was below 25 Mpa. It is the argument of the appellant that, it was wrong for the trial judge to pick DW2's statement relating to the range of the strength for the basement floor which was found to be 27 – 34 Nmm^2 and not 25 Mpa as ordered by the plaintiff/respondent, more so, when taking into account that the strength result of concrete cubes after 28 days ought to have been above 25 N/mm^2 as per PW1's evidence. It was, therefore argued that, it was wrong for the trial court's to find that 27 N/mm^2 was not in conformity with 25 Mpa. The appellant added that the trial court's reliance on sections 15 and 16 of the Sales of Goods Act in reaching into that decision without considering other factors was not proper.

On the respondent's side, it is their argument that the trial judge used the averment of DW2 in paragraph 14 (a) of his witness statement where he said that the range for the basement concrete was 27-34

N/mm^2 to corroborate the evidence of PW1, PW2, PW3 and DW3 to show that the supplied concrete was not of grade 25 Mpa as agreed by the parties; and hence, was right to rely on section 16 of the Sales of Goods Act which do not allow implied conditions as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. In other words, the appellant had a responsibility of supplying the concrete mix that matched grade 25 Mpa as she had assured the respondent through Exh P5.

Having considered both written and the oral submission on this ground we think, we need not to determine it in view of the position we have taken in ground no (c) based on the uncertainty of the weakness or otherwise of the concrete in question.

As regards ground no. (f), the appellant's complaint is that the trial court erred in law and fact in awarding the sum of Tshs. 446,740,604/= without any proof. It is contended that the respondent's claim for such amount was for the costs for materials, plant, labour, supervision, equipment charges, redesign quality checking charges and miscellaneous expenses incurred due to failed concrete supplied by the appellant. It was argued that special damages must be pleaded and specifically proved but the appellant failed to do so or even to explain

how she arrived at that figure. The appellant added that there was no even documentary evidence to prove it. To bolster her argument, the appellant has referred us to the case of **Zuberi Augustino v. Anicent Mugabe** [1992] TLR 137.

For respondent, it was argued that, the facts not disputed or admitted do not require proof under section 60 of the Evidence Act. It was elaborated that the respondent had pleaded damages in para 12 of the Plaint (See page 10 of the record of appeal) and the appellant admitted to it in para 10 of the Written Statement of Defence as shown at page 109 of the record of appeal. The respondent referred us to Sarkar on Law of Evidence, 19th Edition 2016 where it is stated that:-

> *"According to English Law, where any material averment by a party in a pleading is passed over without a special denial is taken to be admitted ["As non traverse"].*

The respondent is of the view that the trial judge was satisfied with proof of damages as was shown in Annexure GMKG pleaded in paras 12 and 13 of the Plaint and supported by PW5's witness statement, who explained the breakdown of each cost. On top of that, it

was argued that the costs were approved by the consultant as per para 26 – 27 of PW5's witness statement.

Since the award of the said amount was based on the proposition that, the supplied building materials did not meet the quality agreed upon, the proposition which we have rejected when dealing with ground (c), this ground is rendered irrelevant and we shall thus, not consider it.

Given the totality of the circumstances of this case, we are satisfied that the respondent was not able to prove the case on the balance of probability and therefore, we are allow grounds (a), (b) and (c) of the appeal. As a result, we quash and set aside the judgment and decree of the trial court.

With regard to ground (g), the appellant's complaint is that the trial court erred in law and/or in fact in failing to consider the defendant's (appellant's) uncontested counter-claim and the reliefs prayed thereto. It is her argument that the appellant was entitled to the remaining balance of Tshs. 60,712,000/= for the premix concrete supplied earlier on for the project. The respondent is of the view that the trial court rightly dismissed it following its finding that the appellant supplied poor quality/failed concrete and that appellant could not have benefited from her own negligence/wrong.

Indeed, the appellant had raised a claim of the remaining balance of Tshs. 60,712,000/= in a form of counter claim through paragraphs 18,19 and 20 of the written statement of defence. Unfortunately, the respondent did not respond it in her reply to the written statement of defence. In its decision, the trial court did neither frame an issue on it nor make a determination in that regard but in the end the counter claim was dismissed. In our view, this was also a misdirection on the part of the trial court.

It is our considered view that, since the counter claim was expressly pleaded in the appellant's written statement of defence and the respondent opted not to file a written statement of defence in respect thereof, the trial court should have in terms of rule 22 (1) of the High Court (Commercial Division Procedure Rules, G.N. 250 of 2012 read together with Order VIII rule 11 of the Civil Procedure Code, [Cap 33 R.E. 2019] pronounced a judgment in default in favour of the appellant. This being a first appeal, we step into the shoes of the trial court and accordingly, pronounce a default judgment against the respondent in respect of the counter claim.

In the final analysis, except for ground (d), we find that the appellant's appeal is merited and it is hereby allowed with costs to the extent as aforesaid.

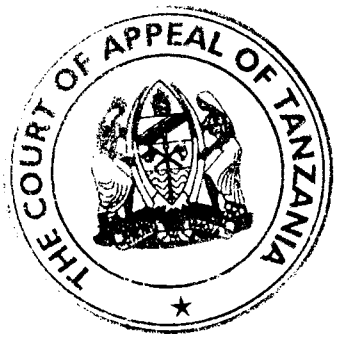
DATED at **DAR ES SALAAM** this 2nd day August, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of August, 2022 in the presence of Mr. Evance Ignas, learned counsel for the appellant and Ms. Velena Clemence, learned counsel for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL